

COURT FILE NUMBER 2501-02606
 COURT COURT OF KING'S BENCH OF ALBERTA
 JUDICIAL CENTRE CALGARY

Clerk's Stamp

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

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR
 ARRANGEMENT OF ROYAL HELIUM LTD., IMPERIAL HELIUM
 CORP., AND ROYAL HELIUM EXPLORATION LIMITED

DOCUMENT **BOOK OF AUTHORITIES**

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File No.: 64793-8

**APPLICATION BEFORE THE HONOURABLE JUSTICE B.B. JOHNSTON
 TO BE HELD ON OCTOBER 1, 2025 AT 10:00 A.M. ON THE COMMERCIAL LIST**

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TAB 1

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

SUPERIOR COURT OF JUSTICE - ONTARIO

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

BEFORE: Regional Senior Justice Morawetz

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

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

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

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

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

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

Linda Galessiere, for Various Landlords

ENDORSEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

....

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

TAB 2

Court of Queen's Bench of Alberta

Citation: Winalta Inc. (Re), 2011 ABQB 399

Date: 20110624
Docket: 1003 06865
Registry: Edmonton

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

**Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski**

I. Introduction

Professional fees in a CCAA proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in CCAA Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

[1] Deloitte & Touche Inc.'s application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA) is opposed by the debtor

companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

[2] The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the CCAA on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about \$9.5 million, while its liabilities exceeded \$73 million.

[3] The CCAA proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

[4] Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for \$1,155,206.05 (Fee) and is asking for a \$275,000.00 adjustment for alleged overcharging. It complains about the following:

- (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
- (ii) duplication;
- (iii) a six percent administration fee charged in lieu of disbursements (\$50,000.00);
- (iv) mathematical errors (\$47,979.39); and
- (v) charges for internal quality reviews described as something "required to be independent from the engagement" (\$10,000.00).

[5] The Winalta Group also seeks a \$75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

[6] Deloitte & Touche Inc. has agreed to deduct its \$10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

[7] A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

[8] The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

[9] In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of \$47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

[10] The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

[11] Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the CCAA process on the following conditions:

- (i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;
- (ii) HSBC would be unaffected by the CCAA proceedings;
- (iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and
- (iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

[12] On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

[13] HSBC continued to provide operating and overdraft facilities to the Winalta Group during the CCAA process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

[14] The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs

associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

[15] There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

[16] The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a CCAA restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

[17] In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

[18] There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

[19] In their article "A Cost-Benefit Analysis: Examining Professional Fees in CCAA Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

[20] At pp. 146-147, they review certain cases addressing CCAA monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

- (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Re Muscletech Research & Development Inc.* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J.)); or
- (ii) approval of “special” or “premium fees” for an administrator under a CCAA plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

[21] In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 at para. 10, 8 C.B.R. (5th) 34, Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: “... the court must be on guard against any course of action which would render the process futile.”

[22] On a different application in the same proceeding (2005 SKQB 252), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might “sink the company’s chances of survival.” He also was critical (at paras. 11-12) of the monitor’s “excellent though useless” report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor’s fees were offside the local practice.

[23] In *Re Triton Tubular Components Corp.* (2006), 20 C.B.R. (5th) 278 at para. 83 (Ont. S.C.J.), additional reasons at 2006 CarswellOnt 1029 (S.C.J.), Madam Justice Mesbur’s criteria in scrutinizing the propriety of a monitor’s counsel’s fee was that which “...one would expect from a resistant client.”

[24] Given the paucity of judicial commentary on the fees of CCAA monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

[25] One of the cases most often cited is *Federal Business Development Bank v. Belyea* (1983), 46 C.B.R. (N.S.) 244 at paras. 3 and 9, 44 N.B.R. (2d) 248 (C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...

. . .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.

[26] In *Re Agristar Inc.*, 2005 ABQB 431, 12 C.B.R. (5th) 1, Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a CCAA monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

[27] Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat, Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

[28] In *Re Hess* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

- (a) allowing the trustee a fair compensation for his services;
- (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
- (c) encouraging efficient, conscientious administration of the estate.

[29] Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

[30] In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

[31] The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

[32] I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

[33] The Fee includes charges for eighteen support staff, a number which the Winalta Group wrongly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from \$65.89 per hour (clerical services) to \$460.79 per hour (senior management services).

[34] The Winalta Group urges that the (discounted) hourly rate of \$588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) *Clerical, administrative, and IT staff*

[35] In ***Peat, Marwick Ltd.*** at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

[36] Referee Funduk in ***Northland Bank*** refused to follow that aspect of the ***Peat, Marwick Ltd.*** decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

[37] The Alberta Court of Appeal weighed in on the topic in ***Columbia Trust Company v. Coopers & Lybrand Ltd.*** (1986), 76 A.R. 303, Stevenson J.A. stating at para. 8:

... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should

be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

[38] In the result, the court in **Columbia Trust Company** elected not to make an arbitrary award but rather to return the matter for “the application of proper principles.”

[39] In **Bank of Montreal v. Nican Trading Co.**, (1990), 78 C.B.R. (N.S.) 85 at 93, 43 B.C.L.R. (2d) 315, the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court, observed that **Columbia Trust** qualified but did not overrule **Northland Bank** as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

[40] The law is no different as it concerns a CCAA monitor. While the court should avoid microscopic examination of the Monitor’s work, the **Columbia Trust** requirements nevertheless apply. To a degree, I concur with Referee Funduk’s observation in **Northland Bank** that the appropriate comparator of a monitor’s charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant’s designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor’s own specialized profession - that of the insolvency practitioner.

[41] In the present case, the Initial Order specified that: “[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings.” I interpret this to mean the Monitor’s standard rates and charges applied in its insolvency practice.

[42] Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies’ Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor’s burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners’ hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

[43] The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

[44] The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

[45] The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

[46] Like Hall J. in *Re Hickman Equipment (1985) Ltd.* (2002), 34 C.B.R. (4th) 203 at para. 20, 214 Nfld. & P.E.I.R. 126, I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

[47] Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

[48] Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Re Hickman Equipment (1985) Ltd.* at para. 26).

[49] Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the CCAA proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

[50] There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

[51] I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

[52] The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

[53] HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the CCAA proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

[54] It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriguez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main *raison d'être* was to liaise with and provide comfort to HSBC.

[55] Both Messrs. Rodriguez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriguez and Keeble.

[56] The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriguez (\$127,000.00) and for Mr. Keeble (\$209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

[57] The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriguez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

[58] The Winalta Group contends that the Monitor's \$50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

[59] The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the CCAA monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the

Winalta Group's knowledge and implicit agreement to pay any administration charge in the CCAA.

[60] Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as CCAA Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

[61] A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

[62] The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a CCAA debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

[63] The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

[64] The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

[65] The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

[66] At the hearing of this matter, the Monitor quite properly conceded that the \$10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

[67] A monitor appointed under the CCAA is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

[68] Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236 :

The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the CCAA process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

[69] The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

[70] The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

- (1) the bank appoints a receiver for all companies on September 7, 2010;
- (2) the bank supports the company through the CCAA and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriguez and Keeble the next day.

[71] Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

[72] The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a CCAA monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

[73] Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation.
2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the CCAA and court orders.
3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:
 - (a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and
 - (b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a CCAA monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) *The monitor's fiduciary and ethical duties*

[74] Section 25 of the CCAA provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

[75] Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("BIA") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the BIA. These Rules provide in part that:

- (a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).
- (b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).
- (c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the

opinion of an informed person to impair, their professional judgment (Rule 44).

[76] In addition, CCAA monitors are subject to the ethical standards imposed on them by their governing professional bodies.

[77] A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank of Canada* (1994), 29 C.B.R. (3d) 1 at 8 (N.B.C.A.); *Re Laidlaw Inc.* (2002), 34 C.B.R. (4th) 72 at para. 2 (Ont. S.C.J.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 at para. 20 (B.C.S.C.); and *Re 843504 Alberta Ltd.*, 2003 ABQB 1015 at para. 19, 351 A.R. 223). The following observations made by Farley J. in *Re Confederation Treasury Services Ltd.*, (1995), 37 C.B.R. (3d) 237 at 247 (Ont. Ct. (Gen. Div.)) about a bankruptcy trustee's duty of impartiality resonate:

The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

[78] In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996), 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

... The duties of a CCAA monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as CCAA monitor of the same debtor. The engagements are at cross purposes.

[79] Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

[80] Not surprisingly, there may be heightened sensitivity about the work of a CCAA monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

[81] Common sense dictates that CCAA monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

[82] Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a CCAA monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) *The Monitor's legislated and court ordered duties*

[83] One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the CCAA or the court orders made in the proceeding.

[84] Subsections 23(h) and (i) of the CCAA deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

[85] The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

[86] HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the CCAA process.

[87] Clause 28(d) of the Initial Order reads, in part, as follows:

28. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

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

[88] Clause 30 of the Initial Order states:

The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

[89] The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) *Principles of interpretation*

[90] The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the CCAA and CCAA orders.

[91] In ***Smoky River Coal Ltd.***, 2001 ABCA 209, 299 A.R. 125, the Alberta Court of Appeal cautioned that as CCAA orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting CCAA orders (at para. 16).

[92] The issue in ***Smoky River Coal Ltd.*** was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the CCAA and would expect that the disputed charge would be interpreted to accord with the commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

[93] The provision at issue in ***Re Afton Food Group Ltd.*** (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the ***Smoky River Coal Ltd.*** considerations (a liberal interpretation, consideration of the purpose of the CCAA, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

- (i) assume that the parties carefully drafted the terms of the order;

- (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
- (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

[94] The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

[95] In my view, the interpretation of CCAA orders requires a case-specific and contextual approach. In interpreting CCAA orders, the court should consider the objects of the CCAA, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

[96] I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

[97] The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) *Interpreting the relevant provisions of the Initial Order and the CCAA*

[98] The object of the CCAA is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

[99] Section 23 of the CCAA sets out certain reporting requirements for a court-appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis

contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

[100] Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

[101] If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

[102] I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

[103] This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

[104] Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBC, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

[105] Finally, this interpretation is supported by reference to the object of the CCAA, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

[106] The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[107] Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

[108] However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

[109] The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

[110] The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

[111] Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

[112] The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

[113] Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that the Monitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

[114] In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it

to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

[115] HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

[116] No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Murphy v. Sally Creek Environs Corp. (Trustee of)*, 2010 ONCA 312, 67 C.B.R. (5th) 161 is informative, although distinguishable on its facts.

[117] *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

[118] On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from \$240,000.00 to \$1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

[119] These directives apply equally to a court-appointed CCAA monitor.

[120] In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

[121] There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (**Re Nelson** (2006), 24 C.B.R. (5th) 40 at para. 31 (Ont. S.C.J.)).

[122] Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (**Murphy** at para. 112; **Re Nelson** at para. 31).

[123] Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

[124] Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

[125] The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

[126] The Monitor exceeded its statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed CCAA monitor and a private monitor.

[127] In the result:

- (i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.
- (ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.
- (iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

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- (iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.
- (v) The \$10,000.00 charged for internal quality reviews is to be deducted from the Fee.
- (vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.
- (viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Heard on the 21st day of March, 2011

Dated at the City of Edmonton, Alberta this 24th day of June, 2011.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Kentigern Rowan
For Deloitte & Touche Inc.

Darren Bieganek
For the Winalta Group

TAB 3

CITATION: Re Nortel Networks Corporation et al, 2017 ONSC 673

COURT FILE NO.: 09-CL-7950

DATE: 20170127

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

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL
NETWORKS LIMITED, NORTEL NETWORKS GLOBAL
CORPORATION, NORTEL NETWORKS INTERNATIONAL
CORPORATION and NORTEL NETWORKS TECHNOLOGY
CORPORATION**

**APPLICATION UNDER THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

BEFORE: Newbould J.

COUNSEL: *Jessica A. Kimmel*, for the Monitor

Susan Philpott, for the Representative Counsel of former Nortel employees

Lily Harmer, for the Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund

Byron Shaw, for the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan

Thomas McRae, for the Representative Counsel for the Nortel Canadian continuing employees

Michael E. Barrack and D.J. Miller, for the Nortel Networks UK Pension Trust Limited and the Board of the Pension Protection Fund

Adam Slavens, for Nortel Networks Inc.

Michael Wunder, for the Unsecured Creditors Committee

Gavin H. Finlayson and Amanda C. McLachlan, for the Ad Hoc Group of Bondholders

Matthew-Milne Smith, for the EMEA Debtors

John Salmas, for Wilmington Trust, N.A. as indenture trustee

HEARD: January 12, 2017

ENDORSEMENT

Introduction

[1] Ernst & Young Inc. in its capacity as Monitor of Nortel Networks Corporation (“NNC”), Nortel Networks Limited (“NNL”), Nortel Networks Technology Corporation, Nortel Networks International Corporation, Nortel Networks Global Corporation, Nortel Communications Inc., Architel Systems Corporation and Northern Telecom Canada Limited (collectively, the “Canadian Debtors”), moves for an order passing the accounts of the Monitor and of its counsel incurred during the period January 14, 2009, the date these CCAA proceedings were commenced, through to and including May 31, 2016.

[2] The background to this sorry saga has been described in a number of decisions.¹

[3] At the time of the filing under the CCAA, Nortel consisted of more than 140 separate corporate entities located in 60 separate sovereign jurisdictions including Canada, the United States and the EMEA² region, as well as the Caribbean and Latin America and Asia. NNC, the

¹ See the decision regarding the allocation of the \$7.3 billion escrowed sales proceeds: *Nortel Networks Corp. (Re)* (2015), 27 C.B.R. (6th) 175.

² EMEA is an acronym for 19 Nortel subsidiaries in Europe, the Middle East and Africa

Nortel Group's ultimate parent holding company, was publicly listed and traded on both the Toronto Stock Exchange and the New York Stock Exchange.

[4] On January 14, 2009 NNC, NNL, the wholly owned subsidiary of NNC which was its operating subsidiary and a number of other Canadian corporations filed for protection under the CCAA. On the same date, Nortel Network Inc. ("NNI"), the principal US subsidiary of NNL, and a number of other US corporations filed for protection under chapter 11 of the US Bankruptcy Code and Nortel Networks UK Limited ("NNUK"), the principal UK subsidiary of NNL, and certain of their subsidiaries (the "EMEA Debtors") save the French subsidiary Nortel Networks S.A. ("NNSA") were granted administration orders under the UK Insolvency Act, 1986. On the following day, a liquidator of NNSA was appointed in France pursuant to Article 27 of the European Union's Council Regulation (EC) No 1346/2000 on Insolvency Proceedings in the Republic of France.

[5] The Monitor was appointed in the Initial Order of January 14, 2009 which directed that "the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice." It is normal in CCAA proceedings for the Monitor to pass its accounts periodically. This was no normal CCAA proceeding and the Monitor chose not to pass its accounts periodically but rather wait until the end of the proceedings. One advantage in having all of the accounts passed at this stage is that up to date information as to the level of success achieved by the Monitor, one of the key factors to be considered, is now available as a result of the settlement recently achieved in the allocation dispute.

[6] Normally a Monitor performs a neutral role as a court officer in a CCAA proceeding. However in this case there were two orders giving the Monitor extraordinary powers. On August 10, 2009, Nortel announced the departure of its then CEO, Mike Zafirovski, and on the same day five members of NNC's and NNL's boards of directors resigned. As a result of this change in

circumstances, on August 14, 2009, this Court granted an Order that expanded the Monitor's role and powers to include, *inter alia*, the ability:

- (a) to conduct, supervise and direct the sales processes for the Canadian Debtors' property or business and any procedure regarding the allocation and/or distribution of proceeds of any sales;
- (b) to cause the Canadian Debtors to exercise the various restructuring powers authorized under paragraph 11 of the Initial Order and to cause the Canadian Debtors to perform such other functions or duties as the Monitor considers necessary or desirable in order to facilitate or assist the Canadian Debtors in dealing with their property, operations, restructuring, wind-down, liquidation or other activities; and
- (c) to administer the claims process established pursuant to the Claims Procedure Order dated July 30, 2009 and any other claims bar and/or claims resolution process or protocol approved by the Court.

[7] Following the resignation of the Canadian Debtors' remaining directors and officers in October 2012, the Monitor's role and powers were further expanded by order dated October 3, 2012, to authorize and empower the Monitor to, amongst other things, exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors.

[8] The changing circumstances of the CCAA proceedings and the resulting expansion of the Monitor's powers have resulted in the Monitor and its counsel undertaking a scope of work that is beyond the typical role of a monitor in a CCAA proceeding. Indeed, since October 2012 substantially all activities undertaken by or on behalf of the Canadian Estate, including the massive litigation, have been undertaken by the Monitor's professionals with the assistance of the Monitor's counsel. It has been the Monitor that has been the effective defendant in the claims made against the Canadian Debtors and the effective plaintiff in the allocation trial seeking a portion of the \$7.3 billion of the escrowed sale proceeds.

[9] The provision in the Initial Order that the Monitor pass its accounts from time to time was not changed with these orders enhancing the Monitor's powers and so what is included in the accounts to be passed is far more and different than what would ordinarily be included in a Monitor's accounts to be passed.

[10] Most of the core parties in the insolvency proceedings do not object to the accounts as proposed by the Monitor being passed. This is due to the final settlement reached by them. The Canadian allocation decision became final after the Court of Appeal refused leave to appeal the decision of this Court. However appeals were brought in the U.S. from the allocation decision of Judge Gross. These appeals and the allocation of the \$7.3 billion sale escrow proceeds were finally settled after mediation by a Settlement Agreement on October 12, 2016. It was a term of the Settlement Agreement that no party to it could contest the fees and disbursements of any other party to it.

[11] The UKPC at one point in a pre-hearing conference took the position that the Monitor's motion to approve its fees and disbursements should be adjourned until after January 24, 2017, the date on which motions seeking an order sanctioning the Plan of Compromise and Arrangement proposed by the Canadian Debtors and seeking confirmation of the First Amended Joint Chapter 11 Plan of Arrangement proposed by the US Debtors would be heard in a joint hearing by this Court and by Judge Gross of the US Bankruptcy Court. The UKPC said that if the Plans were sanctioned and the Settlement Agreement became effective, it would take no position on the Monitor's fee approval motion. I declined to adjourn the Monitor's motion. At the hearing of the motion, counsel for the UKPC said that no adjournment request was now being made. Thus there is no opposition to the Monitor's motion by the UKPC.

[12] The only opposition to the passing of the accounts of the Monitor was by The Bank of New York Mellon, as Indenture Trustee to some of the bonds issued by Nortel.³ It took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts and offered a suggestion that a practical solution is to refer the matter to a Master, to an Assessment Officer or to an outside expert. Such person could do due diligence on staffing, hours and rates, and provide the Court with a Report organized around the major activity blocks and identifying any potential issues or matters for consideration by the Court. Counsel for the Indenture Trustee later advised that it was not taking a position on the substance of the motion and did not appear at the hearing of the motion. For reasons that will follow, I do not think such a reference is necessary, nor would it be a practical solution.

Considerations on a passing of a Monitor's accounts

[13] There are few cases dealing with the factors to consider on a passing of the accounts of a monitor. Most deal with a receiver's accounts. However I agree with Justice Topolniski in *Winalta Inc., Re* (2011), 84 C.B.R. (5th) 157 that there should be no difference in dealing with a monitor's accounts and that the onus is on a monitor to make out its case. She stated:

30 In my view, the appropriate focus on an application to approve a CCAA monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the CCAA process. As with any inquiry, the evidence proffered will be important in making those determinations.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is

³ A majority but not all of the bondholders under the particular Indenture Trust are a party to the Settlement Agreement.

reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

[14] So far as the test for reviewing a receiver's fees is concerned, the New Brunswick Court of Appeal in *Belyea v. Federal Business Development Bank* (1983), 44 N.B.R. (2d) 248 (C.A.) referred to a number of factors to be considered. These factors have been accepted in Ontario as being a useful guideline but not an exhaustive list as other factors may be material in any particular case. See *Confectionately Yours Inc., Re* (2002), 36 C.B.R. (4th) 200 at para. 51 (Ont. C.A.) ("*Bakemates*") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 5 (S.C. J.), aff'd (2014), 20 C.B.R. (6th) 292 (Ont. C.A.). In *Diemer*, Pepall J.A. listed the factors as follows:

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.

[15] Justice Pepall further stated:

45 ... That said, in proceedings supervised by the court and particularly where the court is asked to give its imprimatur to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[16] As stated, The Bank of New York Mellon, as Indenture Trustee took the position that it is not possible based on the material filed by the Monitor to do an analysis required on a passing of accounts. It offered a suggestion that a practical solution is to refer the matter to a Master, an Assessment Officer or an outside expert. I do not agree with this suggestion. In my view there is sufficient evidence to undertake a proper consideration of the accounts of the Monitor taking into account the factors to be considered in arriving at a fair and reasonable result.

[17] The time and expense of referring the accounts to someone else would be very time consuming, create further expense and delay completion of this matter that has gone on far too long. The Initial Order directed the accounts to be passed by this Court. That makes sense, particularly as no other person has the familiarity of what has gone on in the Nortel insolvency as the Court has. These considerations have led other courts to decline to send the accounts out for review by others. See *Tepper Holdings Inc., Re* (2011), 381 N.B.R. (2d) 1 (Q.B.) at para. 3; *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Comm. List]) at para. 83.

[18] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund has been involved in these proceedings from the outset in January, 2009 and has been a member of the Canadian Only Creditors Committee (the “CCC”). The Superintendent supports the motion for an order passing the accounts of the Monitor and opposes the appointment of a special fee examiner to review the Monitor’s accounts. It takes the position that this would create unnecessary and unwarranted additional expense and potential delay by virtue of the need to educate the examiner with respect to these hugely complex proceedings, particularly if the examiner was independent of the court with additional professional costs. The Superintendent further states that it is satisfied with a high level assessment of the Monitor’s accounts in this case by this Court, given this Court’s familiarity with many of the complexities of the proceedings, and by reference to the significantly higher costs incurred by the other Estates.

[19] Morneau Shepell Ltd., was appointed the Administrator of the Nortel Networks Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan in October 2010 and has been actively involved in the CCAA restructuring process. It is one of the largest creditors of the Canadian Debtors. It takes the same position as the Superintendent regarding any attempt to have the accounts of the Monitor examined by some other party. It states that more litigation or court process in relation to the Monitor’s accounts should be strongly discouraged and avoided. Far too much time and too much of the Canadian estate’s resources have been consumed with seemingly endless litigation. More court process only delays, and may diminish, the distribution of assets available to creditors.

[20] Michel E. Campbell is a former engineer employed by Nortel. Since the January 2009 CCAA filing, he has been heavily involved in the proceedings as a court-appointed representative of approximately 21,000 Nortel former employees, as an active member of the Nortel Retirees and Former Employees Protection Canada (“NRPC”), and as a claimant against the Nortel estate for the loss of severance and termination pay. He estimates that he has spent over 4,000 hours on issues in the proceedings relating to employee issues. As one of the former employees and as a court-appointed Representative, he has a financial stake in these proceedings.

He too supports the passing of the Monitor's accounts and does not think a referral of the accounts to some third party is desirable. He states in his affidavit:

44. Moreover, given the volume and nature of the information provided in the Monitor's materials filed for this motion, and the fact that the fees as disclosed are subject to this Court's approval, I see no reason for another third party review or assessment. In any event, such a third party review would create more expense and delay in these proceedings, and would likely further postpone approval of the Plan of Arrangement and distributions on claims, which is far from desirable. The Former Employees have been waiting now for almost eight years to receive some payment for their losses. Further, it would be difficult for a third party who lacks background knowledge of this case to conduct a reliable, meaningful or accurate assessment of the Monitor's fees without the expenditure of considerable additional time and resources of the Monitor to provide information to the third party reviewer. This Court is by far the more appropriate arbiter of the Monitor's fees.

[21] This case requires an overall assessment of the work done and a consideration of the results achieved. A line by line particularization of each particular job and each particular invoice would involve no doubt hundreds of thousands of dollars, taken the amount of activity and time involved in various matters. As well, in this case it is by no means the case that each task was discrete and could easily be separated out. As was stated by Justice Pepall, the value provided should pre-dominate the consideration of what a fair and reasonable amount is appropriate. A detailed assessment in this case would not be practical or serve that purpose.

Consideration of the Monitor's accounts

[22] The Monitor engaged Goodmans LLP ("Goodmans") as its Canadian legal counsel, Allen & Overy LLP ("A&O") as its U.S. legal counsel and Buchanan Ingersoll & Rooney PC ("BIR") as its Delaware local legal counsel. A large number of professionals from the Monitor's firm E & Y, from Goodmans and from A&O were involved throughout these proceedings. The accounts from each of those firms are included in the passing of accounts with affidavits supporting the accounts.

[23] The Monitor seeks approval of its accounts in the amount of CA\$122,972,821.96, inclusive of applicable taxes. This amount includes billings for 200,065.4 professional hours at an average hourly rate of CA\$540.

[24] The Monitor also seeks to pass the accounts of Goodmans in the amount of CA\$99,994,744.85, inclusive of applicable taxes. This amount includes billings for 134,562.4 professional hours at an average hourly rate of CA\$643.

[25] The Monitor also seeks to pass the accounts of A&O in the amount of \$31,352,136.73, inclusive of applicable taxes. This amount includes billings for 46,448.4 professional hours at an average hourly rate of \$639.

[26] These amounts are enormous by any measure, even taking into account that they cover eight years of work. However, when one understands the enormity of the work that had to be done by the Monitor and its counsel to regularize the insolvency proceedings, to gather in the assets and to protect the interests of the Canadian creditors against the relentless attacks made by the other estates, these amounts become more understandable. It is unquestionable that the work of the Monitor added value to the assets.

[27] In this case, the Monitor has delivered its 132nd Report in which the services performed over the last 8 years have been extensively discussed in some 113 pages plus a number of attachments. Throughout the entire matter what has taken place has been described in the Monitor's previous 131 Reports.

[28] I do not intend to discuss at length what all the Monitor has done. Suffice it to say, the job the Monitor has performed has been massive in a case that knows no equal.

[29] The normal things required of a Monitor in any CCAA case, such as cash flow forecasting, were far more complex than normal in light of the matrix way in which the business was operated by Nortel. Prior to the CCAA filing, Nortel had no cash flow forecasting model or

cash flow reporting process that allowed for weekly cash flow forecasting and reporting on an entity level. One of the earliest activities (and focuses) of the Monitor was assisting the Canadian Debtors in preparing both a consolidated and unconsolidated global weekly cash flow forecasting and reporting process for Nortel's global operations so Nortel could understand its entity-level cash position in "real time". These and subsequent cash flow forecasting efforts by the Monitor have included: creating cash flow templates for approximately 60 Nortel entities (including joint venture entities) in North America, APAC, CALA and EMEA; creating a global process to retrieve cash flow data on a weekly basis, reviewing and analyzing variances, discussion with management from all regions, preparing consolidated, regional and entity cash flows, and reporting on cash flows and related analysis to stakeholders on a weekly basis from January 14, 2009, until Estate separation in 2011; after the Estate separations until the end of 2012, preparing and reporting on the Canadian Debtors and APAC entities cash flows to stakeholders, initially on a weekly basis and subsequently on a bi-weekly basis; continuing to prepare cash flow forecasts for the Canadian Debtors on a bi-weekly basis and reporting thereon to stakeholders; and preparing and filing cash flow forecasts and reconciliations in connection with stay extension motions in the CCAA proceedings.

[30] One issue that was central to the CCAA proceedings in the first six months was a means of addressing the significant cash burn being experienced by NNL as a result of it continuing to incur significant corporate overhead and R&D costs to preserve the enterprise value of the LOBs and coordinate global restructuring efforts notwithstanding the post-filing cessation of ordinary course payments to NNL under Nortel's transfer pricing system. The Monitor recognized these issues, in particular NNL's funding crisis and the risk it posed to both stabilizing Nortel's business and achieving either a successful restructuring or a coordinated going-concern sale of the Nortel LOBs. Accordingly, the Monitor engaged with representatives of the other Estates and key stakeholders in an attempt to address these matters.

[31] On June 9, 2009, NNL, NNI, NNUK and the Joint Administrators (among other parties) entered into an Interim Funding and Settlement Agreement (the "IFSA") that assisted in addressing these issues. First, pursuant to the IFSA, NNI agreed to pay \$157 million to the

Canadian Debtors which, together with a \$30 million payment made in January 2009, was in satisfaction of any claims of NNL for corporate overhead and research and development costs incurred by NNL for the benefit of the U.S. Debtors for the period from the Filing Date to September 30, 2009. Second, NNL agreed to pay NNUK \$20 million on a deferred basis (secured by a Court-ordered charge) and the EMEA Debtors, on the one hand, and the Canadian Debtors and U.S. Debtors, on the other, agreed to the settlement of any transfer pricing obligations between them for the period from the Filing Date to December 31, 2009. Third, pursuant to the IFSA, the Estates reached certain agreements that facilitated the LOB transactions that would be entered into in the coming months, including an agreement that the execution of sale documentation or closing of a transaction of material assets would not be conditioned upon reaching agreement on either allocation of the sale proceeds of such sale or a binding procedure for the allocation of such sale proceeds and that all sale proceeds would be deposited in escrow pending resolution of their allocation.

[32] On December 23, 2009, the Canadian Debtors, the Monitor and the U.S. Debtors entered into a Final Canadian Funding and Settlement Agreement (the “CFSA”) pursuant to which NNI agreed to make a payment of approximately \$190 million to NNL in full satisfaction of its reimbursement obligations in respect of corporate overhead, R&D, and other costs incurred by any of the Canadian Debtors for the benefit of the U.S. Debtors for the period October 1, 2009, through the end of the CCAA proceedings. In addition, pursuant to the CFSA NNL agreed to admit a \$2.0627 billion claim by NNI (the “NNI Claim”) in settlement of, among other things, any transfer pricing overpayments made by NNI to NNL for the period 2001 through 2005 and an outstanding revolving loan.

[33] Over the period March 2009 through March 2011, Nortel entered into and closed nine Lines of Business transactions involving businesses carried out by Nortel entities around the world. They were as follows:

LOB	Sale Process Approval Date	Initial (Stalking Horse) Sale Price	Final Sale Price	% Increase in Sale Price	Closing Date
Layer 4-7	2/27/2009	\$17,650,000	\$17,650,000	-	3/31/2009
CDMA/LTE	6/29/2009	\$650,000,000	\$1,130,000,000	74%	11/13/2009
NGPC	9/29/2009	n/a	\$10,000,000	n/a	12/8/2009
Enterprise	8/4/2009	\$475,000,000	\$900,000,000	89%	12/19/2009
MEN	10/15/2009	\$390,000,000	\$769,000,000	97%	3/19/2010
GSM/GSM-R	10/15/2009	n/a	\$103,000,000	n/a	3/31/2010
CVAS	1/6/2010	\$282,000,000	\$282,000,000	-	5/28/2010
GSM Retained Contracts	n/a	n/a	\$2,000,000	n/a	6/4/2010
MSS	9/1/2010	\$39,000,000	\$65,000,000	67%	3/11/2011
TOTAL			\$3,278,650,000		

[34] To be noted, the final sale price for these LOB sales was far in excess of the initial stalking horse sale prices.

[35] During that period the Monitor also oversaw the sale of significant Canadian assets, including various businesses and real estate assets.

[36] Once the LOB sales had been completed a process in conjunction with the other Estates was undertaken to sell the Residual IP used by various Nortel entities around the world. This was preceded by a consideration of the potential ways to monetize NNL's portfolio of approximately 7,000 patents and patent applications that remained following the conclusion of the LOB sales including considering both a potential sale of the Residual IP and the possibility of establishing an "IP Co." Eventually it was decided after much work to sell the Residual IP.

[37] The sale of the Residual IP was by way of an auction after a stalking-horse bid from Google of \$900 million was approved. The auction brought in \$4.5 billion. During the auction the Monitor and its counsel vigorously negotiated with representatives of the other Estates and their stakeholders to ensure the auction continued when certain Estate representatives indicated

they were satisfied with the bid price achieved at that point and wanted to terminate the auction. The continuation of the auction resulted in numerous additional rounds of bidding and a further \$1.3 billion being paid for the Residual IP.

[38] The claims process in this case was enormous. A total of 1,146 claims have been filed in the CCAA Claims Process totalling approximately CA\$39.9 billion. Of the 1,146 claims filed in the CCAA Claims Process, 1,012 claims with a claim value of approximately CA\$2.9 billion (original filed claim amount of approximately CA\$12.5 billion) were classified by the Monitor as “Accepted or Reviewed and unadjusted” as at May 31, 2016. Accordingly, with respect to claims resolved through the Period, the Monitor reduced the value of those claims by approximately CA\$9.6 billion, or approximately 77%.

[39] The development of the compensation claims process was complicated by a number of factors:

- (a) Nortel’s employment records were incomplete, out of date and resided in various physical locations. This required that the Monitor spend considerable time and resources to consolidate the information, validate the data and organize it a manner that would allow for the automation of the compensation claims process. In addition, given the uncertainty over the accuracy of the data, the process had to provide employees with the opportunity to review the information and allow for the correction of data that may have been inaccurate.
- (b) The process identified approximately 20 different claim types that could be held by any particular employee. The potential combinations of such claims complicated the creation of a single claim form and necessitated extensive consultations between the representatives and the Monitor.
- (c) Each of the approximately 20 different types of claims included a number of variables and formulas that were negotiated between the Monitor and the representatives. These variables and formulas had to be explained to the claimants

in a manner that could be understood. The Monitor worked closely with the representatives to develop a user guide and glossary of terms that simplified this process.

[40] Two significant claims were made against the Canadian Debtors by the EMEA estates and by the UKPC. They were eventually litigated at enormous expense. At the outset, both EMEA and UKPC took the position that their claims should be arbitrated because of the terms of the IFSA. This issue was litigated in both this Court and in the Delaware Bankruptcy Court. Both Courts held that there was no binding agreement to arbitrate and that EMEA and UKPC had attorned to the jurisdiction of the courts. Appeals by EMEA and UKPC to the Ontario Court of Appeal and to the U.S. Third Circuit Court of Appeals were dismissed. There followed very expensive litigation of these claims.

[41] With respect to the claims made against the Canadian Debtors by the EMEA estates, although they were not capable of precise quantification, the total amount of quantified claims against NNL alone exceeded CA\$9.8 billion. In addition to unsecured claims, EMEA also asserted trust and/or proprietary claims against the Canadian Debtors' assets that could have resulted in effective priority treatment for such claims. Certain of the EMEA claims were also asserted against the Nortel directors and officers. Following completion of a lengthy and costly discovery process and several months of negotiation between the Monitor and the Joint Administrators, the EMEA Claims were settled on the eve of the commencement of the EMEA and UKPC Claims trial for a maximum admitted general unsecured claim against NNL of \$125 million. This represented very little to EMEA because Nortel's books and records indicated that the consolidated intercompany book debt payable from the Canadian Debtors to the EMEA debtors as at January 14, 2009, was approximately \$203 million. When netted against pre-filing intercompany amounts shown in Nortel's books and records to be payable by the EMEA debtors to the Canadian Debtors, there was a net \$101 million payable to the EMEA Debtors. Accordingly, the EMEA claims were settled for an amount only slightly in excess of the net consolidated pre-filing debt shown as being payable by the Canadian Debtors to the EMEA debtors in Nortel's books and records.

[42] With respect to the claim against the Canadian Debtors made by the Board of Trustees of NNUK's U.K. Pension Plan and the Pension Protection Fund (the "UKPC"), although a total liquidated claim amount was not specified, the UKPC Proofs of Claim filed by the Trustee against NNL included: (i) £495.25 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee dated November 21, 2006; (ii) \$150 million in respect of amounts alleged owing pursuant to a guarantee made by NNL in favour of the Trustee; and (iii) an unspecified claim in respect of liability owing pursuant to the FSD regime under the *U.K. Pensions Act 2004*. Although no liquidated claim amount was specified with respect to the alleged FSD liability, the claim noted that the section 75 debt of NNUK had been estimated to be £2.1 billion as at January 13, 2009, and that the Joint Administrators had stated that an informal estimate of the section 75 debt of NNUK was \$3.055 billion. Accordingly, the FSD claim raised the possibility of a claim in excess of \$3 billion against NNL. The same FSD liability was claimed against each of the other Canadian Debtors. Accordingly, the UKPC claims contemplated aggregate claims against the Canadian Debtors of nearly \$20 billion. The FSD claims before the U.K. regulatory body were contrary to the stay imposed in the Initial Order and appropriate orders were made in this Court and upheld by the Ontario Court of Appeal. An amended UKPC claim in this CCAA proceeding asserted an FSD related claim of up to £2.1 billion against each of NNC and NNL.

[43] The UKPC claim went to trial. The issues were extremely complex and the trial lasted 15 days based on a shortened trial procedure ordered by the Court. The reasons for decision of this Court were 127 pages. All of the claims against Nortel were dismissed except for a claim for of £339.75 million, which was approximately £152 million less than the amount sought by the UKPC on account of such claim.⁴

⁴ See *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171.

[44] The allocation dispute was a heavily contested matter involving the issue of which Nortel Estates were entitled to the \$7.3 billion proceeds from the asset sales being held in escrow. A joint trial was held by this Court with Judge Gross of the U.S. Bankruptcy Court in Delaware that lasted for 24 days. It was a very complicated matter. The trial decision in this Court numbered some 115 pages. Reconsideration motions were brought in each Court, largely unsuccessful. Leave to appeal to the Ontario Court of Appeal was refused. The matter was appealed in the U.S. to the District Court. A lengthy mediation process took place with retired Judge Farnan in the U.S. and a settlement was reached in October 2016.

[45] Relative to the claims asserted by the other estates, the Canadian Estates were successful. The position of the U.S. interests at the trial of the allocation dispute was that the Canadian Debtors were entitled to only approximately \$770 million of the \$7.3 billion, or approximately 10.6% of the total sale proceeds. The position of the EMEA debtors at trial was that the Canadian Debtors were entitled to receive either \$836 million or \$2.3 billion, depending on the theory the Courts adopted. Based on the settlement of the allocation dispute reflected in the settlement, the Canadian estates will receive an allocation in excess of \$4.1 billion, or approximately 57.1% of the total sale proceeds.

[46] One other large issue that had to be dealt with was a claim by the bondholders to post-filing interest on their bonds which had the covenants of both the Canadian Debtor NNC or>NNL and the U.S. Debtor>NNI. At the time the matter was litigated, this claim for interest was in excess of \$1.6 billion. The Monitor successfully took the position that the bondholders were not entitled to any post-filing interest. A decision of this Court denying the bondholders any post-filing interest was upheld by the Ontario Court of Appeal and leave to the Supreme Court of Canada was denied. In the U.S. the matter was settled but in the end, no post-filing interest was obtained by the bondholders because the U.S. Estate was not solvent as a result of the allocation of the \$7.3 billion.

[47] Given the overlap between the \$7.3 billion allocation dispute and the EMEA and UKPC claims, an Allocation Protocol proposed by the Canadian Debtors and the Monitor (and

ultimately approved by the Courts) contemplated a joint discovery and litigation process to resolve the three claims. Unfortunately the discovery process got out of hand.

[48] The Monitor proposed certain proportionate limitations on discovery, including that each core party be restricted to identifying 10 fact witnesses and that documentary discovery be restricted to electronic documents and indices of boxes of hard copy documents. Various core parties opposed the Monitor's proposal and advocated for a discovery plan that imposed no restrictions on the number of depositions or discovery generally. Ultimately because of the need to accommodate the U.S. parties' broader discovery rights, the litigation timetable and discovery plan proposed by the U.S. debtors that imposed no restrictions on the number of depositions or on discovery generally had to be adopted.

[49] Ultimately, more than 3 million documents were produced and approximately 140 fact and expert witness depositions were conducted in, among other cities, Toronto, Montreal, Ottawa, New York, Boston, Chicago, Washington, London, Paris, Brussels and Hong Kong. In addition, the start date for the hearings contemplated by the Allocation Protocol was extended from January 6, 2014, to March 31, 2014, and subsequently to May 12, 2014, to allow for further time for the litigation and discovery process to be completed.

[50] As the custodian of the largest number of documents, the Canadian Debtors (and, by extension, the Monitor and its counsel) bore a substantially higher burden than other parties in the document review and production process. The scope of the document requests and interrogatories received by the Canadian Debtors was wide ranging and related to documents going back to the 1980s, and in some cases earlier. Given the scope and overlap of the document requests and interrogatories served by the core parties, they worked together to develop an agreed set of consolidated document requests and interrogatories, itself a significant undertaking. The consolidated document requests contained 140 total document requests grouped into 26 broad categories with more than 85 sub-categories of documents identified. Similarly, the consolidated interrogatories contained 54 individual requests spanning some 25 pages.

[51] Before the broad discovery that took place, there were several mediations. One was with a mediator in New York in which the parties tried to come to some agreement on a protocol for resolving disputes concerning the allocation of sale proceeds from sale transactions governed by the IFSA. The mediation took place in November 2010 and April 2011. The work involved on behalf of the Monitor was extensive, including having to review 43,000 documents posted in the mediation data room and other information exchanged by the Estates in advance of the mediation.

[52] There were two unsuccessful mediations in the U.S. with a retired judge to try to settle the allocation dispute. There was later a mediation with then Chief Justice Winkler in an attempt to settle the allocation dispute. The mediation was ordered in June 2011. Mediation briefs were eventually filed and mediation took place from April, 2012 until discontinued on January, 2013. There was then the final mediation in New York with retired U.S. Judge Farnan that took several months and was eventually successful.

[53] Overall, the Monitor and its Canadian counsel estimate that approximately 40% of their total fees in these proceedings relate to work done in connection with the allocation dispute, the EMEA claims and the UKPC claims, including the allocation and claims litigation and the various mediation and settlement efforts directed at resolving those disputes. The extensive discovery process, which was not the fault of the Monitor, played a large role in the costs getting out of hand.

[54] In his affidavit, Mr. Campbell described his view of the efforts of the Monitor regarding the litigation. I view his evidence as being particularly relevant and helpful. Mr. Campbell is independent of the Monitor and the Monitor's counsel and has been involved throughout the process. Mr. Campbell stated:

40. The Canadian Estate was the main target of claims globally because Nortel's head office and parent corporation were located in Canada. From early in the CCAA proceedings, the Monitor was forced to deal with massive claims and persistent attacks on Canadian assets. Even then, the Monitor was consistently the

voice of reason in what were often fractious and unnecessarily litigious cross-border proceedings. The Monitor advocated for limits on the scope of the allocation litigation process, which was rejected in favour of the more expansive American style with the hugely expensive document and deposition discovery process. The Monitor spearheaded a coordinated approach with the Canadian creditors in the mediations and Allocation Litigation which had the effect of consolidating and rationalizing resources and containing costs.

[55] Morneau Shepell Ltd., the Administrator of the Nortel pension plans has also commented positively on the actions of the Monitor and its counsel. It stated in its brief:

The Canadian estate has faced a multitude of claims asserted by the other estates and by creditors more closely aligned with the other estates. In addition, the Nortel estates and the key creditors worldwide have been engaged in a long-running allocation dispute that included a series of intense mediation efforts and a complex and hard fought cross-border trial, with subsequent appeals. On behalf of the Canadian estate, the Monitor has had to respond to and participate in all of these matters for the benefit of Canadian stakeholders. Without the extensive effort, dedication and leadership of the Monitor and its counsel, the Canadian estate would not have achieved the favourable outcomes accomplished in the claims litigation and allocation trial, nor would it have achieved the favourable resolution of the outstanding litigation by way of the settlement.

Because of its active involvement in the case and firsthand dealings with the Monitor, the Administrator observed directly the efforts of the Monitor to be mindful of costs and to seek efficiency wherever possible. As one of many examples, the Monitor was instrumental in organizing and coordinating the trial effort with creditors (where coordination was feasible) to avoid duplication of effort. Even though different positions were advanced, the Monitor did not allow that to preclude coordination to achieve efficiency. In addition, in respect of the design of the very complex trial process, the Monitor took positions directed at reducing complexity throughout the trial process.

[56] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund spoke of the claims by the U.S. and UK/EMEA estates and bondholders to enhance their recoveries at the expense of the Canadian creditors. The Superintendent stated:

The amount of the Monitor's time and effort required to protect the Canadian Estate and its creditors by resisting all these attacks was an enormous

undertaking. Because the Monitor worked cooperatively with the CCC on these issues, duplication of many costs was avoided.

The cost savings to the Canadian Estate and the Superintendent regarding the allocation trial are significant. The Superintendent's costs and that of the CCC could have been significantly (possibly as much as 50%) higher, or more, if we did not work cooperatively with the Monitor.

[57] These comments by interested, knowledgeable but independent parties are strong evidence that the Monitor and its counsel tried to be as efficient as possible in very difficult circumstances and that overall they achieved very favourable outcomes for the Canadian creditors.

[58] There were a number of other matters that the Monitor and its counsel had to deal with during the 8 years from the time of the CCAA filing. Some included (i) dealing with and settling a large dispute with Flextronics, Nortel's largest contract manufacturer, including a \$7 billion claim; (ii) developing an employee hardship process which has provided for interim relief for employees; (iii) restructuring eleven Nortel entities in the APAC region; (iv) negotiating an employee settlement agreement covering a number of issues; (v) developing a Health & Welfare Trust allocation methodology and distribution to those entitled; (vi) estate separation and wind-down activities to enable them to become stand-alone entities; (vii) dealing with French employee claims brought by NNSA employees in the Versailles Employment Tribunal in France; (viii) selling residual IP owned by the Canadian Estate, consisting of 17 million internet protocol; (ix) dealing with environmental issues arising from several Nortel properties in Ontario and claims by the MOE; (x) settling a number of transfer pricing issues amongst the various estates; (xi) dealing with a claim by the French liquidator of NNSA brought in the Versailles Commercial Court; (xii) financial reporting and tax issues; (xiii) dealing with claims by Frank Dunn, a former CEO of Nortel, and by 110 Calgary employees; (xiv) dealing with a class action brought in New York against a number of former officers and directors of NNC under the Securities and Exchange Act; (xv) dealing with a claim brought by SNMPRI in this Court and in the U.S. In most of these issues, court proceedings were taken, often with appeals to the Ontario Court of Appeal and to the Supreme Court of Canada.

[59] SNMPRI asserted claims against the Canadian Debtors alleging unauthorized use and transfer of SNMPRI's software and claimed damages of \$200 million. It unsuccessfully sought to lift the stay to permit the case to be tried in the U.S. before a jury. In April, 2016 this Court on a summary judgment motion dismissed the bulk of the claim. Leave to appeal to the Ontario Court of Appeal was dismissed.

[60] The Superintendent of Financial Services as administrator of the Pension Benefits Guarantee Fund strongly supports the efforts made by the Monitor. It states:

The Monitor's motion materials reflect an enormous amount of work over many years, all ultimately in aid of maximizing recoveries in the Canadian estate. The stakes being so high; the huge number of interested and well funded parties and the lengths to which they have been prepared to go given the amounts at issue, and the global nature of Nortel, are unprecedented.

The Monitor's fee, absent context, is quite large. However, in context, from the perspective of the Superintendent, who paid its way and did not receive funding from the Estate, the fee appears fair and reasonable. The Monitor's strong, fair, balanced and practical approach to this file, from the perspective of the Superintendent, likely saved the Estate millions to tens of millions of dollars.

[61] I will deal briefly with the *Belyea* factors to be taken into account.

1. Nature, extent and value of the assets being handled

[62] There can be no question about the significant nature, extent and value of the assets that were realized upon so that they could be available to creditors.

2. Complications and difficulties encountered

[63] These proceedings are unprecedented in terms of their size, complexity, international aspects and the vast number of competing interests. It was in part due to these unprecedented

complications and difficulties that the Monitor's role and powers had to be twice expanded, first in August 2009 and again in October 2012.

[64] The Monitor, with the involvement of its counsel, has delivered 132 reports, participated in more than 200 motions and hearings before this Court and 23 leave to appeal applications and appeals before the Ontario Court of Appeal or Supreme Court of Canada, and been integrally involved in the 10 cross-border sales processes and transactions for the LOBs and residual intellectual property as well as a further 18 transactions through the relevant period in respect of other assets of the Canadian Debtors. The allocation dispute and the EMEA and UKPC Claims were hotly contested and complex.

3. Degree of assistance provided by the company, its officers or its employees

[65] The Monitor was granted enhanced powers in mid-2009 and authorized to exercise any powers which might be properly exercised by a board of directors of any of the Canadian Debtors since October 2012. This has resulted from the liquidating nature of this case, including the transfer or termination of most employees by early 2010 and the ultimate resignation of the few remaining officers and directors of the Canadian Debtors in October 2012. Substantially all activities undertaken by or on behalf of the Canadian Estate have been undertaken by the Monitor's professionals with the assistance of Monitor's counsel. This expanded role has resulted in the Monitor and its counsel undertaking a significantly greater scope of work than in a typical CCAA case.

4. Time spent

[66] The billings over the relevant period comprise a combined 384,652.6 professional hours by the Monitor and its counsel. Throughout, the professional fees and disbursements of the Monitor, its counsel and other professionals being funded by the Canadian Debtors have been disclosed in Monitor's reports along with forecasts of expected fees and disbursements which were part of the restructuring costs. Starting in April 2013, the Monitor provided in its relevant reports detailed breakdowns of the Canadian Debtors' restructuring costs, including total fees for

advisors as well as an aggregate total of the fees and disbursements of the Monitor, Goodmans and A&O. In sum, there has been full disclosure throughout the period of the activities of the Monitor and its counsel, including the estimated and resulting fees and disbursements.

5. Knowledge, experience and skill

[67] To ask the question is to answer it. The professionals in this case from the Monitor and its counsel are the cream of the crop.

6 Diligence and thoroughness displayed

[68] The same applies to this question. The 132 reports of the Monitor make clear that these qualities were brought to bear.

7. Responsibilities assumed

[69] In this case, particularly with the two orders granting the Monitor extraordinary powers, the responsibilities assumed were enormous.

8. Results Achieved

[70] I have dealt with this at some length. The results achieved were commendable.

9. The cost of comparable services when performed in a prudent and economical manner

[71] I am quite satisfied that the Monitor's professional rates and disbursements, as well as those of its counsel, are comparable to the rates charged by other professional firms in the Toronto, New York or Wilmington market for the provision of similar services regarding significant complex commercial restructuring matters.

[72] Indeed, the professional fees and disbursements of the Monitor and its counsel, together with the fees and disbursements of the Canadian Debtors' main advisors, are less, and in some cases significantly less, than the fees and disbursements of the main advisors to the other Estates. The fees and disbursements of the main advisors to the Canadian Estate for the period January 14, 2009, through December 31, 2015, are approximately 76% of the fees and disbursements of the main advisors to the U.S. Estate, and approximately 51% of the fees and disbursements of the EMEA Estate advisors, as detailed in the following chart⁵:

⁵ It is apparently unclear from the information available to the Monitor whether the expenses of the EMEA Debtors include disbursements for experts. If they do, a comparison would require those expert fees to be deducted. The Canadian and US Debtors' experts' fees are not included in the chart. The chart goes to the end of December, 2015, which does not include work done since then, and so should be taken as a guide rather than as amounts fixed in stone.

Nortel Estate Main Advisors Professional Fees For the period January 14, 2009 - December 31, 2015 (in USD millions)			
	Fees	Disbursements	Total Fees & Disbursements
Ernst & Young Inc. ^{1,2}	100.1	2.9	103.0
Goodmans LLP ^{1,2}	77.8	2.4	80.2
Norton Rose Fulbright Canada LLP ^{1,2}	63.3	1.6	64.9
Gowling Lafleur Henderson LLP ²	9.0	0.2	9.2
Freshfields Bruckhaus Deringer LLP ³	7.3	1.7	9.0
Total	257.5	8.8	266.3
Allen & Overy LLP	28.5	1.6	30.1
Buchanan Ingersoll & Rooney PC	1.1	0.4	1.5
Total Professional Fees	287.1	10.8	297.9
Fees and Expenses of Main Advisors of:			
US Debtors ⁴			389.9
EMEA Debtors ⁵			581.9
1. Fees exclude undrawn retainer 2. Foreign exchange rates used based on Bank of Canada Monthly Average Noon-Exchange Rates 3. Foreign exchange rates used based on Federal Reserve Monthly Average Noon-Exchange Rates 4. US Debtors professionals included are Cleary Gottlieb Steen & Hamilton LLP, Ernst & Young LLP (US), Huron Consulting Group, John Ray, Torys LLP, Chillmark Partners, LLC and Morris, Nichols, Arsht & Tunnell LLP, based on monthly fee applications filed in the United States Bankruptcy Court for the District of Delaware 5. Based on Joint Administrators' Abstract of Receipts and Payments from January 14, 2009 to January 13, 2016			

[73] The comparison is all the remarkable when one considers the extra work that the Monitor had to do because the head office of Nortel was in Canada and the fact that the Monitor had to respond to the many issues raised in the foreign proceedings as those issues had the potential to affect the recovery by the Canadian creditors.

[74] I could be somewhat critical regarding the number of counsel in the courtroom during the allocation trial. At the outset, there were four or five lawyers in court for the Monitor. When a witness was giving evidence in Delaware, counsel for the Monitor doing the cross-examination attended in the Delaware courtroom with fewer lawyers in the Toronto courtroom. However, it was quite obvious that the Monitor risked being outmatched. The U.S. debtors had five lawyers

in the courtroom throughout the trial, as well as many in the Delaware courtroom, the EMEA debtors had two or three each day, the UKPC had usually two lawyers each day, the UCC had two and the bondholders usually had two. All of these other parties were lined up against the Monitor. After a while, the Monitor began sending fewer lawyers to court. In a case of this size and complexity, I am not in a position to know exactly what role each of the Monitor's lawyers had played in preparation for the trial or to say that they should not have been there.

[75] My general impression was that there were far too many lawyers in the courtrooms in Toronto and in Delaware, some of whom (not the Monitor's counsel) spent much time on their blackberries. The accounts of all of these other parties are not before this Court for approval.

[76] It is fair to say that each of the *Belyea* factors supports the accounts of the Monitor and its counsel being passed and I approve them.

Insolvency culture

[77] I cannot leave this passing of accounts without some discussion of what is becoming prevalent in insolvency cases in Toronto.

[78] My comments are restricted to the trial procedures. Prior to the litigation becoming the focus of the work, the parties worked very cooperatively to achieve an asset realization that was remarkable and much more than forecasted.

[79] Justice Pepall dealt recently with a receiver's costs in *Diemer*. The concerns she raised are no different than in a CCAA or BIA case. One concern is the extent of "over lawyering" a file.

[80] In my early days in this Nortel matter, Judge Gross and I faced shortly before trial a large number of "pre-trial" motions, consisting largely of motions to strike various parts of expert reports as being outside the expertise of the particular expert. There were very thick briefs,

responding briefs and reply briefs with lengthy facta. Motions of this kind are routinely made during the course of a trial without all of the briefs and facta. The motions were dismissed and the parties were left free to make such arguments during the trial. Needless to say, the issues evaporated.

[81] We were also faced with arguments over the length of affidavits that could be filed and the time available to the various parties during the trial. The debate seemed endless and Judge Gross and I had to settle the issues. In the end, the time allotted was more than necessary and it too never became an issue during the trial

[82] These sorts of things should not have occurred. The Nortel case was unique in that there were no significant secured creditors who had an interest in controlling costs. That is, there was no typical client whose own money was at stake, such as a bank, which normally would put a brake on excess lawyering taking place.

[83] There are too many occasions when a large number of lawyers will attend at court on a matter that is on consent or knowingly without opposition, usually conducted in chambers because of those circumstances. Usually there is no need for most of the lawyers to attend and no need for senior lawyers at all. Courts must be mindful when this occurs to register a concern and, if costs are in the discretion of the court, to refuse to provide costs to those who need not have attended.

[84] In Nortel, during the allocation trial, there were far too many lawyers in Court in both Toronto and Delaware. Five lawyers for a party, such as was the case invariably with the U.S. debtors, were likely not needed. That situation breeds disrespect for the legal system in general and particularly so in a case in which thousands of pensioners and disability claimants have had to wait far too long for this proceeding to end. I realize that a judge does not know what all goes on in terms of preparation, and it may be that there is a need for several counsel during a particular witness, but in the Nortel case there had been extensive discovery and all of the

evidence of the witnesses was known before the trial began and contained in affidavits or expert reports that were used as their evidence in chief.

[85] Some have criticized the Courts in this case for letting things get out of hand. It may be that the criticism is merited, but in my view there is not so much in the point. What got out of hand was the extensive discovery process that ensued once the size of the value of the residual patents at \$4.5 billion was known. The U.S. Debtors and the EMEA Debtors changed their initial position from the Canadian Debtors owning the residual patents to the U.S. Debtors taking the position that they owned all of the interests in the patents in their market and the EMEA debtors saying that the patents were jointly owned. In the allocation decision I referred to this and said:

In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation.

[86] Professor Janis Serra wrote an article in the Globe & Mail shortly after the allocation decision was made. The headline was "The Nortel judgments were fair. Uncontrolled legal costs are not". In her article, Professor Serra said:

While parties should be able to assert their claims, the disproportionate negative effects of protracted litigation on smaller creditors are tremendous.

Few people dispute that professionals need to be paid for their services and that parties need lawyers and financial professionals to help guide them through complex insolvency cases. However, the Nortel case represents the extreme in the amount of fees directed away from creditors to professionals, with more than \$1-billion already paid to the experts, illustrating the problem of uncontrolled costs.

[87] Against the wishes of the Monitor, a broader discovery process was permitted because of the rights under U.S. law permitting wide-ranging depositions. To have ignored those rights in this innovative cross-border proceeding would likely have led to reversible error of any decision made contrary to those parties who had such rights. However, what should have happened is that

the parties should have engaged in meaningful negotiations far sooner and settled the matter for the benefit of those who have lost so much in the Nortel insolvency.

[88] While there are some who would like to see the Court “punish” the lawyers in this case, it should be recognized that the only party that is subject to the Court’s jurisdiction over its costs is the Monitor. For the reasons already given, it would be unjust to center out the Monitor or its counsel for the blame.

[89] What Nortel teaches us is that the gatekeepers of expenses in insolvency cases must exercise as much vigilance as possible to see that costs are maintained at a proper level. Nortel was unusually complex, to be sure, but lessons learned can be useful for less complex insolvencies.

Conclusion

[90] The Monitor’s accounts and those of its counsel including the respective fees and disbursements incurred during the period January 14, 2009, through to and including May 31, 2016, are approved, being:

- (a) for the Monitor, CA\$122,972,821.96, inclusive of applicable taxes;
- (b) for Goodmans, CA\$99,994,744.85, inclusive of applicable taxes;
- (c) for A&O, US\$31,352,136.73, inclusive of applicable taxes; and
- (d) for BIR, US\$1,476,489.87.

Newbould J.

Date: January 27, 2017

TAB 4

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.

[2] This appeal involves a motion judge's refusal to approve legal fees of \$255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately \$4.9 million (approximately \$2 million and \$2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of \$8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and

sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to \$138,297 plus \$9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of \$338.38. The highest hourly rate charged by the Receiver was \$525 per hour. Fees estimated to complete were \$20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to \$255,955, plus \$4,434.92 in disbursements and \$33,821.69 in taxes for a total account of \$294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of \$643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of \$750.00. The rates of the other 10 people on the account ranged from \$950 per hour for a senior lawyer to \$195 for a student and \$330 for a law clerk.

[14] Fees estimated to complete were \$20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- \$100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was \$500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to \$30,000.

Motion Judge's Decision

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately \$8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of \$475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at \$157,500 from which the \$100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of \$4,434.92 and applicable HST.

Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA*, the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

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.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association (“ABA”)’s Special Commission on the Economics of Law Practice published a study entitled “The 1958 Lawyer and his 1938 Dollar”. The study noted that lawyers’ incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers’ profits: see Stuart L. Pardau, *“Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated”* (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer’s record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of \$5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Redcorp Ventures Ltd. (Re)*,
2016 BCSC 188

Date: 20160209
Docket: S091670
Registry: Vancouver

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

And

In the matter of the *Canada Business Corporations Act*,
R.S. 1985 c. C-44

And

In the Matter of the *British Columbia Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Redcorp Ventures Ltd. and
Redfern Resources Ltd.

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment (From Chambers)

Counsel for Alvarez & Marsal Canada Inc.,
Receiver of Redcorp Ventures Ltd. and
Redfern Resources Ltd.:

H.L. Williams

Counsel for Secured Noteholders
Whitebox Advisors LLC, GMP Investment
Management LP, Sandleman Partners LP
and VR Global Partners LP:

N. Renner
(attendance by telephone)

Place and Date of Hearing:

Vancouver, B.C.
December 14, 2015

Place and Date of Judgment:

Vancouver, B.C.
February 9, 2016

[1] Alvarez & Marsal Canada Inc. ("Alvarez") in its capacity as a Court appointed Interim Receiver and Receiver ("Receiver") of the assets, undertakings and properties of Redcorp Ventures Ltd. ("Redcorp") and Redfern Resources Ltd. ("Redfern") applies for a number of Orders including that:

- (a) The reports of the Receiver filed in these proceedings, including the Tenth Report of the Receiver dated December 8, 2015 ("Tenth Report"), and the actions and conduct of the Receiver as particularized therein be approved;
- (b) The fees and disbursements of the Receiver and its counsel as set out in the Tenth Report, be approved;
- (c) The Receiver be authorized to destroy any and all records of the Companies.
- (d) Upon the filing of a Receiver's Discharge Certificate, the Receiver shall be discharged as Receiver of the assets, undertaking and property of the Companies, provided that notwithstanding its discharge herein: (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein; and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of Alvarez in its capacity as Receiver.
- (e) Alvarez be hereby released and discharged from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, Alvarez be hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.
- (f) Notwithstanding any provision herein, this Order shall not affect any person to whom notice of these proceedings was not delivered as required by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and regulations thereto, any other applicable enactment or any other Order of this Court.

BACKGROUND

[2] Redcorp and Redfern made a filing under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *British Columbia Business Corporations Act*, R.S.B.C. 2002, c. 57. An Order was made on March 4, 2009 in response to the filing ("Initial Order").

[3] On May 29, 2009, Alvarez was appointed Receiver, without security, of the current and future personal assets, undertakings and properties of Redcorp and Redfern ("Appointment Order"). Under the Appointment Order, the sum of \$1,000,000 (exclusive of any interest earned thereon) as secured by the Administration Charge set out in the Initial Order was to be held and administered by the Receiver. The sum of \$5,000,000 (exclusive of any interest earned thereon) as secured by the Directors' Charge set out in the Initial Order was also to be held and administered by the Receiver.

[4] The Appointment Order contained the following provision limiting the liability of Alvarez as Receiver:

THIS COURT ORDERS that the Receiver shall incur no personal liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by Section 14.06 of the B.I.A. [*Bankruptcy and Insolvency Act*, R.S.C, 1985, c. B-3] or by any other applicable legislation.

DISCUSSION, CASE AUTHORITIES AND DECISION**(a) Approval of the "Actions and Conduct of the Receiver" and the Release and Discharge of the Receiver**

[5] What is requested in (a) and (e) above amounts to insurance for the Receiver in addition to any liability insurance that may be available to Alvarez. Not only are the "actions and conduct" of the Receiver as "particularized" in all of the ten Reports of the Receiver approved but also the Receiver is to be released and discharged from "any and all liability that it now has or may hereafter have by reason of, or in any way arising out of its acts or omissions..." whether or not the "actions and

conduct” are particularized in any of the ten Reports filed with the Court by the Receiver.

[6] While the personal liability and obligation of the Receiver is protected in the Initial Order save and except for gross negligence or wilful misconduct, the effect of the release and discharge sought in (e) above goes beyond what is set out in the Initial Order and does not make it clear that “gross negligence or wilful misconduct” are not released or discharged. The effect of (e) is that the Receiver is to be released from personal liability or obligations arising as a result of its appointment including any liability for gross negligence or wilful misconduct. Pepall J. in *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.*, [2009] O.J. No. 4265 (Ont. S.C.J. Commercial List) made this statement in that regard:

It seems to me that as a matter of principle, on discharge, a receiver should not be granted a release that encompasses gross negligence or willful misconduct. It may be that such conduct only comes to light after a receiver has been discharged. In such circumstances, a receiver should be liable for its actions.

(at para. 14)

[7] The combined effect of what is sought in (a) and in (e) above is so broad as to attempt to protect the Receiver from any and all liability. There is no obvious inherent jurisdiction to exempt even its own officer from the general operation of statutes or to excuse liability for negligence or willful misconduct. That is why the standard appointment order excludes “gross negligence or wilful misconduct” from the exclusion given to a receiver for any “personal liability or obligation.”

[8] The position of a court appointed Receiver was set out in *Ed Mirvish, supra*, where Pepall J. stated:

A Court appointed receiver is an officer and instrument of the Court. Liability it incurs is for its own account. It is for this reason that, subject to certain exceptions, a receiver typically receives a first charge over the assets under receivership. This secures its fees and disbursements and any liability it may incur with the exception of gross negligence and willful misconduct. The receiver is fully compensated by the estate once it has realized on the assets. A receiver wishes to be discharged once it has completed the substance of its mandate. Creditors typically support the requested discharge as they wish a final distribution of the remaining funds in the estate and do not wish

additional receivership expenses to be incurred which would reduce the funds available for distribution. A receiver often is concerned that if it is discharged without a full release, it may be required to spend time and money defending an unmeritorious action. Once discharged, there is no ability for the receiver to recover its costs from the estate. Absent a discharge and if there are funds in the estate, a receiver may be protected and compensated by the estate.

Unlike a trustee in bankruptcy, a receiver is unable to look for statutory assistance. Section 41(8) of the *Bankruptcy and Insolvency Act* provides that the discharge of a trustee discharges him [or her] from all liability in respect of any act done or default made by him [or her] in the administration of the property of the bankrupt and in relation to his conduct as trustee but any discharge may be revoked by the Court on proof that it was obtained by fraud or by suppression or concealment of any material fact. A receiver's discharge is not addressed by statute. For all of these reasons, requests for full releases are made of the Court.

(at paras. 8 and 9)

[9] Counsel for the Receiver indicated that the shortfall to creditors is in the neighbourhood of \$110 million and those creditors who will already suffer a shortfall had agreed to the passing of accounts of the Receiver, the passing of accounts of counsel for the Receiver, and for the releases sought by the Receiver.

[10] I am satisfied that this is not a sufficient answer to the questions raised by the applications of the Receiver. The Receiver is a Court appointed officer and the Court retains and must exercise a reasonable review of the actions taken by the Receiver and of the seriousness of any omissions relating to actions not taken by the Receiver. The Court cannot be bound by the corporate “monetary” decision taken by a creditor or by creditors who will have to bear the cost of an appropriate review by the Court.

[11] An order following the format of the “Model Discharge Order” does not automatically include such a broad release and discharge as is contemplated in (e) above. Rather, if such a broad release and discharge is to be included, that inclusion must be drawn to the attention of the Court. The B.C. Model Insolvency Order Committee provided this comment in this regard:

The BCMIOC was divided as to whether a general release might be appropriate. On the one hand, the Receiver has presumably reported its activities to the Court, and presumably the reported activities have been approved in prior Orders. Moreover, the Order that appointed the Receiver

likely has protections in favour of the Receiver. These factors tend to indicate that a general release of the Receiver is not necessary. On the other hand, the Receiver has acted only in a representative capacity and as the Court's officer, so the Court may be of the view that it is appropriate to insulate the Receiver from liability by way of a general release. Some members of the BCMIOC felt that, absent a general release, Receivers might hold back funds and/or wish to conduct a claims bar process, which would unnecessarily add time and cost to the receivership.

Without intending to express an opinion as to whether a general release is appropriate, the BCMIOC has decided not to include the general release language in the body of the model order. Whether such language is appropriate is a matter to be considered by the presiding Judge based on the specific circumstances of the case. If this relief is being sought, stakeholders should be specifically advised and given ample notice.

If a general release is ordered, the language approved by the BCMIOC is as follows:

[RECEIVER'S NAME] is hereby released and discharged from any and all liability that [RECEIVER'S NAME] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [RECEIVER'S NAME] while acting in its capacity as Receiver herein. Without limiting the generality of the foregoing, [RECEIVER'S NAME] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings.

[12] In requesting this provision, counsel could not confirm that all "stakeholders" had been "specifically advised and given ample notice". Rather, notice was only provided to "Secured Noteholders" who will suffer a shortfall as a result of the receivership. Even if all stakeholders had been notified, I cannot be satisfied that the breadth of the release sought is appropriate even though it is the wording that is set out in the Model Discharge Order. Despite the suggested wording, it could not have been contemplated by the drafters that "any and all liability relating to matters that were raised, or which could have been raised" would include a release and discharge of liability for gross negligence or wilful misconduct. First, it would be contrary to what was set out in the Appointment Order. Second, the Court should not countenance the release and discharge of any gross negligence or wilful misconduct of its own officer.

[13] Regarding the request that the Receiver be released and discharged from any liability it "may hereafter have", I am satisfied that it is inappropriate for the Receiver to make such a request. First, such a request would include a release and

discharge of claims for gross negligence or wilful misconduct. Second, what is contemplated is that the Receiver will be discharged upon filing a “Receiver’s Discharge Certificate” so that the Court will not necessarily have the benefit of a further Report from the Receiver about future activities.

[14] The Tenth Report of the Receiver sets out a number of matters that remain unresolved and which will require further action by the Receiver. It is inappropriate to request that any future “acts or omissions” be released and discharged in view of this ongoing activity of the Receiver. Once all outstanding matters have been completed, the Receiver can re-apply for its discharge. At that time, the Court can take into account all activities of the Receiver and whether a claims bar process has been undertaken.

[15] Once the further actions contemplated in the Tenth Report are completed by the Receiver, the Receiver will be in a position to apply for what is requested in (d) above. In this regard, the Explanatory Notes attached to the Model Discharge Order note the following regarding what is requested by the Receiver in (d) above: “Counsel should consider including this provision only if the Receiver’s Report identifies any outstanding matters that should be completed before the Receiver’s discharge. “As well, what is requested in (d) above does not include the necessary phrase: “...upon the Receiver filing a certificate certifying that it has completed the remaining outstanding activities described in the Report”. Here, it is not clear whether all “outstanding matters that should be completed before the Receivers’ discharge” are specifically set out in the Tenth Report.

[16] So that the Court is in a position to confirm that all creditors and interested parties are aware of the effect of any release and discharge requested by the Receiver, the Receiver is in the position to establish “claims bar process” whereby all creditors and interested parties are notified that they will lose any rights to claim against the Receiver after a suitable period of time has elapsed and no application has been made to the Court to seek leave to proceed against the Receiver. In this regard, the Initial Order provided the following protection:

THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of the Court.

(para. 7)

[17] Receiver will be at liberty to reapply for its release and discharge.

THE ACCOUNTS OF THE RECEIVER AND ITS COUNSEL

[18] The Appointment Order provided the following regarding the accounts of the Receiver and its counsel:

THIS COURT ORDERS that any expenditure or liability which shall properly be made or incurred by the Receiver, including the fees of the Receiver and the fees and disbursements of its legal counsel, incurred at the standard rates and charges of the Receiver and its counsel, shall be allowed to it in passing its accounts and shall form a first charge on the Property (the "Receiver's Charge") in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but excluding the charge on the ERIP Monies, the Administration Charge and the Directors' Charge.

THIS COURT ORDERS that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Supreme Court of British Columbia and may be heard on a summary basis.

[19] Regarding the question of the duty of a Court appointed receiver to report to the Court and to pass its accounts, the following statements were made in *Re Confectionately Yours, Inc. et al* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.) by Borins J.A. on behalf of the Court:

A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

...the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order...Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the

receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions.* [Emphasis added.]

(at paras. 34-36)

(a) Receiver's Accounts

[20] Attached as an appendix to the Tenth Report of Receiver is a “summary of the receiver’s professional fees and disbursements for the period May 26, 2009 to September 27, 2014....” Those accounts total \$2,244,414.45 including out-of-pocket disbursements of \$123,408.26 and applicable taxes of \$153,611.29. What was attached in the appendix set out the following information relating to the 43 invoices issued by Alvarez: (a) invoice number; (b) invoice date; (c) invoice period/description; (d) total hours; (e) fees; (f) disbursements; (g) HST; and (h) invoice total. Despite the inclusion of the word “description”, no description of the services was included. As well, there is no detail regarding the date when services were rendered and no breakdown of the “total charges for each of the categories of services rendered”.

[21] Also attached as an appendix to the Tenth Report is a list of the seven “Staff Members” who had worked on the receivership with the following included in that appendix: (a) staff member names; (b) title of the staff member; (c) the total hours spent by the staff member; (d) the billing rate of the staff member; and (e) the amount billed. The total of hours billed is 3,705.8. The average of the rates charged is \$530.90, and the total billed is \$1,967,394.90. There is no indication whether the billing rates changed during the period of May 26, 2009 through September 27, 2014. As well, there is no indication of the seniority of the staff members who worked on the matter.

[22] The purpose of a Receiver passing its accounts is to afford all interested parties the opportunity to question the Receiver’s activities and conduct. In order to be in a position to ascertain whether the fees and disbursements of the Receiver were “properly made or incurred” and are “fair and reasonable” what was done should be set out. In *Re Bakemates International Inc.*, (2002) 36 C.B.R. (4th) 200 (Ont. C.A.), Borins J.A. on behalf of the Court, dealt with the accounts of a Court appointed receiver and manager and made the following statement in that regard:

The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended

each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Ass. Off.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (S.C.). 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.

Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). I agree.

(at paras. 37 and 38)

[23] In addressing the appropriate principles and factors to be considered in assessing the appropriate compensation for a receiver, Taggart J.A. on behalf of the Court in *Bank of Montreal v. Nican Trading Co.* (1990), 43 B.C.L.R. (2d) 315 (C.A.), made the following statements:

The principles which guided the Registrar were those set out in the *Belyea [Belyea and Fowler v. Federal Business Development Bank]* (1983), 46 C.B.R. (n.s.) 244 (N.B.C.A.) case to which he referred. He applied the relevant considerations listing them at the end of his recommendations. They included: (a) the value of the assets; (b) complications and difficulties encountered by the Receiver; (c) degree of assistance provided by Nican; (d) time spent by the Receiver; (e) Receiver's knowledge, experience and skill; (f) diligence and thoroughness; (g) responsibilities assumed; (h) results; (i) cost of comparable services

In addition to those factors the Registrar took into the account the estimates made by the Receiver as to the cost of the receivership with particular reference to the various fee estimates provided from time to time.

(at pp. 320-321)

[24] In *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), further "relevant considerations" were added including the existence of an indemnity agreement, the secured position for priority for payment, the demanding of efficiency by a debtor, and with special emphasis on the parties agreeing to a charged based on the number of hours times an hourly rate of the persons involved.

[25] In *Bakemates, supra*, Borins J.A. made the statement regarding what information should be available to the Court in the passing of accounts of a receiver.

When a "receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

(at para. 31)

[26] Here, the accounts of the Receiver were not verified by Affidavit. Such an Affidavit should include what is set out in *Nican, BT-PR Realty*, both *supra*. As well, there is no description of what was done by each of the personnel who worked on the file and whose time is reflected in the 43 invoices which were issued. There is no information regarding the "standard rates and charges" of each of the personnel. There is no ability to ascertain whether what was charged was at the "standard rates and charges" of the Receiver. It is not possible to ascertain whether the liability for the fees of the Receiver were expenditures or liabilities which were "...properly be made or incurred...." I adopt the statement made by Borins J.A. in *Bakemates, supra* regarding what should have been available:

Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

(at para. 38)

[27] Because any accounts actually rendered by the Receiver were not attached, because there was no actual description available to the Court about what the Receiver had accomplished, and because very few of the "relevant considerations" were provided to the Court, what was presented on behalf of the Receiver does not meet the requirements set out in *Nican, BT-PR Realty*, or *Re Confectionately Yours, all supra*. What should be presented must include copies of any invoices issued, information regarding the standard rates and charges of each of the personnel who had worked on the receivership, and an indication of seniority within the profession, a narrative description about what was done, statement of affairs setting out the assets and liabilities of the debtor, statement of receipts and disbursements, and time that the Receiver took to perform its duties. This information would allow the Court to determine the appropriateness of any standard rates and charges imposed. If there is any information in the invoices which is confidential, such information

could be redacted or sealed in the records of the Court. The reference to a “summary basis” does not relate to reduced information that should be before the Court. Rather, the phrase relates to the basis to have the Court rather than the Registrar consider the materials that would ordinarily be before the Registrar.

[28] I cannot interpret the phrase “pass their accounts from time to time” as meaning only once in the six years since the Receiver was appointed and close to the time when the activities of the Receiver have come to an end. Where total receipts of Redcorp and Redfern amount to in excess of \$39,500,000, an appropriate passing of accounts cannot be interpreted as being once in six years. The same goes for the total fees and disbursements of the Receiver of in excess of \$2,200,000. It is not unreasonable to expect that the passing of accounts “from time to time” would at least every two years. In this regard, s. 99(1) of the *Trustee Act, R.S.B.C. 1996 c. 464* provides for an “executor, administrator, trustee under a will” to pass his or her accounts every two years unless the accounts are approved and consented to in writing by all beneficiaries, or “the court otherwise orders”. While the Receiver is not an executor, administrator, or trustee, I see no reason why it would not be appropriate for a Receiver to pass his or her accounts at least every two years. If necessary, a Court application could be made to extend that period if the circumstances justify such an extension.

[29] If a lengthier time goes by, a Receiver will not have the benefit of any comments about the form of the accounts which can then be incorporated into later passing of accounts. By waiting six years, the Receiver has run the risk that what was presented was in a format which was unacceptable and lacking in the required detail.

[30] The Receiver will be at liberty to re-apply for the passing of its accounts.

(b) The Accounts of Counsel for the Receiver

[31] Attached as a further appendix to the Tenth Report is a “summary of the professional fees and disbursements for the Receiver’s legal counsel” for the period of May 30, 2009 through November 9, 2015. The total fees are \$1,065,788.24

including out-of-pocket disbursements of \$18,545.43 and applicable taxes of \$113,492.71. Also attached is a break-down of the 57 invoices rendered by counsel which include information under the following headings: (a) invoice number; (b) invoice date; (c) fees; (d) disbursements; (e) HST; and (f) invoice total. There was a breakdown of the personnel by “Staff Member” which included the following categories: students, associates, paralegals, partners, tax advisors, associate counsel, and “Word Processing”. There was also a break-down under the following headings: (a) name of staff member; (b) their title; (c) their total hours; (d) their billing rate which included varying rates depending on the year that the services were rendered; and (e) amount billed attributable to each of them. There is no indication as to what services were rendered by any of those listed.

[32] Regarding the “fees and disbursements” of legal counsel for the Receiver, the same comments can be made relating to what was presented. First, the accounts should have been verified by Affidavit. Second, there is nothing which would allow me to conclude that what was incurred for legal services was at the “standard rates and charges” of counsel. Third, because there is no description of the services rendered, it is not possible to ascertain whether this liability for legal fees was “properly...made or incurred”. Fourth, the assessment of fees should not be just a matter of calculating the number of hours spent times an hourly rate. There should be some correlation of the cost to the benefits derived by the receivership: *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365 at para. 20. Fifth, counsel should keep in mind Rule 14-1(31) of the *Supreme Court Civil Rules* which provides: “A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a Registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.” Sixth, the Court should not automatically approve the “usual” hourly rates for counsel. In this regard, see *Diemer, supra*, where Goodman J. made the following statement:

In my view, the assumption that the court will automatically approve a “usual” hourly rate for Receiver’s counsel, whether it stems from the commercial list practice or from a geographical region like Toronto is a faulty one. As Spies J. opined in *Pandya v. Simpson*, [2006] O.J. No. 2312, the court, with the assistance of opposing counsel [if there is one], has to play the role of what a

client would ordinarily do, namely consider whether the hourly rate is fair and reasonable in light of the nature of the work involved and the amounts in issue.

(at para. 30)

[33] Regarding the fees and disbursements of counsel, I adopt the statement in *Bennett On Receiverships, supra*, where the learned author states:

The court must scrutinize the accounts carefully to assure that the appropriate lawyers are performing services to the receiver on the same basis and factors as the receivers. Where legal accounts have no relevance to the receivership, the court will reduce the fees. Similar factors are considered on the taxation or assessment of the legal accounts, namely:

- (1) the time expended;
- (2) the complexity of the receivership;
- (3) the degree of responsibility assumed by the lawyers;
- (4) the amount of money involved, including reference to the debt, amount of proceeds after realization, payments to the creditors;
- (5) the degree and skill of the lawyers involved;
- (6) the results achieved;
- (7) the ability of the client to pay; and
- (8) the client's expectations as to the fee.

[34] What should have been presented on behalf of legal counsel would be that which would have been presented to the Registrar on the assessment of an account being rendered to a client. As it was not, the Receiver will be in a position to reapply to have the fees and disbursements of the counsel for the Receiver approved.

(c) Should there be a Reference to the Registrar?

[35] The question which arises is whether it is appropriate to refer the question of the passing of accounts of the Receiver and the passing of accounts of the counsel for the Receiver to the Registrar or whether it is appropriate to assess costs summarily as is provided in the Appointment Order. In this regard, Rule 14-1(15) of the *Supreme Court Civil Rules* provides that a Court may award costs "of a proceeding" and "...in ordering those costs the court may fix the amount of costs, including the amount of disbursements". In the context of a trial and an order made

for costs, Donald J.A. made these statements on behalf of the Court in *Graham v. Moore Estate*, 2003 BCCA 497 :

There remains the issue whether the Plaintiffs' costs should have been assessed before the Registrar rather than by the trial judge. It is said that Mr. Campa was denied the procedural protections of a Registrar's hearing, and he did not have an adequate opportunity to challenge items in the solicitor's bill. The Registrar's hearing would have involved more litigation in a losing cause; a problem that underlies all of Mr. Campa's process arguments.

It is well settled that a trial judge has the authority to determine the quantity of the award although it is a power to be exercised sparingly: *Harrington was Royal Inland Hospital* (1995) 131 D.L.R. (4th) 15 [B.C.C.A.]. As in *Harrington*, the trial judge in the present case did not want to burden the parties with the task of acquainting the Registrar with the complexities of the case when he was fully familiar with all aspects of it.

Mr. Campa was unable to demonstrate any denial of the opportunity to address the reasonableness of the bill. (at paras. 45-47)

[36] In view of the Appointment Order and in view of the desire to provide appropriate expediency to the procedures adopted by the Court, I am satisfied that the present Rule allows a summary determination by the Court rather than a reference to the Registrar on the question of costs. Such a summary determination by the Court is contemplated by the Appointment Order. This view is confirmed in the decision in *Gichuru v. Smith* (2014), 65 B.C.L.R. (5th) 72 (C.A.) where Harris and Goepel JJ.A. made these statements regarding the principles under which an assessment before a judge should take place:

The principle governing cost assessments under the Rules is simple: parties are only entitled to their objectively reasonable legal costs as determined according to the particular costs scale that they were awarded. This principle applies equally to assessments made by the registrar under Rules 14-1(2) or 14-1(3) and assessments made by a judge under R. 14-1(15). It applies whether costs are awarded pursuant to a final judgement or interlocutory application. This principle follows from the plain and ordinary meaning of the Rules and the basic principles of natural justice, as discussed below. It reflects the requirement in Rules 14-1(2) and 14-1(3) that only those costs proper and reasonably necessary to conduct the proceeding may be allowed. Lastly, it applies with equal force regardless of the method used to assess costs; that is, whether it is done pursuant to a hearing or summarily. (at para 101)

The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by

that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs. (at para. 154)

[37] In protracted proceedings dealing with the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 proceedings or a receivership, where a judge has heard each of the applications that have come before the Court, and has received regular reports, the assigned Judge can ascertain whether the accounts should be approved summarily without a reference to the Registrar. That is the most expeditious way of determining that question and is consistent with the Appointment Order. However, this decision should be made by the assigned Judge after the form and the completeness of the materials filed in support of the application can be reviewed so that, if the materials do not meet the criteria set out above, the matter can be referred to the Registrar with directions regarding the materials that must be produced. It would also depend on the question of whether notice has been provided to all, not some, stakeholders and whether a claims bar process has been undertaken and completed.

(d) Destruction of Records

[38] The application contained the following request: "The Receiver is authorized to destroy any and all records of the Company in its possession." I am satisfied that this request runs contrary to the requirements set out in Provincial and Federal legislation regarding retention of records including the requirements of the Superintendent of Bankruptcy, of the Canada Revenue Agency, and of Provincial Legislation dealing with corporations. There is also an important reason "any and all records" of Redcorp and Redfern should not be destroyed. If, in the future, a party obtains the consent of the Receiver or the approval of the Court to proceed against the Receiver, the destruction of records means that the discovery process available pursuant to the *Supreme Court Civil Rules* would be meaningless. In the absence of

the expiry of a limitation period, a claims bar process or a Court Order, the records of Redcorp and Redfern should be retained in accordance with Provincial and Federal legislation.

COSTS

[39] Receiver will be at liberty to speak to the question whether the costs of this application should be born by the creditors of Redfern Resources Ltd. and Redcorp Ventures Ltd.

“Burnyeat J.”

TAB 6



ALBERTA

RULES OF COURT

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(b) is seeking to have the money or personal property applied to satisfy a judgment or order or a writ of enforcement against the person on whose behalf the money or personal property is held.

(3) The applicant

(a) must file an affidavit verifying the facts relied on in the application, and

(b) may make the application without serving notice of the application on any other person.

Alta. Reg. 124/2010 r6.27 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Division 4

Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Alta. Reg. 124/2010 r6.28 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

Alta. Reg. 124/2010 r6.29 effective November 1, 2010 (Alta. Gaz. August 14, 2010)

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

TAB 7

**Estate of Bernard Sherman and
Trustees of the Estate and
Estate of Honey Sherman and
Trustees of the Estate** *Appellants*

v.

**Kevin Donovan and
Toronto Star Newspapers Ltd.** *Respondents*

and

**Attorney General of Ontario,
Attorney General of British Columbia,
Canadian Civil Liberties Association,
Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers
Association,
Postmedia Network Inc., CTV, a Division
of Bell Media Inc.,
Global News, a division of Corus Television
Limited Partnership,
The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario,
HIV Legal Network and
Mental Health Legal Committee** *Interveners*

INDEXED AS: SHERMAN ESTATE v. DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis,
Brown, Rowe, Martin and Kasirer JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO**

*Courts — Open court principle — Sealing orders —
Discretionary limits on court openness — Important public*

**Succession de Bernard Sherman et
fiduciaires de la succession et
Succession de Honey Sherman et
fiduciaires de la succession** *Appelants*

c.

**Kevin Donovan et
Toronto Star Newspapers Ltd.** *Intimés*

et

**Procureur général de l'Ontario,
procureur général de la Colombie-
Britannique,
Association canadienne des libertés civiles,
Centre d'action pour la sécurité du revenu,
Ad IDEM/Canadian Media Lawyers
Association,
Postmedia Network Inc., CTV, une division
de Bell Média inc.,
Global News, a division of Corus Television
Limited Partnership,
The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario, Réseau
juridique VIH et
Mental Health Legal Committee** *Intervenants*

**RÉPERTORIÉ : SHERMAN (SUCCESSION) c.
DONOVAN**

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

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

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

*Tribunaux — Principe de la publicité des débats judi-
ciaires — Ordonnances de mise sous scellés — Limites*

interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at

discretionnaires à la publicité des débats judiciaires — Intérêt public important — Vie privée — Dignité — Sécurité physique — Décès inexpiqué d'un couple important suscitant une vive attention chez le public et amenant les fiduciaires des successions à demander la mise sous scellés des dossiers d'homologation — Les préoccupations en matière de vie privée et de sécurité physique soulevées par les fiduciaires des successions constituent-elles des intérêts publics importants qui sont à ce point sérieusement menacés qu'ils justifient le prononcé d'ordonnances de mise sous scellés?

Un couple important a été retrouvé mort dans sa résidence. Les décès apparemment inexplicables ont suscité un vif intérêt chez le public. À ce jour, l'identité et le mobile des personnes responsables demeurent inconnus, et les décès font l'objet d'une enquête pour homicides. Les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense provoquée par les événements en sollicitant des ordonnances visant à mettre sous scellés les dossiers d'homologation. Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par un journaliste qui avait rédigé des articles sur le décès du couple, ainsi que par le journal pour lequel il écrivait. Le juge de première instance a fait placer sous scellés les dossiers d'homologation, concluant que les effets bénéfiques des ordonnances de mise sous scellés sur les intérêts en matière de vie privée et de sécurité physique l'emportaient sensiblement sur leurs effets préjudiciables. La Cour d'appel à l'unanimité a accueilli l'appel et levé les ordonnances de mise sous scellés. Elle a conclu que l'intérêt en matière de vie privée qui avait été soulevé ne comportait pas la qualité d'intérêt public, et qu'il n'y avait aucun élément de preuve d'un risque réel pour la sécurité physique de quiconque.

Arrêt : Le pourvoi est rejeté.

Les fiduciaires des successions n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important en vertu du test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires. Par conséquent, les ordonnances de mise sous scellés n'auraient pas dû être rendues. La publicité des débats judiciaires peut être source d'inconvénients et d'embarras, mais ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption de publicité des débats. Cela dit, la diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte

serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them.

à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important et un tribunal peut faire une exception au principe de la publicité des débats judiciaires si elle est sérieusement menacée. Dans la présente affaire, on ne peut pas dire que le risque pour la vie privée et pour la sécurité physique est suffisamment sérieux.

Les procédures judiciaires sont présumées accessibles au public. La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de la démocratie canadienne. On dit souvent de la liberté de la presse de rendre compte des procédures judiciaires qu'elle est indissociable du principe de publicité. Le principe de la publicité des débats judiciaires s'applique dans toutes les procédures judiciaires, quelle que soit leur nature. Les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire qui met en cause la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence —, de sorte que la forte présomption de publicité s'applique.

Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir la présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger d'autres intérêts publics lorsqu'ils entrent en jeu. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir ce qui suit : (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s'est élargie au fil du temps et s'étend désormais en général aux intérêts publics importants. L'étendue de cette catégorie transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l'atteinte aux valeurs fondamentales de notre société qu'une publicité absolue des procédures judiciaires pourrait causer. Bien qu'il n'y ait aucune liste exhaustive des intérêts publics importants, les tribunaux doivent faire preuve de prudence

Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their

et avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires lorsqu'ils les constatent. Déterminer ce qu'est un intérêt public important peut se faire dans l'abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné. En revanche, la conclusion sur la question de savoir si un risque sérieux menace cet intérêt est une conclusion factuelle qui est nécessairement prise eu égard au contexte. Le fait de constater un intérêt important et celui de constater le caractère sérieux du risque auquel cet intérêt est exposé sont donc en théorie des opérations séparées et qualitativement distinctes.

La vie privée a été défendue en tant que considération fondamentale d'une société libre et son importance pour le public a été reconnue dans divers contextes. Bien que la vie privée d'une personne soit d'une importance primordiale pour celle-ci, la protection de la vie privée est également dans l'intérêt de la société dans son ensemble. La vie privée ne saurait donc être rejetée en tant que simple préoccupation personnelle : il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public.

Cependant, si la vie privée est définie trop largement, la reconnaissance d'un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité. La vie privée des personnes sera menacée dans de nombreuses procédures judiciaires. De plus, la vie privée est une notion complexe et contextuelle, de sorte qu'il est difficile pour les tribunaux de la mesurer. La reconnaissance d'un intérêt important à l'égard de la notion générale de vie privée serait donc irréalisable.

Le caractère public de l'intérêt en matière de vie privée consiste plutôt à protéger les gens contre la menace à leur dignité. La dignité en ce sens comporte le droit de présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée; il s'agit de l'expression de la personnalité ou de l'identité unique d'une personne. Cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée, tout en permettant de maintenir la forte présomption de publicité des débats.

Se fondant sur la dignité, la vie privée sera sérieusement menacée dans des circonstances limitées. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte à la publicité des débats judiciaires. La dignité ne sera sérieusement menacée que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats sont suffisamment sensibles ou privés pour que l'on puisse démontrer que la publicité porte atteinte de

integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. Il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. La mesure dans laquelle les renseignements sont diffusés et font déjà partie du domaine public, ainsi que la probabilité que la diffusion se produise réellement, peuvent avoir une incidence sur le caractère sérieux du risque. Il incombe au demandeur de démontrer que la vie privée, considérée au regard de la dignité, est sérieusement menacée; cela permet d'établir un seuil, tributaire des faits, compatible avec la présomption de publicité des débats.

Il existe également un intérêt public important dans la protection des personnes contre un préjudice physique, mais une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour cet intérêt public important. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt public important est sérieusement menacé, car il est possible d'établir l'existence d'un préjudice objectivement discernable sur la base d'inférences logiques. Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. Le simple fait d'invoquer un préjudice physique grave n'est donc pas suffisant.

Il faut démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R.

En l'espèce, le risque pour l'intérêt public important en matière de vie privée, défini au regard de la dignité, n'est pas sérieux. Les renseignements contenus dans les dossiers d'homologation ne révèlent rien de particulièrement privé ni de très sensible. Il n'a pas été démontré qu'ils toucheraient au cœur même des renseignements biographiques des personnes touchées d'une manière qui minerait leur contrôle sur l'expression de leur identité. De plus, le dossier ne démontre pas l'existence d'un risque sérieux de préjudice physique. Les fiduciaires des successions ont demandé au juge de première instance d'inférer non seulement le fait qu'un préjudice serait causé aux personnes touchées, mais également qu'il existe une ou des personnes qui souhaitent leur faire du mal. Déduire tout cela en se fondant sur les décès et sur les liens unissant les personnes touchées aux défunts ne constitue pas une inférence raisonnable, mais une conjecture.

Même si les fiduciaires des successions avaient réussi à démontrer l'existence d'un risque sérieux pour la vie privée, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Comme dernier obstacle, les fiduciaires des successions auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emportaient sur ses effets préjudiciables.

Jurisprudence

Arrêt appliqué : *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522; **arrêts mentionnés :** *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332; *Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442; *Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403; *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567; *Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113; *R. c. Oakes*,

(3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dymont*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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Chantelle Cseh and Timothy Youdan, for the appellants.

Iris Fischer and Skye A. Sepp, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jaqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

Rochette, Sébastien, et Jean-François Côté. « Article 12 », dans Luc Chamberland, dir. *Le grand collectif : Code de procédure civile — Commentaires et annotations*, vol. 1, 5^e éd., Montréal, Yvon Blais, 2020.

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Chantelle Cseh et Timothy Youdan, pour les appelants.

Iris Fischer et Skye A. Sepp, pour les intimés.

Peter Scrutton, pour l’intervenant le procureur général de l’Ontario.

Jaqueline Hughes, pour l’intervenant le procureur général de la Colombie-Britannique.

Ryder Gilliland, pour l’intervenante l’Association canadienne des libertés civiles.

Ewa Krajewska, pour l’intervenant le Centre d’action pour la sécurité du revenu.

Robert S. Anderson, c.r., pour les intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, pour l’intervenante British Columbia Civil Liberties Association.

Khalid Janmohamed, pour les intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH et Mental Health Legal Committee.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu
par

KASIRER J. —

LE JUGE KASIRER —

I. Overview

[1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of

I. Survol

[1] La Cour a toujours fermement reconnu que le principe de la publicité des débats judiciaires est protégé par le droit constitutionnel à la liberté d'expression, et qu'il représente à ce titre un élément fondamental d'une démocratie libérale. En règle générale, le public peut assister aux audiences et consulter les dossiers judiciaires, et les médias — les yeux et les oreilles du public — sont libres de poser des questions et de formuler des commentaires sur les activités des tribunaux, ce qui contribue à rendre le système judiciaire équitable et responsable.

[2] Par conséquent, il existe une forte présomption en faveur de la publicité des débats judiciaires. Il est entendu que cela permet un examen public minutieux qui peut être source d'inconvénients, voire d'embarras, pour ceux qui estiment que leur implication dans le système judiciaire entraîne une atteinte à leur vie privée. Cependant, ce désagrément n'est pas, en règle générale, suffisant pour permettre de réfuter la forte présomption voulant que le public puisse assister aux audiences, et que les dossiers judiciaires puissent être consultés et leur contenu rapporté par une presse libre.

[3] Malgré cette présomption, il se présente des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires — par exemple, une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage —, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le fait que cette condition soit considérée comme un seuil élevé vise à assurer

proportionality, the benefits of that order restricting openness outweigh its negative effects.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist,

le maintien de la forte présomption de publicité des débats judiciaires. En outre, la protection accordée à la publicité des débats ne s'arrête pas là. Le demandeur doit encore démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs.

[4] Le présent pourvoi porte sur la question de savoir si les préoccupations soulevées par les personnes qui demandent qu'une exception soit faite à la publicité habituelle des dossiers judiciaires dans le cadre de procédures d'homologation successorale — à savoir les préoccupations concernant la vie privée et la sécurité physique des personnes touchées — constituent des intérêts publics importants qui sont à ce point sérieusement menacés que les dossiers devraient être mis sous scellés. Les parties au présent pourvoi conviennent que la sécurité physique constitue un intérêt public important qui pourrait justifier une ordonnance de mise sous scellés, mais elles ne s'entendent pas sur la question de savoir si cet intérêt serait sérieusement menacé, dans les circonstances de l'espèce, advenant la levée des scellés. Elles sont également en désaccord sur la question de savoir si la vie privée constitue en elle-même un intérêt important qui pourrait justifier une ordonnance de mise sous scellés. Les appelants affirment que la vie privée est un intérêt public suffisamment important pouvant justifier l'imposition de limites à la publicité des débats judiciaires, plus particulièrement à la lumière des menaces auxquelles les gens sont exposés dans un contexte où la technologie facilite la diffusion à grande échelle de renseignements personnels sensibles. Ils font valoir que la Cour d'appel a eu tort d'affirmer que les préoccupations personnelles en matière de vie privée, à elles seules, ne comportent pas l'élément d'intérêt public qui relève à juste titre d'une ordonnance de mise sous scellés.

[5] Notre Cour a, dans différents contextes, défendu de manière constante la vie privée en tant que considération fondamentale d'une société libre. Invoquant des arrêts rendus dans d'autres contextes, les appelants soutiennent que la vie privée devrait être reconnue en l'espèce comme un intérêt public qui, au vu des faits de la présente affaire, étaye leur

recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

plaidoyer en faveur du prononcé d'ordonnances de mise sous scellés des dossiers d'homologation. Les intimés s'opposent à ce que de telles ordonnances soient rendues, rappelant que la protection de la vie privée est généralement considérée comme une faible justification à une exception à la publicité des débats. Ils affirment qu'après tout, presque chaque procédure judiciaire entraîne un certain dérangement dans la vie des personnes concernées et que ces atteintes à la vie privée doivent être tolérées parce que la publicité des débats judiciaires est essentielle à une saine démocratie.

[6] Le présent pourvoi offre donc l'occasion de trancher la question de savoir si la vie privée peut constituer un intérêt public suivant la jurisprudence relative à la publicité des débats judiciaires et, dans l'affirmative, si la publicité des débats menace sérieusement la vie privée en l'espèce au point de justifier le type d'ordonnances demandé par les appelants.

[7] Pour les motifs qui suivent, je propose de reconnaître qu'un aspect de la vie privée constitue un intérêt public important pour l'application du test pertinent énoncé dans l'arrêt *Sierra Club du Canada c. Canada (Ministre des Finances)*, 2002 CSC 41, [2002] 2 R.C.S. 522. La tenue de procédures judiciaires publiques peut mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui me semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, est sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée.

[8] Dans la présente affaire, et en gardant cet intérêt à l'esprit, on ne peut pas dire que le risque pour la vie privée est suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en est de même du risque pour la sécurité physique en l'espèce. Dans les circonstances, la Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés et je suis donc d'avis de rejeter le pourvoi.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")¹ sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

¹ As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate". In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

II. Contexte

[9] Bernard Sherman et Honey Sherman, figures importantes du monde des affaires et de la philanthropie, ont été retrouvés morts dans leur résidence de Toronto en décembre 2017. Leur décès apparemment inexpliqué a suscité un vif intérêt chez le public et une attention médiatique intense. En janvier de l'année suivante, le service de police de Toronto a annoncé que les décès faisaient l'objet d'une enquête pour homicides. Au moment où l'affaire a été portée devant les tribunaux, l'identité et le mobile des personnes responsables demeuraient inconnus.

[10] Les successions du couple et les fiduciaires des successions (collectivement les « fiduciaires »)¹ ont cherché à réfréner l'attention médiatique intense provoquée par les événements. Les fiduciaires souhaitaient veiller au transfert harmonieux des biens du couple, à distance de ce qu'ils percevaient comme un intérêt morbide du public pour les décès inexpliqués et la curiosité suscitée par les importantes sommes d'argent apparemment en jeu.

[11] Quand le temps est venu d'obtenir auprès de la Cour supérieure de justice leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires (« personnes touchées ») de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les fiduciaires ont soutenu que, si les renseignements contenus dans les dossiers judiciaires étaient révélés au public, la sécurité des personnes touchées serait menacée et leur vie privée compromise tant et aussi longtemps que les décès demeureraient inexpliqués et que les personnes responsables de la tragédie seraient en liberté. À l'appui de leur demande, ils ont fait valoir qu'il existait un risque réel et important que les personnes touchées subissent un préjudice sérieux en raison de la diffusion publique des documents dans les circonstances.

¹ Comme l'indique l'intitulé de la cause, les appelants en l'espèce ont, tout au long des procédures, été désignés comme suit : « succession de Bernard Sherman et fiduciaires de la succession et succession de Honey Sherman et fiduciaires de la succession ». Dans les présents motifs, les appelants sont appelés les « fiduciaires » par souci de commodité.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").² The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension

² The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

[12] Les ordonnances de mise sous scellés ont au départ été accordées, puis ont été contestées par Kevin Donovan, un journaliste qui avait rédigé une série d'articles sur le décès du couple, ainsi que par Toronto Star Newspapers Ltd., le journal pour lequel il écrivait (collectivement le « Toronto Star »)². Le Toronto Star a affirmé que les ordonnances portaient atteinte à ses droits constitutionnels à la liberté d'expression et à la liberté de la presse, ainsi qu'au principe corollaire selon lequel les activités des tribunaux devraient être accessibles au public comme moyen de garantir l'équité et la transparence de l'administration de la justice.

III. Historique judiciaire

A. *Cour supérieure de justice de l'Ontario, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (le juge Dunphy)*

[13] Examinant la question de savoir si les circonstances justifiaient une atteinte au principe de la publicité des débats judiciaires, le juge de première instance s'est appuyé sur l'arrêt *Sierra Club* de notre Cour. Il a souligné qu'une ordonnance de confidentialité ne devrait être accordée que si [TRADUCTION] : « (1) elle est nécessaire [. . .] pour écarter un risque sérieux pour un intérêt important en l'absence d'autres options raisonnables pour écarter ce risque, et (2) ses effets bénéfiques l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression et l'intérêt du public à la publicité des débats judiciaires » (par. 13(d)).

[14] Le juge de première instance a examiné la question de savoir si les intérêts des fiduciaires seraient servis par l'octroi des ordonnances de mise sous scellés. À son avis, les fiduciaires avaient correctement mis en évidence deux intérêts légitimes à l'appui d'une exception au principe de la publicité des débats judiciaires, à savoir [TRADUCTION] « la

² L'utilisation du terme « Toronto Star » pour désigner collectivement les deux intimés ne devrait pas être interprétée comme indiquant que seule la société Toronto Star Newspapers Ltd. participe au présent pourvoi. Monsieur Donovan est le seul intimé à avoir été une partie devant toutes les cours. Toronto Star Newspapers Ltd. a participé à la première instance, mais, sur consentement, elle a été retirée comme partie à la Cour d'appel. Par une ordonnance de la juge Karakatsanis datée du 25 mars 2020, Toronto Star Newspapers Ltd. a été ajoutée en tant qu'intimée devant notre Cour.

of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased” (paras. 22-25). With respect to the first interest, the application judge found that “[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating” (para. 23). For the second interest, although he noted that “it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation”, he concluded that “the lack of such evidence is not fatal” (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the “willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed” (*ibid.*). He concluded that the “current uncertainty” was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was “grave” (*ibid.*).

[15] The application judge ultimately accepted the Trustees’ submission that these interests “very strongly outweigh” what he called the proportionately narrow public interest in the “essentially administrative files” at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

protection de la vie privée et de la dignité des victimes d’actes criminels ainsi que de leurs êtres chers », et « une crainte raisonnable d’un risque de préjudice chez les personnes connues comme ayant un intérêt à recevoir ou à administrer les biens des défunts » (par. 22-25). S’agissant du premier intérêt, le juge de première instance a conclu que [TRADUCTION] « le degré d’atteinte à cette vie privée et à cette dignité est déjà extrême et [. . .] insoutenable » (par. 23). En ce qui a trait au deuxième intérêt, bien qu’il ait souligné qu’« il aurait été préférable d’inclure des éléments de preuve objectifs de la gravité de ce risque, obtenus, par exemple, auprès des policiers responsables de l’enquête », il a conclu que « l’absence de tels éléments de preuve n’est pas fatale » (par. 24). Les inférences nécessaires pouvaient plutôt être tirées des circonstances, notamment [TRADUCTION] « la volonté de la personne ou des personnes ayant perpétré les crimes de recourir à une violence extrême pour obéir à un mobile quelconque » (*ibid.*). Il a conclu que [TRADUCTION] « l’incertitude actuelle » était source d’une crainte raisonnable du risque de préjudice, et qu’en outre, le préjudice prévisible était « grave » (*ibid.*).

[15] Le juge de première instance a finalement accepté l’argument des fiduciaires selon lequel ces intérêts [TRADUCTION] « l’emportent très fortement » sur ce qu’il a qualifié d’intérêt public proportionnellement restreint à l’égard des « dossiers essentiellement administratifs » en cause (par. 31 et 33). Il a donc conclu que les effets bénéfiques des ordonnances de mise sous scellés sur les droits et les intérêts des personnes touchées l’emportaient sensiblement sur leurs effets préjudiciables.

[16] Enfin, le juge de première instance a examiné la question de savoir quelle ordonnance protégerait les personnes touchées tout en portant le moins possible atteinte au principe de la publicité des débats judiciaires. Il a décidé que, si l’on devait apporter aux deux dossiers le caviardage nécessaire à la protection des intérêts qu’il avait constatés, il n’en resterait plus aucun passage digne d’intérêt susceptible d’être divulgué. Des ordonnances de mise sous scellés d’une durée indéterminée ne lui semblaient toutefois pas une bonne solution. Le juge de première instance a donc fait placer sous scellés les dossiers pour une période initiale de deux ans, avec possibilité de renouvellement.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan J.J.A.)*

[17] The Toronto Star’s appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that “[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle” (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone’s physical safety. The application judge had erred on this point: “the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order” (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

B. *Cour d’appel de l’Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (les juges Doherty, Rouleau et Hourigan)*

[17] L’appel interjeté par le Toronto Star a été accueilli à l’unanimité et les ordonnances de mise sous scellés ont été levées.

[18] La Cour d’appel a examiné les deux intérêts qui avaient été soulevés devant le juge de première instance au soutien des ordonnances visant à mettre sous scellés les dossiers d’homologation. En ce qui concerne la nécessité de protéger la vie privée et la dignité des victimes de crimes violents et de leurs êtres chers, elle a rappelé que le type d’intérêt qui est à juste titre protégé par une ordonnance de mise sous scellés doit comporter un élément d’intérêt public. Citant l’arrêt *Sierra Club*, la Cour d’appel a écrit que [TRADUCTION] « [d]es préoccupations personnelles ne peuvent à elles seules justifier une ordonnance de mise sous scellés de documents qui seraient normalement accessibles au public en vertu du principe de la publicité des débats judiciaires » (par. 10). Elle a conclu que l’intérêt en matière de vie privée à l’égard duquel les fiduciaires sollicitaient une protection ne comportait pas cette qualité d’intérêt public.

[19] Bien qu’elle ait reconnu que la sécurité personnelle des gens constituait, de manière générale, un intérêt public important, la Cour d’appel a écrit qu’il n’y avait aucun élément de preuve en l’espèce permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Le juge de première instance avait commis une erreur sur ce point : [TRADUCTION] « l’idée selon laquelle les bénéficiaires et les fiduciaires sont en quelque sorte en danger parce que les Sherman ont été assassinés n’est pas une inférence, mais une conjecture. Elle ne justifie aucunement l’octroi d’une ordonnance de mise sous scellés » (par. 16).

[20] La Cour d’appel a conclu que les fiduciaires n’avaient pas franchi la première étape du test relatif à l’obtention d’ordonnances de mise sous scellés des dossiers d’homologation. Elle a donc accueilli l’appel et annulé les ordonnances.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical

C. *Procédures subséquentes*

[21] L'ordonnance de la Cour d'appel annulant les ordonnances de mise sous scellés a été suspendue en attendant l'issue du présent pourvoi. Le Toronto Star a présenté une requête pour être autorisé à déposer de nouveaux éléments de preuve dans le cadre du pourvoi, éléments de preuve qui comprennent des documents d'enregistrement des droits immobiliers, des transcriptions du contre-interrogatoire d'un détective sur l'enquête relative aux meurtres ainsi que divers articles de presse. Ces éléments de preuve, affirme-t-il, étayaient la conclusion selon laquelle les ordonnances de mise sous scellés devraient être levées. La requête a été renvoyée à notre formation.

IV. Moyens

[22] Les fiduciaires ont interjeté appel devant notre Cour pour demander le rétablissement des ordonnances de mise sous scellés rendues par le juge de première instance. En plus de contester la requête en production de nouveaux éléments de preuve, ils soutiennent que les ordonnances sont nécessaires pour écarter un risque sérieux pour la vie privée et la sécurité physique des personnes touchées, et que les effets bénéfiques de la mise sous scellés des dossiers d'homologation judiciaire l'emportent sur les effets préjudiciables du fait de limiter la publicité des débats judiciaires. Les fiduciaires soutiennent que deux erreurs de droit ont amené la Cour d'appel à conclure autrement.

[23] Premièrement, ils soutiennent que la Cour d'appel a conclu à tort que la vie privée est une préoccupation personnelle qui ne peut, à elle seule, constituer un intérêt important suivant l'arrêt *Sierra Club*. Les fiduciaires affirment que le juge de première instance a qualifié à bon droit la vie privée et la dignité comme un intérêt public important qui, étant exposé à un risque sérieux, justifiait les ordonnances. Ils demandent à notre Cour de reconnaître que la vie privée constitue en elle-même un intérêt public important pour les besoins de l'analyse.

[24] Deuxièmement, les fiduciaires avancent que la Cour d'appel a commis une erreur en infirmant la conclusion du juge de première instance selon

harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an “administrative” character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star’s view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees’ position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files

laquelle il y avait un risque sérieux de préjudice physique. Ils font valoir que la Cour d’appel n’a pas reconnu que les tribunaux sont habilités à tirer des inférences raisonnables sur le fondement de la raison et de la logique, même en l’absence d’éléments de preuve précis du risque allégué.

[25] Les fiduciaires affirment que ces erreurs ont amené la Cour d’appel à annuler à tort les ordonnances de mise sous scellés. En réponse aux questions qui leur ont été posées à l’audience, les fiduciaires ont reconnu qu’une ordonnance de caviardage de certains documents dans le dossier ou encore une interdiction de publication pourrait contribuer à apaiser certaines de leurs préoccupations, mais ils ont maintenu qu’aucune de ces mesures ne constituait une solution de rechange raisonnable aux ordonnances de mise sous scellés dans les circonstances.

[26] Les fiduciaires font également valoir que la protection de ces intérêts l’emporte sur les effets préjudiciables des ordonnances. Ils soutiennent que la nature des procédures d’homologation successorale dans la présente affaire atténue l’importance du principe de la publicité des débats judiciaires. Étant donné qu’elle n’est ni contentieuse ni, à proprement parler, nécessaire au transfert des biens au décès, l’homologation est une procédure judiciaire de nature [TRADUCTION] « administrative », ce qui réduit la nécessité d’appliquer le principe de la publicité des débats judiciaires à l’espèce (par. 113-114).

[27] Le Toronto Star soutient pour sa part que la Cour d’appel n’a commis aucune erreur en annulant les ordonnances de mise sous scellés et que l’appel devrait être rejeté. Selon le Toronto Star, bien que la vie privée puisse constituer un intérêt important quand elle révèle la présence d’un élément public, les fiduciaires ont seulement fait état d’un désir subjectif de la part des personnes touchées en l’espèce d’éviter toute publicité supplémentaire, laquelle n’est pas préjudiciable en soi. De l’avis du Toronto Star et de certains des intervenants, la position des fiduciaires reviendrait à permettre à cette part d’inconvénients et d’embarras propre à toute instance judiciaire à avoir préséance sur l’intérêt dans la publicité des débats judiciaires, un principe qui est garanti par la *Charte canadienne des droits et libertés* et dans

is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the

lequel toute la société a un intérêt. Le Toronto Star soutient également que les renseignements contenus dans les dossiers judiciaires ne sont pas de nature très sensible. En ce qui a trait à la question de savoir si les ordonnances de mise sous scellés étaient nécessaires pour protéger les personnes touchées d'un préjudice physique, le Toronto Star fait valoir que la Cour d'appel a eu raison de conclure que les fiduciaires n'avaient pas établi l'existence d'un risque sérieux pour cet intérêt.

[28] Subsidiairement, le Toronto Star affirme que, même s'il existe un risque sérieux pour un intérêt important quelconque, les ordonnances de mise sous scellés ne sont pas nécessaires, car le risque pourrait être écarté par une autre ordonnance moins sévère. De plus, il soutient que les ordonnances ne sont pas proportionnées. En cherchant à minimiser l'importance de la publicité des débats judiciaires dans les procédures d'homologation, les fiduciaires invitent à adopter, à l'égard de la pondération des effets de l'ordonnance, une approche inflexible, incompatible avec le principe de la publicité qui s'applique à toutes les procédures judiciaires. Quoi qu'il en soit, il existe précisément un intérêt public à l'égard de la publicité des débats dans la présente affaire, étant donné que les certificats demandés peuvent avoir une incidence sur les droits de tiers et que la publicité des débats garantit l'équité des procédures, qu'elles soient contestées ou non.

V. Analyse

[29] L'issue du pourvoi dépend de la question de savoir si le juge de première instance aurait dû rendre les ordonnances de mise sous scellés conformément au test applicable en matière de limites discrétionnaires à la publicité des débats judiciaires, test établi par notre Cour dans l'arrêt *Sierra Club*.

[30] La publicité des débats judiciaires, qui est protégée par la garantie constitutionnelle de la liberté d'expression, est essentielle au bon fonctionnement de notre démocratie (*Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480, par. 23; *Vancouver Sun (Re)*, 2004 CSC 43, [2004] 2 R.C.S. 332, par. 23-26). On dit souvent de la liberté de la presse de rendre compte

principle of open justice. “In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so” (*Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court’s jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra*

des procédures judiciaires qu’elle est indissociable du principe de publicité. [TRADUCTION] « En rendant compte de ce qui a été dit et fait dans un procès public, les médias sont les yeux et les oreilles d’un public plus large qui aurait parfaitement le droit d’y assister, mais qui, pour des raisons purement pratiques, ne peut le faire » (*Khuja c. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161, par. 16, citant *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1339-1340, le juge Cory). Le pouvoir d’imposer des limites à la publicité des débats judiciaires afin de servir d’autres intérêts publics est reconnu, mais il doit être exercé avec modération et en veillant toujours à maintenir la forte présomption selon laquelle la justice doit être rendue au vu et au su du public (*Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, p. 878; *R. c. Mentuck*, 2001 CSC 76, [2001] 3 R.C.S. 442, par. 32-39; *Sierra Club*, par. 56). Le test des limites discrétionnaires à la publicité des débats judiciaires vise à maintenir cette présomption tout en offrant suffisamment de souplesse aux tribunaux pour leur permettre de protéger ces autres intérêts publics lorsqu’ils entrent en jeu (*Mentuck*, par. 33). Les parties conviennent qu’il s’agit du cadre d’analyse approprié à appliquer pour trancher le présent pourvoi.

[31] Les parties et les tribunaux d’instance inférieure ne s’entendent pas, cependant, sur la façon dont ce test s’applique aux faits de la présente affaire et cela nécessite des éclaircissements sur certains points de l’analyse établie dans l’arrêt *Sierra Club*. Plus fondamentalement, il y a désaccord sur la façon dont un intérêt important à la protection de la vie privée pourrait être reconnu de telle sorte qu’il justifierait des limites à la publicité des débats, et en particulier lorsque la vie privée peut constituer une question d’intérêt public. Les parties font valoir deux principes établis dans la jurisprudence de la Cour à l’appui de leur position respective. Tout d’abord, notre Cour a souvent fait observer que la vie privée est une valeur fondamentale nécessaire au maintien d’une société libre et démocratique (*Lavigne c. Canada (Commissariat aux langues officielles)*, 2002 CSC 53, [2002] 2 R.C.S. 773, par. 25; *Dagg c. Canada (Ministre des Finances)*, [1997] 2 R.C.S. 403, par. 65-66, le juge La Forest (dissident, mais non sur ce point); *Nouveau-Brunswick*, par. 40).

Club test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

Dans certains cas, les tribunaux ont invoqué la vie privée pour justifier l'application d'une exception à la publicité des débats judiciaires conformément au test établi dans *Sierra Club* (voir, p. ex., *R. c. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, par. 11 et 17). En même temps, la jurisprudence reconnaît qu'un certain degré d'atteinte à la vie privée — qui entraîne des inconvénients, voire de la contrariété ou de l'embarras — est inhérent à toute instance judiciaire accessible au public (*Nouveau-Brunswick*, par. 40). Par conséquent, le maintien de la présomption de la publicité des débats judiciaires signifie reconnaître que ni la susceptibilité individuelle ni le simple désagrément personnel découlant de la participation à des procédures judiciaires ne sont susceptibles de justifier l'exclusion du public des tribunaux (*Procureur général de la Nouvelle-Écosse c. MacIntyre*, [1982] 1 R.C.S. 175, p. 185; *Nouveau-Brunswick*, par. 41). Déterminer le rôle de la vie privée dans le cadre de l'analyse prévue dans l'arrêt *Sierra Club* exige de concilier ces deux idées, et c'est là le nœud du désaccord entre les parties. Le droit à vie privée n'est pas absolu et le principe de la publicité des débats judiciaires n'est pas sans exception.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[32] Pour les motifs qui suivent, je ne suis pas d'accord avec les fiduciaires pour dire que l'intérêt en matière de vie privée apparemment illimité qu'ils invoquent constitue un intérêt public important au sens de *Sierra Club*. Leur revendication large n'est pas axée sur les éléments de la vie privée qui méritent une protection publique dans le contexte de la publicité des débats judiciaires. Cela ne veut pas dire, cependant, que la protection de la vie privée ne peut jamais justifier une mesure exceptionnelle comme les ordonnances de mise sous scellés sollicitées en l'espèce. Bien que le simple embarras causé par la diffusion de renseignements personnels dans le cadre d'une procédure judiciaire publique ne suffise pas à justifier une limite à la publicité des débats judiciaires, il existe des circonstances où un aspect de la vie privée d'une personne revêt une dimension d'intérêt public manifeste.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this

[33] La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne.

affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this

Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent selon *Sierra Club*. La dignité en ce sens est une préoccupation connexe à la vie privée en général, mais elle est plus restreinte que celle-ci; elle transcende les intérêts individuels et, comme d'autres intérêts publics importants, c'est une question qui concerne la société en général. Un tribunal peut faire une exception au principe de la publicité des débats judiciaires, malgré la forte présomption en faveur de son application, si l'intérêt à protéger les aspects fondamentaux de la vie personnelle des individus qui se rapportent à leur dignité est sérieusement menacé par la diffusion de renseignements suffisamment sensibles. La question est de savoir non pas si les renseignements sont « personnels » pour la personne concernée, mais si, en raison de leur caractère très sensible, leur diffusion entraînerait une atteinte à sa dignité que la société dans son ensemble a intérêt à protéger.

[34] Cet intérêt du public à l'égard de la vie privée axe à juste titre l'analyse sur l'incidence de la diffusion de renseignements personnels sensibles, plutôt que sur le simple fait de cette diffusion, intérêt qui est fréquemment menacé dans les procédures judiciaires et qui est nécessaire dans un système qui privilégie la publicité des débats judiciaires. Il s'agit d'un seuil élevé — plus élevé et plus précis que le vaste intérêt en matière de vie privée invoqué en l'espèce par les fiduciaires. Cet intérêt public ne sera sérieusement menacé que lorsque les renseignements en question portent atteinte à ce que l'on considère parfois comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires.

[35] Je m'empresse de dire que la personne qui demande une ordonnance visant à faire exception au principe de la publicité des débats judiciaires ne peut se contenter d'affirmer sans fondement que cet intérêt du public à l'égard de la dignité est compromis, pas plus qu'elle ne le pourrait si c'était son intégrité physique qui était menacée. Selon *Sierra Club*, le demandeur doit démontrer, au vu des faits de l'affaire,

dignity dimension of their privacy is at “serious risk”. For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star’s new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

qu’il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l’application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l’on puisse dire qu’ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu’il existe un risque sérieux d’atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n’est pas rendue.

[36] En l’espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu’on pourrait dire qu’ils touchent à l’identité fondamentale des personnes concernées; les fiduciaires n’ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l’atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l’exige *Sierra Club*. De plus, comme je tenterai de l’expliquer, il n’y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n’est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l’accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l’admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d’avis de rejeter le pourvoi.

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l’étape de la nécessité et celle de la proportionnalité de l’ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

- (1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;
- (2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et
- (3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become “one of the hallmarks of a democratic society” (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that “acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice” (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the “fairness of the trial” (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the “proper administration of justice” (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an “important interest, including a commercial interest, in the context of litigation” (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that

public à l’égard de leur travail et sa compréhension de celui-ci, et, au bout du compte, la légitimité du processus (voir, p. ex., *Vancouver Sun*, par. 23-26). Dans l’arrêt *Nouveau-Brunswick*, le juge La Forest a expliqué que la présomption en faveur de la publicité des débats judiciaires était devenue « [TRADUCTION] “l’une des caractéristiques d’une société démocratique” » (citant *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), p. 119), qui « fait en sorte que la justice est administrée de manière non arbitraire, conformément à la primauté du droit [. . .], situation qui favorise la confiance du public dans la probité du système judiciaire et la compréhension de l’administration de la justice » (par. 22). Le caractère fondamental de ce principe pour le système judiciaire sous-tend la forte présomption — quoique réfutable — en faveur de la tenue de procédures judiciaires publiques (par. 40; *Mentuck*, par. 39).

[40] Le test fait en sorte que les ordonnances discrétionnaires ne soient pas assujetties à une norme moins exigeante que la norme à laquelle seraient assujetties des dispositions législatives qui limiteraient la publicité des débats judiciaires (*Mentuck*, par. 27; *Sierra Club*, par. 45). À cette fin, la Cour a élaboré un cadre d’analyse par analogie avec le test de l’arrêt *Oakes*, que les tribunaux utilisent pour déterminer si une limite imposée par un texte de loi à un droit garanti par la *Charte* est raisonnable et si sa justification peut se démontrer dans le cadre d’une société libre et démocratique (*Sierra Club*, par. 40, citant *R. c. Oakes*, [1986] 1 R.C.S. 103; voir également *Dagenais*, p. 878; *Vancouver Sun*, par. 30).

[41] La portée reconnue des intérêts qui pourraient justifier une exception discrétionnaire à la publicité des débats judiciaires s’est élargie au fil du temps. Dans l’arrêt *Dagenais*, le juge en chef Lamer a parlé de la nécessité d’un risque « que le procès soit inéquitable » (p. 878). Dans *Mentuck*, le juge Iacobucci a étendu cette condition à un risque « pour la bonne administration de la justice » (par. 32). Enfin, dans *Sierra Club*, le juge Iacobucci, s’exprimant encore une fois au nom de la Cour à l’unanimité, a reformulé le test de manière à englober tout risque sérieux pour un « intérêt important, y compris un intérêt commercial, dans le contexte d’un litige » (par. 53). Il a en

case, a harm to a particular business interest would not have been sufficient, but the “general commercial interest of preserving confidential information” was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the “pressing and substantial” objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term “important interest” therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.’s sense, explained in *Sierra Club*, that courts must be “cautious” and “alive to the fundamental importance of the open court rule” even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at “serious risk” is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of

même temps précisé que l’intérêt important doit être exprimé en tant qu’intérêt public. Par exemple, à la lumière des faits de cette affaire, le préjudice causé à un intérêt commercial particulier n’aurait pas été suffisant, mais « l’intérêt commercial général dans la protection des renseignements confidentiels » constituait un intérêt important en raison de son caractère public (par. 55). Cette conclusion est compatible avec le fait que ce test a été élaboré à l’égard de la jurisprudence relative à l’arrêt *Oakes*, laquelle met l’accent sur l’objectif « urgen[t] et rée[l] » d’un texte de loi d’application générale (*Oakes*, p. 138-139; voir également *Mentuck*, par. 31). L’expression « intérêt important » vise donc un large éventail d’objectifs d’intérêt public.

[42] Bien qu’il n’y ait aucune liste exhaustive des intérêts publics importants pour l’application de ce test, je partage l’opinion du juge Iacobucci, exprimée dans *Sierra Club*, selon laquelle les tribunaux doivent faire preuve de « prudence » et « avoir pleinement conscience de l’importance fondamentale de la règle de la publicité des débats judiciaires », même à la toute première étape lorsqu’ils constatent les intérêts publics importants (par. 56). Déterminer ce qu’est un intérêt public important peut se faire dans l’abstrait sur le plan des principes généraux qui vont au-delà des parties à un litige donné (par. 55). En revanche, la conclusion sur la question de savoir si un « risque sérieux » menace cet intérêt est une conclusion factuelle qui, pour le juge qui examine le caractère approprié d’une ordonnance, est nécessairement prise eu égard au contexte. En ce sens, le fait de constater, d’une part, un intérêt important et celui de constater, d’autre part, le caractère sérieux du risque auquel cet intérêt est exposé sont, en théorie du moins, des opérations séparées et qualitativement distinctes. Une ordonnance peut donc être refusée du simple fait qu’un intérêt public important valide n’est pas sérieusement menacé au vu des faits de l’affaire ou, à l’inverse, parce que les intérêts constatés, qu’ils soient ou non sérieusement menacés, ne présentent pas le caractère public important requis sur le plan des principes généraux.

[43] Le test énoncé dans *Sierra Club* continue d’être un guide approprié en ce qui a trait à l’exercice du pouvoir discrétionnaire des tribunaux dans des

“important interest” transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, “Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information” (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court’s authority. The court’s decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of

affaires comme en l’espèce. L’étendue de la catégorie d’« intérêt important » transcende les intérêts des parties au litige et offre une grande souplesse pour remédier à l’atteinte aux valeurs fondamentales de notre société qu’une publicité absolue des procédures judiciaires pourrait causer (voir, p. ex., P. M. Perell et J. W. Morden, *The Law of Civil Procedure in Ontario* (4^e éd. 2020), par. 3.185; J. Bailey et J. Burkell, « Revisiting the Open Court Principle in an Era of Online Publication : Questioning Presumptive Public Access to Parties’ and Witnesses’ Personal Information » (2016), 48 *R.D. Ottawa* 143, p. 154-155). Parallèlement, cependant, l’obligation de démontrer l’existence d’un risque sérieux pour un intérêt important établit un seuil valable nécessaire au maintien de la présomption de publicité des débats. S’ils devaient tout simplement mettre en balance les avantages et les effets négatifs de l’imposition d’une limite à la publicité des débats judiciaires, les décideurs appelés à examiner les incidences concrètes pour les personnes qui comparaissent devant eux pourraient avoir du mal à accorder un poids suffisant aux effets négatifs moins immédiats sur le principe de la publicité des débats. Une telle pondération pourrait échapper à un contrôle efficace en appel. À mon avis, le cadre d’analyse fourni par les arrêts *Dagenais*, *Mentuck* et *Sierra Club* demeure approprié et devrait être confirmé.

[44] Enfin, je rappelle que le principe de la publicité des débats judiciaires s’applique dans toutes les procédures judiciaires, quelle que soit leur nature (*MacIntyre*, p. 185-186; *Vancouver Sun*, par. 31). Je suis en désaccord avec les fiduciaires dans la mesure où ils affirment, dans leurs arguments sur les effets négatifs des ordonnances de mise sous scellés, que l’homologation successorale en Ontario ne fait pas intervenir le principe de la publicité des procédures judiciaires ou que la publicité de ces procédures n’a pas de valeur pour le public. Les certificats que les fiduciaires ont demandés au tribunal sont délivrés sous le sceau de ce tribunal, portant ainsi l’imprimatur du pouvoir judiciaire. La décision du tribunal, même si elle est rendue dans un contexte non contentieux, aura une incidence sur des tiers, par exemple en déterminant l’écrit testamentaire qui constitue un testament valide (voir *Otis c. Otis* (2004), 7 E.T.R. (3d) 221 (C.S. Ont.), par. 23-24). Contrairement

estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its

à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. L'obtention d'un certificat de nomination à titre de fiduciaire d'une succession en Ontario est une procédure judiciaire, et la raison d'être fondamentale de la publicité des débats — décourager les actes malveillants et garantir la confiance dans l'administration de la justice par la transparence — s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire.

[45] Il est vrai que d'autres mécanismes de planification successorale non assujettis à une procédure d'homologation peuvent permettre que le transfert du patrimoine soit effectué en dehors des voies ordinaires de la succession testamentaire ou *ab intestat* — c'est le cas, par exemple, de certaines assurances et prestations de retraite, et de certains biens détenus en copropriété. Cependant, cela ne change rien au caractère nécessairement public des procédures d'homologation. Le fait que les transferts non assujettis à une procédure d'homologation soustraient aux regards du public certains renseignements se rapportant à l'administration d'une succession ne signifie pas que les fiduciaires en l'espèce, en demandant au tribunal de leur délivrer des certificats, ne font pas d'une façon ou d'une autre intervenir ce principe. Les fiduciaires sollicitent les avantages qui découlent de la procédure judiciaire publique d'homologation : la transparence garantit que le tribunal successoral exerce son pouvoir de manière équitable et efficace (*Vancouver Sun*, par. 25; *Nouveau-Brunswick*, par. 22). La forte présomption en faveur de la publicité des débats judiciaires s'applique manifestement aux procédures d'homologation et les fiduciaires doivent satisfaire au test des limites discrétionnaires à cette publicité.

B. *L'importance pour le public de la protection de la vie privée*

[46] Comme il a été mentionné précédemment, je ne suis pas d'accord avec les fiduciaires pour dire qu'un intérêt illimité en matière de vie privée constitue un intérêt public important au sens du test des

manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to “[p]ersonal concerns” which cannot, “without more”, satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that “[p]urely personal interests cannot justify non-publication or sealing orders” (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that “personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test” (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

limites discrétionnaires à la publicité des débats judiciaires. Pourtant, dans certaines de ses manifestations, la vie privée revêt une importance sociale allant au-delà de la personne la plus immédiatement touchée. Sur ce fondement, elle ne peut être exclue en tant qu’intérêt qui pourrait justifier, dans les circonstances appropriées, une limite à la publicité des débats judiciaires. En fait, la Cour a dans divers contextes reconnu l’importance pour le public de la vie privée, ce qui permet de mieux comprendre pourquoi l’aspect plus restreint de la vie privée lié à la protection de la dignité constitue un intérêt public important.

[47] Soit dit en tout respect, je ne puis souscrire à la manière dont la Cour d’appel a statué sur l’allégation des fiduciaires selon laquelle il existe un risque sérieux pour l’intérêt à la protection de la vie privée personnelle dans la présente affaire. Pour les juges d’appel, les préoccupations en matière de vie privée soulevées par les fiduciaires équivalent à des [TRADUCTION] « [p]réoccupations personnelles » qui ne peuvent, « à elles seules », satisfaire à l’exigence énoncée dans *Sierra Club* voulant qu’un intérêt important soit exprimé en tant qu’intérêt public (par. 10). Au paragraphe 10 de ses motifs dans l’affaire qui nous occupe, la Cour d’appel s’est appuyée sur l’arrêt *H. (M.E.) c. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, où il a été conclu que [TRADUCTION] « [d]es intérêts purement personnels ne peuvent justifier des ordonnances de non-publication ou de mise sous scellés » (par. 25). Citant les arrêts *MacIntyre* et *Sierra Club* de notre Cour comme des décisions faisant autorité à cet égard, la cour a poursuivi en soulignant que « les préoccupations personnelles d’une partie, y compris les préoccupations relatives à la détresse émotionnelle et à l’embarras bien réels que peuvent subir les parties quand la justice est rendue en public, ne satisferont pas à elle seules au volet nécessité du test » (par. 25). En toute déférence, j’estime que la Cour d’appel a eu tort de mettre l’accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l’exigence de la nécessité dans la présente affaire et dans *Williams*. Les préoccupations personnelles qui s’attachent à des aspects de la vie privée de la personne qui comparaît devant les tribunaux peuvent coïncider avec un intérêt public à la confidentialité.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the “sensibilities of the individuals involved” (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions “personal concerns”. Certain personal concerns — even “without more” — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a “public interest in confidentiality” that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face “a substantial risk of serious debilitating emotional . . . harm”, an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a “public interest in confidentiality” is therefore not whether the interest reflects or is rooted in “personal concerns” for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual’s privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on

[48] À l’instar de la Cour d’appel, je souscris à l’opinion exprimée en particulier dans *MacIntyre*, une affaire antérieure à la *Charte*, selon laquelle lorsque la publicité des débats judiciaires entraîne une atteinte à la vie privée qui perturbe « la susceptibilité des personnes en cause » (p. 185), cette préoccupation est généralement insuffisante pour justifier une ordonnance de mise sous scellés ou une ordonnance semblable et ne constitue pas un intérêt public important suivant l’arrêt *Sierra Club*. Cependant, je ne suis pas d’accord avec la Cour d’appel dans la présente affaire et dans *Williams* pour dire que c’est parce que l’atteinte n’occasionne que des [TRADUCTION] « préoccupations personnelles ». Certaines préoccupations personnelles — même « à elles seules » — peuvent coïncider avec des intérêts publics importants au sens de *Sierra Club*. Pour reprendre l’expression du juge Binnie dans *F.N. (Re)*, 2000 CSC 35, [2000] 1 R.C.S. 880, par. 10, il y a un « droit du public à la confidentialité » qui touche, d’abord et avant tout, la personne concernée et qui est très certainement une préoccupation personnelle. Même dans *Williams*, la Cour d’appel a pris soin de souligner que lorsque, sans protection de la vie privée, une personne serait exposée à [TRADUCTION] « un risque important de préjudice émotionnel [. . .] débilisant », une exception à la publicité des débats devrait être permise (par. 29-30). Pour savoir si un intérêt en matière de vie privée reflète un « droit du public à la confidentialité », il ne s’agit donc pas de se demander si l’intérêt est le reflet ou tire sa source de « préoccupations personnelles » relatives à la vie privée des personnes concernées. Il y a chevauchement entre certaines préoccupations personnelles relatives à la vie privée et les intérêts du public en matière de confidentialité. Ces intérêts relatifs à la vie privée peuvent, à mon avis, être des intérêts publics importants au sens de *Sierra Club*. Il est vrai que la vie privée d’une personne est d’une importance primordiale pour celle-ci. Cependant, notre Cour reconnaît depuis longtemps que la protection de la vie privée est, dans divers contextes, dans l’intérêt de la société dans son ensemble.

[49] La proposition selon laquelle la vie privée est importante, non seulement pour la personne touchée, mais également pour notre société, est profondément enracinée dans la jurisprudence de la Cour en dehors

court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: “The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual’s unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one’s own thoughts, actions and decisions” (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733 (“*UFCW*”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as “intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values” (para. 24). The importance of privacy, its “quasi-constitutional status” and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. R.*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59).

du contexte du test des limites discrétionnaires à la publicité des débats judiciaires. Cela aide à expliquer pourquoi la vie privée ne saurait être rejetée en tant que simple préoccupation personnelle. Cependant, les différences clés dans ces contextes sont telles que l’importance pour le public de la vie privée ne saurait être transposée sans adaptation dans le contexte de la publicité des débats judiciaires. Seuls certains aspects particuliers des intérêts en matière de vie privée peuvent constituer des intérêts publics importants suivant l’arrêt *Sierra Club*.

[50] Dans le contexte de l’art. 8 de la *Charte* et des mesures législatives sur la protection de la vie privée dans le secteur public, le juge La Forest a cité un universitaire américain spécialiste de la vie privée, Alan F. Westin, à l’appui de la thèse selon laquelle la vie privée est une valeur fondamentale de l’État moderne; il l’a fait d’abord dans *R. c. Dyment*, [1988] 2 R.C.S. 417, p. 427-428 (motifs concordants), puis dans *Dagg*, par. 65 (dissident, mais non sur ce point). Dans ce dernier arrêt, le juge La Forest a écrit : « La protection de la vie privée est une valeur fondamentale des États démocratiques modernes. Étant l’expression de la personnalité ou de l’identité unique d’une personne, la notion de vie privée repose sur l’autonomie physique et morale — la liberté de chacun de penser, d’agir et de décider pour lui-même » (par. 65 (références omises)). Notre Cour a entériné à l’unanimité cette déclaration dans *Lavigne*, par. 25.

[51] De plus, dans l’arrêt *Alberta (Information and Privacy Commissioner) c. Travailleurs et travailleuses unis de l’alimentation et du commerce, section locale 401*, 2013 CSC 62, [2013] 3 R.C.S. 733 (« *TTUAC* »), qui a été jugé dans le contexte d’une loi régissant l’utilisation de renseignements par des organisations, il a été reconnu que l’objectif de fournir à une personne un certain droit de regard sur les renseignements la concernant était « intimement lié à son autonomie, à sa dignité et à son droit à la vie privée, des valeurs sociales dont l’importance va de soi » (par. 24). L’importance de la vie privée, son « caractère quasi constitutionnel » et son rôle dans la protection de l’autonomie morale continuent de trouver écho dans notre jurisprudence récente (voir, p. ex., *Lavigne*, par. 24; *Bragg*, par. 18, la juge Abella, citant *Toronto Star Newspaper Ltd. c. R.*,

In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that “the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person’s privacy interests” (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (“PIPEDA”); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).³ Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which “the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process” was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, “Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies” (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, “A Behavioural Understanding of Privacy and its Implications for Privacy Law” (2012), 75 *Mod. L. Rev.* 806, at p. 823; P. Gewirtz, “Privacy and Speech” (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean,

2012 ONCJ 27, 289 C.C.C. (3d) 549, par. 40-41 et 44; *Douez c. Facebook, Inc.*, 2017 CSC 33, [2017] 1 R.C.S. 751, par. 59). Dans l’arrêt *Douez*, les juges Karakatsanis, Wagner (maintenant juge en chef) et Gascon ont insisté sur le même point, ajoutant que « la croissance d’Internet — un réseau quasi atemporel au rayonnement infini — a exacerbé le préjudice susceptible d’être infligé à une personne par une atteinte à son droit à la vie privée » (par. 59).

[52] La protection de la vie privée en tant qu’intérêt public est mise en évidence par des aspects particuliers de cette protection présents dans les lois fédérales et provinciales (voir, p. ex., *Loi sur la protection des renseignements personnels*, L.R.C. 1985, c. P-21; *Loi sur la protection des renseignements personnels et les documents électroniques*, L.C. 2000, c. 5 (« LPRPDE »); *Loi sur l’accès à l’information et la protection de la vie privée*, L.R.O. 1990, c. F.31; *Charte des droits et libertés de la personne*, RLRQ, c. C-12, art. 5; *Code civil du Québec*, art. 35 à 41)³. En outre, en examinant la constitutionnalité d’une exception législative au principe de la publicité des débats judiciaires, notre Cour a reconnu que la protection de la vie privée de la personne pouvait constituer un objectif urgent et réel (*Edmonton Journal*, p. 1345, le juge Cory; voir également les motifs concordants de la juge Wilson, à la p. 1354, dans lesquels a explicitement été souligné « l’intérêt public à la protection de la vie privée de l’ensemble des parties aux affaires matrimoniales par rapport à l’intérêt public à la publicité du processus judiciaire »). L’importance sociale et publique de la vie privée de la personne trouve également un appui continu dans la doctrine (voir, p. ex., A. J. Cockfield, « Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies » (2007), 40 *U.B.C. L. Rev.* 41, p. 41; K. Hughes, « A Behavioural Understanding of Privacy and its Implications for Privacy Law » (2012), 75 *Mod. L. Rev.* 806, p. 823; P. Gewirtz,

³ At the time of writing the House of Commons is considering a bill that would replace part one of PIPEDA: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

³ Au moment de la rédaction des présents motifs, la Chambre des communes étudiait un projet de loi destiné à remplacer la première partie de la LPRPDE : le projet de loi C-11, *Loi édictant la Loi sur la protection de la vie privée des consommateurs et la Loi sur le Tribunal de la protection des renseignements personnels et des données et apportant des modifications corrélatives et connexes à d’autres lois*, 2^e sess., 43^e lég., 2020.

however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a “public interest in confidentiality” (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is “something more” to elevate them beyond personal concerns and sensibilities (*R.F.*, at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of

« Privacy and Speech », [2001] *Sup. Ct. Rev.* 139, p. 139). Il est donc inapproprié, en toute déférence, de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. Cela ne signifie pas, cependant, que la vie privée est, de façon générale, un intérêt public important dans le contexte de l'imposition de limites à la publicité des débats judiciaires.

[53] Le fait que l'affaire dont était saisi le juge de première instance concernait des personnes défendant leurs propres intérêts en matière de vie privée, intérêts qui étaient indéniablement importants pour elles en tant qu'individus, ne signifie pas qu'il n'y a aucun intérêt public en jeu. Dans *F.N. (Re)*, il était question de l'intérêt personnel que les jeunes contrevenants avaient à garder l'anonymat dans les procédures judiciaires afin de favoriser leur réadaptation personnelle (par. 11). Selon le juge Binnie, la société dans son ensemble avait un intérêt dans les perspectives personnelles de réadaptation de l'adolescent visé. Cette même idée exposée dans *F.N. (Re)* a été citée à l'appui de la conclusion selon laquelle l'intérêt en cause dans *Sierra Club* était un intérêt public. Cet intérêt, qui prenait tout d'abord sa source dans une entente touchant personnellement les parties contractantes concernées, était une question de nature privée qui, en plus de son intérêt personnel pour les parties, faisait état d'un « intérêt public à la confidentialité » (*Sierra Club*, par. 55). De même, si les fiduciaires ont un intérêt personnel à protéger leur vie privée, cela ne signifie pas que le public n'a pas un intérêt à cet égard, car — comme l'a clairement souligné la Cour —, cet intérêt est lié à l'autonomie morale et à la dignité, lesquelles constituent des préoccupations urgentes et réelles.

[54] Dans le présent pourvoi, le Toronto Star avance que les préoccupations légitimes en matière de vie privée seraient efficacement protégées par une ordonnance discrétionnaire dans le cas où il y aurait [TRADUCTION] « quelque chose de plus » pour les élever au-delà des préoccupations et de la susceptibilité personnelles (m.i., par. 73). Le Centre d'action pour la sécurité du revenu, par exemple, soutient que la protection de la vie privée sert les intérêts du public qui consistent à prévenir les préjudices et à faire en sorte que les particuliers ne soient pas

privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings, and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

dissuadés de recourir aux tribunaux. Je reconnais que ces notions sont liées, mais il faut, à mon avis, prendre soin de ne pas confondre l'importance pour le public de la vie privée avec l'importance pour le public d'autres intérêts; des aspects de la vie privée, comme la dignité, peuvent constituer des intérêts publics importants en soi. Un risque pour la vie privée personnelle peut être lié à un risque de préjudice psychologique, comme c'était le cas dans l'affaire *Bragg* (par. 14; voir également J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (feuilles mobiles), section 2.4.1). Cependant, il se peut que les préoccupations relatives à la vie privée ne coïncident pas toujours avec le désir d'éviter un préjudice psychologique et soient plutôt axées, par exemple, sur la protection de la réputation professionnelle d'une personne (voir, p. ex., *R. c. Paterson* (1998), 102 B.C.A.C. 200, par. 76, 78 et 87-88). De même, il peut y avoir des circonstances où la perspective de devoir communiquer les renseignements personnels nécessaires à la poursuite d'une action en justice peut dissuader une personne d'intenter cette action (voir *S. c. Lamontagne*, 2020 QCCA 663, par. 34-35 (CanLII)). De la même manière, la perspective de devoir communiquer des renseignements commerciaux sensibles aurait nui à la conduite de la défense d'une partie dans *Sierra Club* (par. 71), ou pourrait inciter une personne à régler un litige prématurément (K. Eltis, *Courts, Litigants, and the Digital Age* (2^e éd. 2016), p. 86). Cependant, cela ne signifie pas nécessairement qu'un intérêt public en matière de vie privée est entièrement subsumé dans de telles préoccupations. Je tiens à souligner, par exemple, que les préoccupations relatives à l'accès à la justice ne s'appliquent pas lorsque l'intérêt à protéger en matière de vie privée est celui d'un tiers au litige, comme un témoin, dont l'accès aux tribunaux n'est pas en cause et à qui il n'est pas loisible de mettre fin au litige et d'éviter toute incidence sur sa vie privée (voir, p. ex., *Himel c. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, par. 58; voir également Rossiter, section 2.4.2(2)). En tout état de cause, la reconnaissance de ces importants intérêts publics connexes et valides ne permet pas de savoir si certains aspects de la vie privée constituent en eux-mêmes des intérêts publics importants et ne diminue en rien le caractère public distinctif de la vie privée, examiné précédemment.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)), and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that “[i]f we are serious about peoples’ private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way” (“Courts, Transparency and Public Confidence – To the Better Administration of Justice” (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy

[55] En fait, les atteintes particulières à la vie privée ayant été occasionnées par la publicité des débats judiciaires ne sont pas passées inaperçues et n’ont pas non plus été écartées au motif qu’il s’agissait de simples préoccupations personnelles. Les tribunaux ont exercé leur pouvoir discrétionnaire de limiter la publicité des débats judiciaires afin de protéger les renseignements personnels de la publicité, y compris pour empêcher que soient divulgués l’orientation sexuelle d’une personne (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), sa séropositivité (voir, p. ex., *A.B. c. Canada (Citoyenneté et Immigration)*, 2017 CF 629, par. 9 (CanLII)), et ses antécédents de toxicomanie et de criminalité (voir, p. ex., *R. c. Pickton*, 2010 BCSC 1198, par. 11 et 20 (CanLII)). Notre Cour a souligné cette nécessité de concilier l’intérêt du public à l’égard de la vie privée et le principe de la publicité des débats judiciaires (voir, p. ex., *Edmonton Journal*, p. 1353, la juge Wilson). Dans un article de doctrine, la juge en chef McLachlin a expliqué que [TRADUCTION] « [s]i nous nous préoccupons sérieusement de la vie intime des gens, nous devons protéger un minimum de vie privée. De même, si nous nous préoccupons sérieusement de notre système judiciaire, les débats judiciaires doivent être publics. La question est de savoir comment concilier ces deux impératifs d’une manière qui soit équitable et raisonnée » (« Courts, Transparency and Public Confidence – To the Better Administration of Justice » (2003), 8 *Deakin L. Rev.* 1, p. 4). En cherchant à concilier ces deux impératifs, il faut alors se demander si la dimension de la vie privée en cause constitue un intérêt public important qui, lorsqu’il est sérieusement menacé, justifierait de réfuter la forte présomption en faveur de la publicité des débats judiciaires.

C. *L’intérêt public important en matière de vie privée se rapporte à la protection de la dignité de la personne*

[56] Bien que l’importance pour le public de la protection de la vie privée ait clairement été reconnue par la Cour dans divers contextes, la prudence est de mise lorsqu’il s’agit d’utiliser cette notion dans le cadre du test des limites discrétionnaires à la publicité des débats judiciaires. Il est bien établi en droit que les procédures judiciaires publiques, de par leur

are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that “covertness is the exception and openness the rule”, he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, “that the ‘privacy’ of litigants requires that the public be excluded from court proceedings” (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that “[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings” (*ibid.*).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For

nature, peuvent être une source de désagrément et d’embarras, et l’on considère généralement que ces atteintes à la vie privée ne sont pas suffisamment importantes pour réfuter la présomption de publicité des débats. Le Toronto Star a exprimé la crainte que la reconnaissance de la vie privée en tant qu’intérêt public important n’allège le fardeau de preuve incombant aux demandeurs, car la vie privée des parties à un litige sera, à certains égards, toujours menacée dans les procédures judiciaires. Je conviens que l’exigence de démontrer l’existence d’un risque sérieux pour un intérêt important est un élément préliminaire clé de l’analyse qui doit être maintenu afin de protéger le principe de la publicité des débats judiciaires. La reconnaissance d’un intérêt public en matière de vie privée pourrait menacer la forte présomption de publicité si la vie privée est définie trop largement sans tenir compte de son caractère public.

[57] La vie privée pose des défis dans l’application du test des limites discrétionnaires à la publicité des débats judiciaires en raison de la diffusion nécessaire de renseignements que supposent des procédures publiques. Il convient de rappeler que lorsqu’il a écrit, dans l’arrêt *MacIntyre*, que « le secret est l’exception et que la publicité est la règle », le juge Dickson, plus tard juge en chef, examinait explicitement un argument relatif à la vie privée en revenant sur un point de vue préconisé maintes fois auparavant devant les tribunaux selon lequel « le droit des parties au litige de jouir de leur vie privée exige des audiences à huis clos » (p. 185 (je souligne)), et en rejetant celui-ci. Le juge Dickson a rejeté l’opinion selon laquelle les préoccupations personnelles en matière de vie privée exigent des audiences à huis clos, expliquant qu’« [e]n règle générale, la susceptibilité des personnes en cause ne justifie pas qu’on exclut le public des procédures judiciaires » (*ibid.*).

[58] Bien qu’il ait rendu sa décision avant le prononcé de l’arrêt *Dagenais* et qu’il ne commente donc pas les étapes précises de l’analyse telles que nous les comprenons aujourd’hui, j’estime que le juge Dickson a, à juste titre, reconnu que le principe de la publicité des débats judiciaires apporte des limites nécessaires au droit à la vie privée. Quoique les particuliers puissent s’attendre à ce que les renseignements qui les concernent ne soient pas révélés

example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that “a party who institutes a legal proceeding waives his or her right to privacy, at least in part” (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, “Conceptualizing Privacy” (2002), 90

dans le cadre de procédures judiciaires, le principe de la publicité des débats judiciaires s’oppose par présomption à cette attente. Par exemple, dans l’arrêt *Lac d'Amiante du Québec Ltée c. 2858-0702 Québec Inc.*, 2001 CSC 51, [2001] 2 R.C.S. 743, le juge LeBel a conclu que la « partie qui engage un débat judiciaire renonce, à tout le moins en partie, à la protection de sa vie privée » (par. 42). L’arrêt *MacIntyre* et les jugements similaires reconnaissent — en affirmant que la publicité est la règle et le secret, l’exception — que le droit à la vie privée, quelle qu’en soit la définition, cède le pas, dans une certaine mesure, à l’idéal de la publicité des débats judiciaires. Je partage le point de vue selon lequel le principe de la publicité des débats suppose que cette limite au droit à la vie privée est justifiée.

[59] Le Toronto Star a donc raison d’affirmer que la vie privée des personnes sera très souvent en quelque sorte menacée dans les procédures judiciaires. Les litiges entre et concernant des particuliers qui se déroulent dans le cadre de débats judiciaires publics révèlent nécessairement des renseignements qui pourraient autrement être restés à l’abri des regards du public. En fait, tout comme la Cour d’appel en l’espèce, les tribunaux ont explicitement fait mention de cette préoccupation lorsqu’ils ont conclu que de simples inconvénients ne suffisaient pas à franchir le seuil initial du test (voir, p. ex., *3834310 Canada inc. c. Chamberland*, 2004 CanLII 4122 (C.A. Qc), par. 30). Affirmer que toute incidence sur la vie privée d’une personne suffit à établir un risque sérieux pour un intérêt public important pour l’application du test des limites discrétionnaires à la publicité des débats judiciaires pourrait rendre cette exigence préliminaire théorique. Le sort de nombreuses causes dépendrait de la pondération à l’étape de la proportionnalité. Une telle évolution reviendrait à déroger à l’arrêt *Sierra Club*, qui constitue le cadre approprié à appliquer, lequel doit être maintenu.

[60] De plus, la reconnaissance d’un intérêt important à l’égard de la notion générale de vie privée pourrait s’avérer trop indéterminée et difficile à appliquer. La vie privée est une notion complexe et contextuelle (*Dagg*, par. 67; voir également B. McIsaac, K. Klein et S. Brown, *The Law of Privacy in Canada* (feuilles mobiles), vol. 1, p. 1-4; D. J.

Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of “theoretical disarray” (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the *Toronto Star* that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multifaceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy’s complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such

Solove, « Conceptualizing Privacy » (2002), 90 *Cal. L. Rev.* 1087, p. 1090). En fait, notre Cour a décrit la nature des limites à la vie privée comme étant dans un état de « confusion [. . .] sur le plan théorique » (*R. c. Spencer*, 2014 CSC 43, [2014] 2 R.C.S. 212, par. 35). Cela dépend en grande partie du contexte dans lequel la vie privée est invoquée. Je suis d’accord avec le *Toronto Star* pour dire que la reconnaissance de la vie privée, sans nuances, comme un intérêt important dans le contexte du test des limites discrétionnaires à la publicité des débats judiciaires, ainsi que le revendiquent les fiduciaires en l’espèce, susciterait énormément de confusion. Il serait difficile pour les tribunaux de mesurer un risque sérieux pour un tel intérêt, en raison de ses multiples facettes.

[61] Bien que je reconnaisse la validité de ces préoccupations, je ne suis pas d’accord pour dire qu’elles exigent que la vie privée ne soit jamais prise en considération lorsqu’il s’agit de décider s’il existe un risque sérieux pour un intérêt public important. J’arrive à cette conclusion pour deux raisons. Premièrement, il est possible d’atténuer le problème de la complexité de la vie privée en se concentrant sur l’objectif qui sous-tend la protection publique de la vie privée, lequel est pertinent dans le cadre du processus judiciaire, de manière à s’en tenir précisément à l’aspect qui transcende les intérêts des parties dans ce contexte. Cette dimension plus restreinte de la vie privée est la protection de la dignité, un intérêt public important qui peut être menacé par la publicité des débats judiciaires. D’ailleurs, plutôt que d’essayer d’appliquer une notion unique et complexe de la vie privée à tous les contextes, notre Cour s’est généralement arrêtée sur des intérêts plus précis en matière de vie privée adaptés à la situation particulière en cause (*Spencer*, par. 35; *Edmonton Journal*, p. 1362, la juge Wilson). C’est ce qu’il faut faire en l’espèce, en vue de cerner l’aspect public de la vie privée que la publicité des débats risque de miner indûment.

[62] Deuxièmement, je rappelle que, pour franchir la première étape de l’analyse, il ne suffit pas d’invoquer un intérêt important, mais il faut aussi réfuter la présomption de publicité des débats en démontrant l’existence d’un risque sérieux pour cet intérêt. Le

an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] “[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties’ privacy However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban” (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

fardeau d’établir l’existence d’un risque pour un tel intérêt au vu des faits d’une affaire donnée constitue le véritable seuil initial à franchir pour la personne cherchant à restreindre la publicité. Il n’est jamais suffisant d’alléguer la seule existence d’un intérêt public important reconnu. Démontrer l’existence d’un risque sérieux pour cet intérêt demeure toujours nécessaire. Ce qui importe, c’est que l’intérêt soit précisément défini de manière à ce qu’il n’englobe que les aspects de la vie privée qui font entrer en jeu des objectifs publics légitimes, de sorte que le seuil à franchir pour établir l’existence d’un risque sérieux pour cet intérêt demeure élevé. De cette manière, les tribunaux peuvent efficacement maintenir la garantie de la présomption de publicité des débats.

[63] Plus particulièrement, pour maintenir l’intégrité du principe de la publicité des débats judiciaires, un intérêt public important à l’égard de la protection de la dignité devrait être considéré sérieusement menacé seulement dans des cas limités. Rien en l’espèce n’écarte le principe selon lequel le secret en matière de procédures judiciaires doit être exceptionnel. Ni la susceptibilité des gens ni le fait que la publicité soit désavantageuse, embarrassante ou pénible pour certaines personnes ne justifieront généralement, à eux seuls, une atteinte au principe de la publicité des débats judiciaires (*MacIntyre*, p. 185; *Nouveau-Brunswick*, par. 40; *Williams*, par. 30; *Coltsfoot Publishing Ltd. c. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, par. 97). Ces principes n’empêchent pas de reconnaître l’importance du caractère public d’un intérêt en matière de vie privée quand celui-ci est lié à la protection de la dignité. Ils obligent simplement à faire la preuve de l’existence d’un risque sérieux pour cet intérêt de manière à justifier, à titre exceptionnel, une restriction à la publicité des débats, comme c’est le cas pour tout intérêt public important au regard de l’arrêt *Sierra Club*. Comme l’expliquent les professeurs Sylvette Guillemard et Séverine Menétrey, « [l]a confidentialité des débats peut se justifier notamment pour protéger la vie privée des parties [. . .] La jurisprudence affirme cependant que l’embarras ou la honte ne sont pas des motifs suffisants pour ordonner le huis clos ou la non-publication » (*Comprendre la procédure civile québécoise* (2^e éd. 2017), p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the *Toronto Star*. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[64] Comment devrait-on considérer que l'intérêt en matière de vie privée en cause soulève un intérêt public important qui est pertinent pour les besoins du test des limites discrétionnaires à la publicité des débats judiciaires dans le présent contexte? Il est utile de rappeler que les ordonnances rendues en première instance avaient été demandées pour limiter l'accès aux documents et aux renseignements figurant dans les dossiers judiciaires. L'argument des fiduciaires sur ce point était directement axé sur le risque de diffusion immédiate et à grande échelle, par le *Toronto Star*, de renseignements permettant d'identifier des personnes ainsi que d'autres renseignements sensibles contenus dans les documents placés sous scellés. Les fiduciaires soutiennent que cette diffusion constituerait une atteinte injustifiée à la vie privée des personnes touchées, qui s'ajouterait à la contrariété qu'elles ont déjà subie en raison de la publicité ayant entouré le décès des Sherman.

[65] À mon avis, il est bon de laisser les personnes libres de fixer des limites quant à savoir à quel moment les renseignements très sensibles les concernant seront communiqués à d'autres personnes dans la sphère publique, et de quelle manière et dans quelle mesure ils le seront. En effet, en choisissant la manière dont on se présente en public, on protège son autonomie morale et sa dignité en tant que personne. La Cour a eu l'occasion de faire ressortir le lien entre l'intérêt en matière de vie privée mis en jeu par la tenue de procédures judiciaires publiques et la protection de la dignité plus particulièrement. Par exemple, dans l'arrêt *Edmonton Journal*, la juge Wilson a souligné que la disposition contestée, qui devait avoir pour effet de limiter la publication de détails sur des procédures matrimoniales, portait sur « un aspect un peu différent de la vie privée, un aspect qui se rapproche davantage de la protection de la dignité personnelle [. . .], c'est-à-dire l'angoisse et la perte de dignité personnelle qui peuvent résulter de la publication dans les journaux de détails gênants de la vie privée d'une personne » (p. 1363-1364). Citons comme autre exemple l'affaire *Bragg*, dans laquelle la protection de la capacité des jeunes à contrôler des renseignements sensibles avait été considérée comme favorisant le respect [TRADUCTION] « de leur dignité, de leur intégrité personnelle et de leur autonomie » (par. 18, citant *Toronto Star Newspaper Ltd.*, par. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 (“C.C.P.”), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 C.C.P., a discretionary exception to the open court principle can be made by the court if “public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests”, requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the “important public interest” that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff’d [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 C.C.P., the interest must be understood as defined [TRANSLATION] “in terms of a public interest in confidentiality” (see 3834310 *Canada inc.*, at para. 24, per Gendreau J.A. for the Court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 C.C.P. alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 C.C.P. — [TRANSLATION] “what is part of one’s personal life, in short, what constitutes a minimum personal sphere” (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990

[66] Conformément à cette jurisprudence, je relève, par exemple, que le législateur québécois a expressément fait ressortir la protection de la dignité lorsque le test énoncé dans l’arrêt *Sierra Club* a été codifié dans le *Code de procédure civile*, RLRQ, c. C-25.01 (« C.p.c. »), art. 12 (voir Ministère de la Justice, *Commentaires de la ministre de la Justice : Code de procédure civile, chapitre C-25.01* (2015), art. 12). Selon l’art. 12 C.p.c., un tribunal peut faire exception de façon discrétionnaire au principe de la publicité si « l’ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d’intérêts légitimes importants » l’exige.

[67] La notion d’ordre public témoigne d’une souplesse analogue à la notion d’intérêt public important suivant l’arrêt *Sierra Club*; elle rappelle pourtant que l’intérêt invoqué transcende, en ce qui a trait à son importance et à ses conséquences, la susceptibilité purement subjective des personnes touchées. Tout comme l’« intérêt public important » qui doit être sérieusement menacé pour justifier des ordonnances de mise sous scellés dans le présent pourvoi, l’ordre public englobe un large éventail de principes généraux et de normes impératives qu’un législateur et les tribunaux considèrent comme fondamentaux pour une société donnée (voir *Goulet c. Cie d’Assurance-Vie Transamerica du Canada*, 2002 CSC 21, [2002] 1 R.C.S. 719, par. 42-44, citant *Godbout c. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), p. 2570, conf. par [1997] 3 R.C.S. 844). Comme l’a écrit un juge québécois en renvoyant à l’arrêt *Sierra Club* avant l’adoption de l’art. 12 C.p.c., l’intérêt doit être considéré comme étant défini « en termes d’intérêt public à la confidentialité » (voir 3834310 *Canada inc.*, par. 24, le juge Gendreau s’exprimant au nom de la Cour d’appel). Parmi les diverses considérations qui composent la notion d’ordre public et d’autres intérêts légitimes évoqués par l’art. 12 C.p.c., il est significatif que la dignité, et non une référence générale à la vie privée, au préjudice ou à l’accès à la justice, se soit vu accorder une place de choix. En effet, c’est cet aspect restreint de la vie privée considéré comme un droit fondamental que les tribunaux ont retenu avant l’adoption de l’art. 12 C.p.c. — « ce qui fait partie de la vie intime de la personne, bref ce qui constitue un

CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The “preservation of the dignity of the persons involved” is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, “Article 12”, in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*’s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, “The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in “protecting the privacy and dignity of victims of crime and their loved ones” (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

cercle personnel irréductible » (*Godbout*, p. 2569, le juge Baudouin; voir également *A. c. B.*, 1990 CanLII 3132 (C.A. Qc), par. 20, le juge Rothman).

[68] La « protection de la dignité des personnes concernées » est désormais consacrée comme l’archétype de l’intérêt d’ordre public à l’art. 12 *C.p.c.* C’est le modèle de l’intérêt public important à la confidentialité de *Sierra Club* qui sert à justifier une exception à la publicité des débats (S. Rochette et J.-F. Côté, « Article 12 », dans L. Chamberland, dir., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5^e éd. 2020), vol. 1, p. 102; D. Ferland et B. Emery, *Précis de procédure civile du Québec* (6^e éd. 2020), vol. 1, par. 1-111). La dignité donne une expression concrète à cet intérêt d’ordre public parce que toute la société a intérêt à ce qu’elle soit protégée, malgré ses liens personnels avec les personnes touchées. Cette codification de la notion d’intérêt public important de *Sierra Club* souligne l’importance primordiale de la dignité humaine et la pertinence de limiter la publicité des débats judiciaires sur ce fondement au lieu de donner une interprétation trop large à la vie privée qui pourrait par ailleurs ne pas convenir au contexte de la publicité des débats.

[69] Dans le même ordre d’idée, on a fait valoir qu’il est utile de considérer que la vie privée se fonde sur la dignité dans le contexte des défis que posent les communications numériques (K. Eltis, « The Judicial System in the Digital Age : Revisiting the Relationship between Privacy and Accessibility in the Cyber Context » (2011), 56 *R.D. McGill* 289, p. 314).

[70] Il est également significatif, à mon avis, que le juge de première instance en l’espèce ait explicitement reconnu, en réponse aux arguments pertinents des fiduciaires, un intérêt à [TRADUCTION] « la protection de la vie privée et de la dignité des victimes d’actes criminels ainsi que de leurs êtres chers » (par. 23 (je souligne)). Cela montre clairement que la préoccupation centrale des personnes touchées à cet égard n’est pas simplement de protéger leur vie privée en tant que telle, mais bien de protéger leur vie privée là où elle coïncide avec le caractère public de leurs intérêts en matière de dignité.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible

[71] Les atteintes à la vie privée qui entraînent une perte de contrôle à l'égard de renseignements personnels fondamentaux peuvent porter préjudice à la dignité d'une personne, car elles minent sa capacité à présenter de manière sélective certains aspects de sa personne aux autres (D. Matheson, « Dignity and Selective Self-Presentation », dans I. Kerr, V. Steeves et C. Lucock, dir., *Lessons from the Identity Trail : Anonymity, Privacy and Identity in a Networked Society* (2009), 319, p. 327-328; L. M. Austin, « Re-reading Westin » (2019), 20 *Theor. Inq. L.* 53, p. 66-68; Eltis (2016), p. 13). La dignité, employée dans ce contexte, est un concept social qui consiste à présenter des aspects fondamentaux de soi-même aux autres de manière réfléchie et contrôlée (voir de manière générale Matheson, p. 327-328; Austin, p. 66-68). La dignité est minée lorsque les personnes perdent le contrôle sur la possibilité de fournir des renseignements sur elles-mêmes qui touchent leur identité fondamentale, car un aspect très sensible de qui elles sont qu'elles n'ont pas décidé consciemment de communiquer est désormais accessible à autrui et risque de façonner la manière dont elles sont perçues en public. Cela a même été évoqué par le juge La Forest, dissident mais non sur ce point, dans l'arrêt *Dagg*, lorsqu'il a parlé de la notion de vie privée comme « [é]tant l'expression de la personnalité ou de l'identité unique d'une personne » (par. 65).

[72] En cas d'atteinte à la dignité, l'incidence sur la personne n'est pas théorique, mais pourrait entraîner des conséquences humaines réelles, y compris une détresse psychologique (voir de manière générale *Bragg*, par. 23). Dans l'arrêt *Dyment*, le juge La Forest a fait remarquer dans ses motifs concordants que la notion de vie privée est essentielle au bien-être d'une personne (p. 427). Vu sous cet angle, un intérêt en matière de vie privée, lorsqu'il protège les renseignements fondamentaux associés à la dignité qui est nécessaire au bien-être d'une personne, commence à ressembler beaucoup à l'intérêt relatif à la sécurité physique également soulevé en l'espèce, dont la nature importante et publique n'est pas débattue, et n'est pas non plus, selon moi, sérieusement discutable. Lorsque le fonctionnement des tribunaux menace le bien-être physique d'une

court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of

personne, l'administration de la justice en souffre, car un système judiciaire responsable est sensible aux dommages physiques qu'il inflige aux individus et s'efforce d'éviter de tels effets. De même, j'estime qu'un tribunal responsable doit être sensible et attentif aux dommages qu'il cause à d'autres éléments fondamentaux du bien-être individuel, notamment la dignité individuelle. Ce parallèle aide à comprendre que la dignité est une dimension plus limitée de la vie privée, pertinente en tant qu'intérêt public important dans le contexte de la publicité des débats judiciaires.

[73] Je suis donc d'avis que protéger les gens contre la menace à leur dignité qu'entraîne la diffusion de renseignements révélant des aspects fondamentaux de leur vie privée dans le cadre de procédures judiciaires publiques constitue un intérêt public important pour l'application du test.

[74] Insister sur la valeur sous-jacente de la vie privée lorsqu'il s'agit de protéger la dignité d'une personne de la diffusion de renseignements privés dans le cadre de débats judiciaires publics permet de surmonter les critiques selon lesquelles la vie privée sera toujours menacée dans un tel cadre et constitue une notion théoriquement complexe. La publicité des débats donne lieu à des atteintes à la vie privée personnelle dans presque tous les cas, mais la dignité en tant qu'intérêt public dans la protection de la sensibilité fondamentale d'une personne entre plus rarement en jeu. Plus précisément, et conformément à l'approche prudente servant à reconnaître des intérêts publics importants, cet intérêt en matière de vie privée, bien qu'il soit déterminé par rapport au contexte factuel plus large, ne sera sérieusement menacé que lorsque le caractère sensible des renseignements touche à l'aspect le plus intime de la personne.

[75] S'il porte essentiellement sur la protection de la dignité d'une personne, cet intérêt sera miné dans le cas de renseignements qui révèlent quelque chose de sensible sur elle en tant qu'individu, par opposition à des renseignements d'ordre général révélant peu ou rien sur ce qu'elle est en tant que personne. Par conséquent, les renseignements qui

intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the “biographical core” — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that “reasonable and informed Canadians” would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the “biographical core” or, “[p]ut another way, the more personal and confidential the information” (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is “personal” to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity

seront révélés en raison de la publicité des débats judiciaires doivent être constitués de détails intimes ou personnels concernant une personne — ce que notre Cour a décrit, dans sa jurisprudence relative à l’art. 8 de la *Charte*, comme le cœur même des « renseignements biographiques » — pour qu’un risque sérieux pour un intérêt public important soit reconnu dans ce contexte (*R. c. Plant*, [1993] 3 R.C.S. 281, p. 293; *R. c. Tessling*, 2004 CSC 67, [2004] 3 R.C.S. 432, par. 60; *R. c. Cole*, 2012 CSC 53, [2012] 3 R.C.S. 34, par. 46). La dignité transcende les inconvénients personnels en raison de la nature très sensible des renseignements qui pourraient être révélés. Notre Cour a tracé dans l’arrêt *Cole* une ligne de démarcation similaire entre le caractère sensible des renseignements personnels et l’intérêt du public à protéger ces renseignements en ce qui a trait au cœur même des renseignements biographiques. Elle a conclu que « les Canadiens raisonnables et bien informés » seraient plus disposés à reconnaître l’existence d’un intérêt en matière de vie privée lorsque les renseignements pertinents concernent le cœur même des « renseignements biographiques » ou, « [a]utrement dit, plus les renseignements sont personnels et confidentiels » (par. 46). La présomption de publicité des débats signifie que le simple désagrément associé à des atteintes moindres à la vie privée sera généralement toléré. Cependant, il est dans l’intérêt public de veiller à ce que cette publicité n’entraîne pas indûment la diffusion de ces renseignements fondamentaux qui menacent la dignité — même s’ils sont « personnels » pour la personne touchée.

[76] Selon le test des limites discrétionnaires à la publicité des débats judiciaires, il incombe au demandeur de démontrer que l’intérêt public important est sérieusement menacé. Reconnaître que la vie privée, considérée au regard de la dignité, n’est sérieusement menacée que lorsque les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles permet d’établir un seuil compatible avec la présomption de publicité des débats. Ce seuil est tributaire des faits. Il répond à la préoccupation, mentionnée précédemment, portant que les dossiers judiciaires comportent fréquemment des renseignements personnels, mais conclure que cela suffit à franchir le

of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses

seuil du risque sérieux dans tous les cas mettrait en péril la structure du test. Exiger du demandeur qu'il démontre le caractère sensible des renseignements comme condition nécessaire à la conclusion d'un risque sérieux pour cet intérêt a pour effet de limiter le champ d'application de l'intérêt aux seuls cas où la justification de la non-divulgence des aspects fondamentaux de la vie privée d'une personne, à savoir la protection de la dignité individuelle, est fortement en jeu.

[77] Il n'est aucunement nécessaire en l'espèce de fournir une liste exhaustive de l'étendue des renseignements personnels sensibles qui, s'ils étaient diffusés, pourraient entraîner un risque sérieux. Qu'il suffise de dire que les tribunaux ont démontré la volonté de reconnaître le caractère sensible des renseignements liés à des problèmes de santé stigmatisés (voir, p. ex., *A.B.*, par. 9), à un travail stigmatisé (voir, p. ex., *Work Safe Twerk Safe c. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, par. 28 (CanLII)), à l'orientation sexuelle (voir, p. ex., *Paterson*, par. 76, 78 et 87-88), et au fait d'avoir été victime d'agression sexuelle ou de harcèlement (voir, p. ex., *Fedeli c. Brown*, 2020 ONSC 994, par. 9 (CanLII)). Je prends acte également de l'observation du Centre d'action pour la sécurité du revenu, intervenant, selon laquelle des renseignements détaillés quant à la structure familiale et aux antécédents professionnels pourraient, dans certaines circonstances, constituer des renseignements sensibles. Dans chaque cas, il faut se demander si les renseignements révèlent quelque chose d'intime et de personnel sur la personne, son mode de vie ou ses expériences.

[78] Je marque ici un temps d'arrêt pour souligner que je renvoie ci-dessus aux décisions relatives à l'art. 8 de la *Charte* à seule fin de donner une idée des types de renseignements qui sont plus ou moins personnels et qui méritent donc une protection publique. Pour mesurer avec précision l'incidence de la divulgation sur la dignité, il est essentiel que l'analyse différencie ainsi les renseignements. Ce qui est utile, c'est que l'un des facteurs permettant de déterminer si l'attente subjective d'un demandeur en

on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today,

matière de vie privée est objectivement raisonnable dans la jurisprudence relative à l'art. 8 met l'accent sur la mesure dans laquelle les renseignements sont privés (voir, p. ex., *R. c. Marakah*, 2017 CSC 59, [2017] 2 R.C.S. 608, par. 31; *Cole*, par. 44-46). Cependant, bien que la consultation de ces décisions puisse être avantageuse à cette fin précise, cela ne veut pas dire que le reste de l'analyse relative à l'art. 8 est pertinent pour l'application du test des limites discrétionnaires à la publicité des débats. Par exemple, demander aux fiduciaires quelle était leur attente raisonnable en matière de vie privée en l'espèce pourrait entraîner une analyse circulaire visant à déterminer s'ils s'attendaient raisonnablement à ce que leurs dossiers judiciaires soient accessibles au public ou s'ils s'attendaient raisonnablement à réussir à obtenir leur mise sous scellés. En conséquence, la jurisprudence relative à l'art. 8 n'est utile qu'à la fin décrite ci-dessus.

[79] Dans les cas où les renseignements sont suffisamment sensibles pour toucher au cœur même des renseignements biographiques d'une personne, le tribunal doit alors se demander si le contexte factuel global de l'affaire permet d'établir l'existence d'un risque sérieux pour l'intérêt en cause. Bien qu'il s'agisse manifestement d'une question de fait, il est possible de faire certaines observations générales en l'espèce pour guider cette appréciation.

[80] Je souligne que la mesure dans laquelle les renseignements seraient diffusés en l'absence d'une exception au principe de la publicité des débats judiciaires peut avoir une incidence sur le caractère sérieux du risque. Si le demandeur invoque le risque que les renseignements personnels en viennent à être connus par un large segment de la population en l'absence d'une ordonnance, il s'agit manifestement d'un risque plus sérieux que si le résultat était qu'une poignée de personnes prendrait connaissance des mêmes renseignements, toutes autres choses étant égales par ailleurs. Par le passé, l'obligation d'être physiquement présent pour obtenir des renseignements dans le cadre de débats judiciaires publics ou à partir d'un dossier judiciaire signifiait que les renseignements étaient, dans une certaine

courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, “Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 *U.T.L.J.* 305, at p. 346).

mesure, protégés parce qu’ils n’étaient [TRANSLATION] « pratiquement pas connus » (D. S. Ardia, « Privacy and Court Records : Online Access and the Loss of Practical Obscurity » (2017), 4 *U. Ill. L. Rev.* 1385, p. 1396). Cependant, aujourd’hui, les tribunaux devraient prendre en considération le contexte des technologies de l’information, qui a facilité la communication de renseignements et le renvoi à ceux-ci (voir Bailey et Burkell, p. 169-170; Ardia, p. 1450-1451). Dans ce contexte, il peut fort bien être difficile pour les tribunaux d’avoir la certitude que les renseignements ne seront pas largement diffusés en l’absence d’une ordonnance.

[81] Il y aura lieu, bien sûr, d’examiner la mesure dans laquelle les renseignements font déjà partie du domaine public. Si la tenue de procédures judiciaires publiques ne fait que rendre accessibles ce qui est déjà largement et facilement accessible, il sera difficile de démontrer que la divulgation des renseignements dans le cadre de débats judiciaires publics entraînera effectivement une atteinte significative à cet aspect de la vie privée se rapportant à l’intérêt en matière de dignité auquel je fais référence en l’espèce. Cependant, le seul fait que des renseignements soient déjà accessibles à un segment de la population ne signifie pas que les rendre accessibles dans le cadre d’une procédure judiciaire n’exacerbera pas le risque pour la vie privée. La vie privée n’est pas une notion binaire, c’est-à-dire que les renseignements ne sont pas simplement soit privés, soit publics, d’autant plus que, en raison de la technologie en particulier, il vaut mieux considérer la confidentialité absolue comme difficile à atteindre (voir, de manière générale, *R. c. Quesnelle*, 2014 CSC 46, [2014] 2 R.C.S. 390, par. 37; *TTUAC*, par. 27). Le fait que certains renseignements soient déjà accessibles quelque part dans la sphère publique n’empêche pas qu’une diffusion additionnelle de ceux-ci puisse nuire davantage à l’intérêt en matière de vie privée, en particulier si la diffusion appréhendée de renseignements très sensibles est plus large ou d’accès plus facile (voir de manière générale Solove, p. 1152; Ardia, p. 1393-1394; E. Paton-Simpson, « Privacy and the Reasonable Paranoid : The Protection of Privacy in Public Places » (2000), 50 *U.T.L.J.* 305, p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with “privacy”, are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage “social values of superordinate importance” beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[82] De plus, la probabilité que la diffusion évoquée par le demandeur se produise réellement a également une incidence sur le caractère sérieux du risque. Je m'empresse de dire qu'il est implicite dans la notion de risque que le demandeur n'a pas besoin d'établir que la diffusion appréhendée se produira assurément. Cependant, plus la probabilité de diffusion des renseignements est grande, plus le risque pour l'intérêt en matière de vie privée lié à la protection de la dignité sera sérieux. Bien qu'elle l'ait fait dans un contexte différent, la Cour a déjà conclu que l'ampleur du risque est le fruit de la gravité du préjudice appréhendé et de sa probabilité (*R. c. Mabior*, 2012 CSC 47, [2012] 2 R.C.S. 584, par. 86).

[83] Cela dit, la probabilité que les renseignements personnels très sensibles d'une personne soient diffusés en l'absence de mesures de protection de la vie privée sera difficile à quantifier avec précision. Il convient également de souligner que la probabilité dans ce contexte n'a pas à être quantifiée en termes mathématiques ou numériques. Les tribunaux peuvent plutôt simplement déterminer cette probabilité à la lumière de l'ensemble des circonstances et mettre en balance ce facteur avec d'autres facteurs pertinents.

[84] Enfin, rappelons que la susceptibilité individuelle à elle seule, même si elle peut théoriquement être associée à la notion de « vie privée », est généralement insuffisante pour justifier de restreindre la publicité des débats judiciaires lorsqu'elle ne surpasse pas les inconvénients et les désagréments inhérents à la publicité des débats (*MacIntyre*, p. 185). Un demandeur ne pourra établir que le risque est suffisant pour justifier une limite à la publicité des débats que dans des cas exceptionnels, lorsque la perte de contrôle appréhendée des renseignements le concernant est fondamentale au point de porter atteinte de manière significative à sa dignité individuelle. Ces circonstances mettent en jeu « des valeurs sociales qui ont préséance », qui vont au-delà des atteintes plus ordinaires propres à la participation à une procédure judiciaire et qui, comme l'a reconnu le juge Dickson, pourraient justifier de restreindre la publicité des débats (p. 186-187).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to

[85] En résumé, l'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a certainement un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Bien qu'il soit évalué en fonction des faits de chaque cas, le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au cœur même des renseignements biographiques de la personne d'une manière qui menace son intégrité. La reconnaissance de cet intérêt est conforme à l'accent mis par la Cour sur l'importance de la vie privée et de la valeur sous-jacente de la dignité individuelle, tout en permettant aussi de maintenir la forte présomption de publicité des débats.

D. Les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important

[86] Comme il a été clairement indiqué dans *Sierra Club*, une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires ne peut être rendue qu'en présence d'un risque sérieux pour un intérêt public important. Les arguments soulevés dans le présent pourvoi portaient sur la question de savoir si la vie privée constitue un intérêt public important et si les faits en l'espèce révèlent l'existence de risques sérieux pour la vie privée et la sécurité. Bien que le large intérêt en matière de vie privée que font valoir les fiduciaires ne puisse être invoqué pour justifier une limite à la publicité des débats, la notion plus restreinte de vie privée considérée au regard de la dignité constitue un intérêt public important pour l'application du test. Je reconnais aussi qu'un risque pour la sécurité physique représente un intérêt public important, un point qui n'est pas

either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that “[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating” (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with

contesté en l’espèce. Par conséquent, la question pertinente à la première étape est celle de savoir s’il existe un risque sérieux pour l’un de ces intérêts ou pour ces deux intérêts. Pour les motifs qui suivent, les fiduciaires n’ont pas établi l’existence d’un risque sérieux pour l’un ou l’autre de ces intérêts. Cela suffit en soi pour conclure que les ordonnances de mise sous scellés n’auraient pas dû être rendues.

(1) Le risque pour la vie privée allégué en l’espèce n’est pas sérieux

[87] Comme je l’ai déjà dit, l’intérêt public important en matière de vie privée doit être considéré comme un intérêt propre à la protection de la dignité individuelle et non comme l’intérêt largement défini que les fiduciaires ont demandé à la Cour de reconnaître. Pour établir l’existence d’un risque sérieux à l’égard de cet intérêt, les renseignements contenus dans les dossiers judiciaires qui préoccupent les fiduciaires doivent être suffisamment sensibles du fait qu’ils touchent au cœur même des renseignements biographiques des personnes touchées. Si ce n’est pas le cas, il n’y a pas de risque sérieux qui justifierait une exception à la publicité des débats. Si, par contre, c’est le cas, il faut alors se demander si les faits de l’espèce permettent d’établir l’existence d’un risque sérieux.

[88] Le juge de première instance n’a jamais explicitement constaté de risque sérieux pour l’intérêt en matière de vie privée qu’il a relevé, mais, dans la mesure où il est implicitement arrivé à cette conclusion, je ne puis, en toute déférence, partager son point de vue. Sa conclusion se limitait à l’observation selon laquelle [TRADUCTION] « [l]e degré d’atteinte à cette vie privée et à cette dignité [c.-à-d. celle des victimes et de leurs êtres chers] est déjà extrême et, j’en suis sûr, insoutenable » (par. 23). Cependant, l’attention intense dont les Sherman ont fait l’objet jusqu’à la présentation de leur demande n’est qu’une partie de l’équation. Comme les ordonnances de mise sous scellés ne peuvent qu’offrir une protection contre la divulgation des renseignements contenus dans les dossiers judiciaires se rapportant à l’homologation, le juge de première instance était tenu d’examiner le

no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that

caractère sensible des renseignements précis qu'ils contenaient. Or, il n'a pas procédé à une telle appréciation. Sa conclusion sur le caractère sérieux du risque s'est alors entièrement concentrée sur le risque de préjudice physique, alors que rien n'indiquait qu'il avait conclu que les fiduciaires s'étaient acquittés de leur fardeau quant à la démonstration d'un risque sérieux pour l'intérêt en matière de vie privée. En toute déférence, et en sachant qu'il ne disposait pas du cadre d'analyse précédemment exposé, j'estime qu'en n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique. Cela justifiait une intervention en appel.

[89] En appliquant le cadre approprié aux faits de la présente affaire, je conclus que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées, que j'ai défini précédemment au regard de la dignité, n'est pas sérieux. Les renseignements que les fiduciaires cherchent à protéger ne sont pas très sensibles, ce qui suffit en soi pour conclure qu'il n'y a pas de risque sérieux pour l'intérêt public important en matière de vie privée ainsi défini.

[90] Il y a peu de controverse en l'espèce sur la probabilité de diffusion des renseignements contenus dans les dossiers de succession et sur l'étendue de cette diffusion. Il est presque certain que le Toronto Star publiera au moins certains aspects des dossiers de succession si on lui en donne l'accès. Compte tenu de l'important auditoire de l'entreprise médiatique en cause et de la nature très médiatisée des événements entourant la mort des Shermans, je n'ai aucune difficulté à conclure que les personnes touchées perdraient, dans une large mesure, le contrôle des renseignements en question si les dossiers étaient rendus accessibles.

[91] Cependant, en ce qui concerne le caractère sensible des renseignements, ceux contenus dans ces dossiers ne révèlent rien de particulièrement privé sur les personnes touchées. Ce qui serait révélé pourrait bien causer des inconvénients et peut-être de l'embarras, mais il n'a pas été démontré que la divulgation toucherait au cœur même des renseignements

would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that

biographiques de ces personnes d'une manière qui minerait leur contrôle sur l'expression de leur identité. Leur vie privée serait certes perturbée, mais il n'a pas été démontré que l'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées serait sérieusement menacé. Tout au plus, les renseignements contenus dans ces dossiers pourraient-ils révéler quelque chose sur la relation entre les défunts et les personnes touchées, en ce qu'ils pourraient dévoiler à qui les défunts ont confié l'administration de leur succession respective, et qui ils voulaient voir ou étaient présumés vouloir voir devenir héritiers de leurs biens à leur décès. Ils pourraient également révéler certaines données personnelles de base, par exemple des adresses. On peut à juste titre présumer qu'il se peut fort bien que certains des bénéficiaires portent un nom de famille autre que Sherman. Je suis conscient que les décès font l'objet d'une enquête pour homicides par le service de police de Toronto. Cependant, même dans ce contexte, aucun de ces renseignements ne donne des indications importantes sur qui ils sont en tant que personnes, et aucun d'eux n'entraînerait non plus un changement fondamental dans leur capacité à contrôler la façon dont ils sont perçus par les autres. Le fait pour des personnes d'être liées par des documents de succession aux victimes d'un meurtre non résolu n'est pas en soi un renseignement très sensible. Il peut être la source de désagréments, mais il n'a pas été démontré qu'il constitue une atteinte à la dignité, en ce qu'il ne touche pas au cœur même des renseignements biographiques de ces personnes. En conséquence, les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important comme l'exige l'arrêt *Sierra Club*.

[92] Le fait que certaines des personnes touchées puissent être mineures ne suffit pas non plus à franchir le seuil du caractère sérieux. Bien que le droit reconnaisse que les mineurs sont particulièrement vulnérables aux atteintes à la vie privée (voir *Bragg*, par. 17), le simple fait que des renseignements concernent des mineurs n'écarter pas l'analyse généralement applicable (voir, p. ex., *Bragg*, par. 11). Même en tenant compte de la vulnérabilité accrue des mineurs pouvant être des personnes touchées

they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

dans les dossiers d'homologation, rien dans la preuve n'indique qu'ils perdraient le contrôle des renseignements les concernant qui révèlent quelque chose se rapprochant du cœur de leur identité. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée des Sherman ne suffit pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité.

[93] De plus, bien qu'elle indique que les renseignements seraient probablement largement diffusés, l'intense attention médiatique dont a fait l'objet la famille à la suite des décès n'est pas en soi révélatrice du caractère sensible des renseignements contenus dans les dossiers d'homologation.

[94] Démontrer que les renseignements qui seraient révélés en raison de la publicité des débats judiciaires sont suffisamment sensibles et privés pour toucher au cœur même des renseignements biographiques des personnes touchées est une condition préalable nécessaire pour établir l'existence d'un risque sérieux pour l'aspect pertinent de la vie privée relatif à l'intérêt public. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Lorsque l'on affirme qu'il existe un risque pour la vie privée, il est essentiel de démontrer non seulement que les renseignements qui concernent des personnes échapperont au contrôle de celles-ci — ce qui sera vrai dans tous les cas —, mais aussi que ces renseignements concernent ce qu'elles sont en tant que personnes, d'une manière qui mine leur dignité. Or, les fiduciaires n'ont pas fait cette preuve.

[95] Par conséquent, même si certains des éléments contenus dans les dossiers judiciaires peuvent fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraîne un risque sérieux pour l'intérêt public important en matière de vie privée, qui a été défini adéquatement dans le présent contexte au regard de la dignité. Pour cette seule raison, je conclus que les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour cet intérêt.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was “foreseeable” and “grave” (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the *Toronto Star* agrees that the application judge’s conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity

(2) Le risque pour la sécurité physique allégué en l’espèce n’est pas sérieux

[96] Contrairement à ce qu’il en est pour l’intérêt en matière de vie privée soulevé en l’espèce, nul n’a contesté l’existence d’un intérêt public important dans la protection des personnes contre un préjudice physique. Il convient de souligner que le juge de première instance a correctement traité la protection contre un préjudice physique comme un intérêt important distinct de l’intérêt à l’égard de la protection de la vie privée, et a conclu que ce risque était [TRA-DUCTION] « prévisible » et « grave » (par. 22-24). La question consiste à savoir si les fiduciaires ont établi que cet intérêt est sérieusement menacé pour l’application du test des limites discrétionnaires à la publicité des débats judiciaires. Le juge de première instance a fait remarquer qu’il aurait été préférable d’inclure des éléments de preuve objectifs du caractère sérieux du risque fournis par le service de police menant l’enquête pour homicides. Il a néanmoins conclu que la preuve de risque pour la sécurité physique des personnes touchées était suffisante pour que le test soit respecté. Selon la Cour d’appel, il s’agit d’une mauvaise interprétation de la preuve, et, de son côté, le *Toronto Star* convient que la conclusion du juge de première instance quant à l’existence d’un risque sérieux pour la sécurité constitue une simple conjecture.

[97] D’entrée de jeu, je souligne qu’une preuve directe n’est pas nécessairement exigée pour démontrer qu’un intérêt important est sérieusement menacé. Notre Cour a statué qu’il est possible d’établir l’existence d’un préjudice objectivement discernable sur la base d’inférences logiques (*Bragg*, par. 15-16). Or, ce raisonnement inférentiel ne permet pas de se livrer à des conjectures inadmissibles. Une inférence doit tout de même être fondée sur des faits circonstanciels objectifs qui permettent raisonnablement de tirer la conclusion par inférence. Lorsque celle-ci ne peut raisonnablement être tirée à partir des circonstances, elle équivaut à une conjecture (*R. c. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, par. 45).

[98] Comme le soutiennent à juste titre les fiduciaires, ce n’est pas seulement la probabilité du

of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the *Toronto Star*, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed

préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Lorsque le préjudice appréhendé est particulièrement sérieux, il n'est pas nécessaire de démontrer que la probabilité que ce préjudice se matérialise est vraisemblable, mais elle doit tout de même être plus que négligeable, fantaisiste ou conjecturale. La question consiste finalement à savoir si le présent dossier permettait au juge de première instance de discerner de manière objective l'existence d'un risque sérieux de préjudice physique.

[99] Il n'était pas loisible au juge de première instance de tirer cette conclusion au vu du dossier. Nul ne conteste que le préjudice physique appréhendé est grave. Je conviens cependant avec le *Toronto Star* que la probabilité que ce préjudice se produise était conjecturale. La conclusion du juge de première instance quant au caractère sérieux du risque de préjudice physique était fondée sur ce qu'il a appelé [TRADUCTION] « le degré de mystère qui persiste en ce qui concerne à la fois le coupable et le mobile » en lien avec la mort des Sherman et sur sa supposition que ce mobile pourrait être « transposé » aux fiduciaires et aux bénéficiaires (par. 5; voir aussi par. 19 et 23). L'étape suivante du raisonnement, selon laquelle le fait de lever les scellés sur les dossiers de succession amènerait les coupables à commettre leur prochain crime contre une personne mentionnée dans les dossiers, repose sur des conjectures, et non sur les éléments de preuve par affidavit présentés, et ne peut être considérée comme une inférence appropriée ou un quelconque préjudice ou risque de préjudice objectivement discerné. Si tel était le cas, le dossier de succession de chaque victime d'un meurtre non résolu franchirait le seuil initial du test applicable pour déterminer si une ordonnance de mise sous scellés peut être rendue.

[100] En outre, je rappelle que la question à trancher en l'espèce n'est pas de savoir si les personnes touchées sont exposées à un risque pour leur sécurité en général, mais plutôt si la publicité des présents dossiers judiciaires les expose à un tel risque. À la lumière du contenu des dossiers en l'espèce, les

by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated “cases involving gang violence and dangerous firearms” and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it “self-evident” that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans’ deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*,

fiduciaires devaient avancer une autre raison pour laquelle le risque que posait le fait que ces renseignements deviennent accessibles au public était plus que négligeable.

[101] Le caractère conjectural du raisonnement menant à la conclusion selon laquelle il existe un risque sérieux de préjudice physique en l’espèce ressort des différences entre les faits en cause et ceux des affaires invoquées par les fiduciaires. Dans *X. c. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, le tribunal a inféré le risque de préjudice physique au motif que le demandeur était un policier qui avait enquêté sur des [TRADUCTION] « affaires portant sur la violence des gangs et des armes à feu dangereuses » et qui avait rédigé des rapports de détermination de la peine pour ces contrevenants, rapports dans lesquels il était identifié par son nom au complet (par. 6). Dans *R. c. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, le juge Watt a considéré qu’il était [TRADUCTION] « évident » que la divulgation d’éléments permettant d’identifier un agent d’infiltration travaillant dans le domaine du contre-terrorisme compromettrait la sécurité de l’agent (par. 41). Dans les deux cas, le danger découlait de faits établissant que les demandeurs entretenaient des relations antagonistes avec de prétendues organisations criminelles ou terroristes. Cependant, dans l’affaire qui nous occupe, les fiduciaires ont demandé au juge de première instance d’inférer non seulement le fait qu’un préjudice serait causé aux personnes touchées, mais également qu’il existe une ou des personnes qui souhaitent leur faire du mal. Il n’est pas raisonnablement possible au vu du dossier en l’espèce d’inférer tout cela en se fondant sur le décès des Sherman et sur les liens unissant les personnes touchées aux défunts. Il ne s’agit pas d’une inférence raisonnable, mais, comme l’a souligné la Cour d’appel, d’une conclusion reposant sur des conjectures.

[102] Si le simple fait d’invoquer un préjudice physique grave suffisait à démontrer un risque sérieux pour un intérêt important, il n’y aurait pas de seuil valable dans l’analyse. Le test exige plutôt que le risque sérieux invoqué soit bien appuyé par le dossier ou les circonstances de l’espèce (*Sierra*

at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination

Club, par. 54; *Bragg*, par. 15), ce qui contribue au maintien de la forte présomption de publicité des débats judiciaires.

[103] Encore une fois, dans d'autres affaires, des faits circonstanciels pourraient permettre à un tribunal d'inférer l'existence d'un risque sérieux de préjudice physique. Les demandeurs n'ont pas nécessairement à retenir les services d'experts qui attesteront l'existence du risque physique ou psychologique lié à la divulgation. Cependant, sur la foi du présent dossier, le simple fait d'affirmer qu'un tel risque existe ne permet pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel.

E. *Il y aurait des obstacles additionnels à l'octroi d'une ordonnance de mise sous scellés fondée sur le risque d'atteinte à la vie privée allégué*

[104] Bien que cela ne soit pas nécessaire pour trancher le pourvoi, il convient de mentionner que les fiduciaires auraient eu à faire face à des obstacles additionnels en cherchant à obtenir les ordonnances de mise sous scellés sur la base de l'intérêt en matière de vie privée qu'ils ont fait valoir. Je rappelle que, pour satisfaire au test des limites discrétionnaires à la publicité des débats judiciaires, une personne doit démontrer, outre un risque sérieux pour un intérêt important, que l'ordonnance particulière demandée est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs (*Sierra Club*, par. 53).

[105] Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication — moins contraignante à l'égard de la publicité des débats que les ordonnances de mise sous scellés — aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. La condition selon laquelle l'ordonnance doit être nécessaire oblige le tribunal à examiner s'il existe des mesures autres que l'ordonnance demandée et à restreindre l'ordonnance autant

of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same

qu'il est raisonnablement possible de le faire pour écarter le risque sérieux (*Sierra Club*, par. 57). Une ordonnance imposant une interdiction de publication pourrait restreindre la diffusion de renseignements personnels aux seules personnes qui consultent le dossier judiciaire pour elles-mêmes et interdire à celles-ci de diffuser davantage les renseignements. Comme je l'ai mentionné, la probabilité et l'étendue de la diffusion peuvent être des facteurs pertinents lorsqu'il s'agit de déterminer le caractère sérieux d'un risque pour la vie privée dans ce contexte. Alors que le Toronto Star serait en mesure de consulter les dossiers faisant l'objet d'une interdiction de publication, par exemple, ce qui pourrait l'aider dans ses enquêtes, il ne pourrait publier, et ainsi diffuser largement, le contenu des dossiers. Une interdiction de publication semble offrir une protection contre ce dernier préjudice, qui a été au centre de l'argumentation des fiduciaires, tout en permettant un certain accès au dossier, ce qui n'est pas possible aux termes des ordonnances de mise sous scellés. En conséquence, même si un risque sérieux pour l'intérêt en matière de vie privée avait été établi, ce risque n'aurait probablement pas justifié une ordonnance de mise sous scellés, car une ordonnance moins sévère aurait probablement suffi à atténuer ce risque de manière efficace. Je m'empresse cependant d'ajouter qu'une interdiction de publication ne peut être prononcée en l'espèce, puisque, comme il a été souligné, le caractère sérieux du risque pour l'intérêt en matière de vie privée en jeu n'a pas été établi.

[106] De plus, les fiduciaires auraient eu à démontrer que les avantages de toute ordonnance nécessaire à la protection contre un risque sérieux pour l'intérêt public important l'emporteraient sur ses effets préjudiciables, y compris l'incidence négative sur le principe de la publicité des débats judiciaires (*Sierra Club*, par. 53). Pour mettre en balance les intérêts en matière de vie privée et le principe de la publicité des débats judiciaires, il importe de se demander si les renseignements que l'ordonnance vise à protéger sont accessoires ou essentiels au processus judiciaire (par. 78 et 86; *Bragg*, par. 28-29). Il y aura sans doute des affaires où les renseignements présentant un risque sérieux pour la vie privée, du fait qu'ils toucheront à la dignité individuelle, seront essentiels au litige. Cependant, l'intérêt à ce

information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

que des renseignements importants et juridiquement pertinents soient diffusés dans le cadre de débats judiciaires publics pourrait bien prévaloir sur toute préoccupation à l'égard des intérêts en matière de vie privée relativement à ces mêmes renseignements. Cette pondération contextuelle, éclairée par l'importance du principe de la publicité des débats judiciaires, constitue un dernier obstacle sur la route de ceux qui cherchent à faire limiter de façon discrétionnaire la publicité des débats judiciaires aux fins de la protection de la vie privée.

VI. Conclusion

[107] La conclusion selon laquelle les fiduciaires n'ont pas établi l'existence d'un risque sérieux pour un intérêt public important met fin à l'analyse. En de telles circonstances, les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires, y compris les ordonnances de mise sous scellés qu'ils ont initialement obtenues. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires. Cette conclusion est déterminante quant à l'issue du pourvoi. La décision d'annuler les ordonnances de mise sous scellés rendues par le juge de première instance devrait être confirmée. Étant donné que je suis d'avis de rejeter le pourvoi eu égard au dossier existant, je rejetterais la requête en production de nouveaux éléments de preuve présentée par le Toronto Star au motif que celle-ci est théorique.

[108] Pour les motifs qui précèdent, je rejetterais le pourvoi. Le Toronto Star ne sollicite aucuns dépens, compte tenu des importantes questions d'intérêt public en litige. Dans les circonstances, aucuns dépens ne seront adjugés.

Pourvoi rejeté.

Procureurs des appelants : Davies Ward Phillips & Vineberg, Toronto.

Procureurs des intimés : Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Procureurs de l'intervenant le Centre d'action pour la sécurité du revenu : Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Procureurs des intervenants Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc. : Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

Procureurs des intervenants HIV & AIDS Legal Clinic Ontario, le Réseau juridique VIH and Mental Health Legal Committee : HIV & AIDS Legal Clinic Ontario, Toronto.

TAB 8

Court of King's Bench of Alberta

Citation: Long Run Exploration Ltd (Re), 2024 ABKB 710

Date: 20241129
Docket: 2401 09247
Registry: Calgary

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

**And In the Matter of a Plan of Compromise or Arrangement of Long Run Exploration Ltd
and Calgary Sinoenergy Investment Corp**

Corrected judgment: A corrigendum was issued on December 6, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on November 29, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

**Reasons for Decision
of the
Honourable Justice Douglas R. Mah**

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A. Background

- [1] The applicant is the Court-Appointed Monitor of Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp acting under the **CCAA**.¹ The Monitor seeks transaction approval and a Reverse Vesting Order (RVO) in order to give effect to a stalking horse bid in the form of a Subscription Agreement for the shares of Long Run.
- [2] The stalking horse bid is advanced by Hiking Group Shandong Jinyue Int't Trading Corp as part of a Court-approved sale and investment solicitation process (SISP). It was the only qualified offer that emerged from the SISP. Hiking also provided debtor-in-possession or DIP financing in the **CCAA** proceeding to the extent of \$7 million under previous Court Order.
- [3] The stalking horse Subscription Agreement was subsequently slightly amended for tax planning purposes. Subsequent mention of the Subscription Agreement in these Reasons refers to the amended Subscription Agreement (identified as the A & R Subscription Agreement in the application materials).

¹ *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 as am.

[4] Reduced to its basics for the purposes of this decision, the Subscription Agreement contemplates:

- Cancellation of the existing common shares of Long Run and issuance of new shares to Hiking's nominee (a new wholly owned subsidiary created for that purpose), which shares would be free and clear of any existing liabilities of Long Run other than those expressly retained.
- Long Run would continue as a going concern with its retained assets, retained liabilities and retained contracts.
- The retained liabilities include the indebtedness owing by Long Run to senior secured creditors, as represented by China Construction Bank Toronto Branch (CCBT) as collateral agent, in the approximate amount of \$350 million, as well as environmental liabilities of about \$453 million.
- Apart from assumption of the senior secured debt, the cash component of the purchase price consists of an approximate \$17.5 million to deal with priority payables, another much smaller amount (\$100,000) to fund the Trustee's expenses for the Creditor Trust to be created and set-off of the \$7 million DIP financing already advanced.
- Assets, liabilities and contracts not retained would be transferred to a Creditor Trust to be administered by the Monitor, and all of Long Run's liabilities except those expressly retained would be discharged so far as Long Run is concerned.
- Court approval of the Subscription Agreement and granting of an RVO are necessary to create the Creditor Trust. Creditors whose claims are transferred to the Creditor Trust would have further recourse only to the Creditor Trust, which is expected to be negligible. It is not anticipated that unsecured creditors would receive any payment.

[5] The transaction, if approved, enables Long Run to continue operations with a new owner "cleansed" of unwanted liabilities while retaining desired assets, contracts and liabilities.

[6] The Monitor submits that approval of the Stalking Horse Subscription Agreement with the RVO represents the best outcome for the financial stakeholders here.

[7] Two creditors of Long Run object to approval of the Stalking Horse Subscription Agreement and granting of the RVO as presented by the Monitor, on the basis of unfairness. The first objector is Henenghaixin Corp (H Corp) who has been engaged in litigation with Long Run, Calgary Sinoenergy and other defendants since February 2020. H Corp as plaintiff alleges fraud and misrepresentation against them in the action and in this proceeding claims a proprietary constructive trust to the extent of \$44 million against the assets of Long Run.

[8] As it presently stands, H Corp's claim is a transferred liability whose claim against Long Run would be in effect extinguished upon closing of the transaction. H Corp asserts that the transaction must be amended so that its proprietary constructive trust claim is preserved and adjudicated upon.

[9] The second is Mr. Neufeld, a landowner and lessor under a surface lease agreement with Long Run who at one time was owed rent. Mr. Neufeld is not currently owed any rent and all outstanding surface lease rentals will carry over as retained liabilities. He did, however, constitute himself as representative plaintiff in a lawsuit for damages commenced in June

2022 proposing a class action on behalf of all Long Run's Alberta surface lease lessors. No application to certify a class action has ever been brought. Mr. Neufeld contends that any outstanding rentals owed to landowners should be paid up front and the lawsuit claim should be categorized by the Court as a retained liability for the purposes of the transaction.

- [10] Mr. Neufeld also complains about a settlement letter sent last month by the Monitor to landowners offering to resolve outstanding surface lease claims on the basis of fifty cents on the dollar. Some 41 landowners accepted the offer. He asks the Court to rescind the letter.

B. Legal Test for Approval of a Sale or Disposition under the CCAA

- [11] In approving (or not) the disposition of assets outside the ordinary course under the **CCAA**, the Courts in Alberta and elsewhere have applied an amalgam of the factors set out in section 36(3) and those developed in *Royal Bank v Soundair Corp*, 1991 CanLII 2727 (ONCA) applicable to a sale within a receivership: *Sanjel Corporation (Re)*, 2016 ABQB 257 at paras 54-55 & *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314 at paras 10 & 11:

- [12] In the result, the consolidated factors consist of:

- The reasonableness, efficacy and integrity of the sales solicitation process;
- Whether the Monitor approved that process, and filed with the Court its opinion as to the benefit to creditors of the proposed transaction versus the alternative;
- Whether there was unfairness in the implementation of the solicitation process;
- The extent to which creditors were consulted;
- The effects of the transaction on creditors and the interests of other financial stakeholders;
- The fairness and adequacy of the proposed consideration.

- [13] The Monitor also submits that the Court should not lightly interfere with the commercial and business judgment of the debtor company and the Monitor where the solicitation process has been fair, reasonable and transparent, and should give deference to the Monitor's recommendation: *Sanjel* at para 57. This is particularly so where the Monitor conducted itself in accordance with the SISP Order, a Court-supervised process: *Acerus* at para 25.

- [14] With references to its 5th Report, the Monitor says:

- The SISP process leading to the proposed transaction was prescribed by Court Order (2nd Amended & Restated Initial Order of July 30, 2024) and therefore reasonable and fair;
- The SISP was executed according to its terms and therefore the process had efficacy and integrity (5th Report, paras 24-33);
- The Monitor made sufficient efforts to obtain the best price and has not acted improvidently (5th Report, paras 24-33);
- The Monitor expresses its opinion that the transaction is more beneficial to creditors than a sale or disposition under a bankruptcy (5th Report, paras 41-42 & 47);

- Creditors (and specifically CCBT as collateral agent for the senior secured creditors) were consulted and the impact of the transaction on other stakeholders was considered (5th Report, pars 40-41 & 48-49);
- The consideration is reasonable and fair (5th Report, paras 29, 35-36, 41-42 & 50-51);
- The SISP process was fair, reasonable, transparent and efficient (5th Report, paras 24-33); and
- The Monitor recommends that the transaction and the RVO be approved (5th Report, para 42).

[15] During argument, the Monitor's counsel stressed that Hiking was only prepared to proceed with the transaction as presented to the Court and that in the event it is not accepted, then the only remaining alternative is bankruptcy. In such a scenario, Long Run's assets would basically be turned over to the Orphan Well Association to address environmental liabilities with little to no recovery for any creditor of any type.

[16] The Monitor submits that the appropriate legal criteria for approval of the transaction have all been satisfied on the evidence.

C. Legal Test for Approval of an RVO

[17] The **CCAA** at sections 11 and 36 combine to give the Court authority to approve a transaction using an RVO. Judicial discretion in this regard must be exercised in furtherance of the **CCAA**'s purposes: *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 59 and *Harte Gold Corp (Re)*, 2022 ONSC 653 at para 32 and be guided by the baseline considerations of appropriateness, good faith and due diligence: *Harte Gold* at para 31.

[18] The request for an RVO should not be routine and should invite "close scrutiny": *Harte Gold* at para 38. Accordingly, these additional questions are apposite:

- Why is the RVO necessary in this case?
- Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?
- Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and
- Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

[19] To address the questions, the Monitor asserts:

- In terms of necessity of an RVO, Long Run operates in a highly regulated environment where existing permits, licenses or other rights including as party to certain key agreements are difficult or impossible to assign to a purchaser. The transaction is only viable when combined with an RVO and certain attributes otherwise lost in a traditional vesting order transaction are preserved. The attributes are recognized by the Courts as a basis for granting an RVO: *Acerus* at para s 16, 21 & 35 and *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at para 34.

- The transaction with RVO provides more benefits to Long Run's stakeholders than realization under a bankruptcy. Long Run continues as a going concern in oil and gas under a new owner who assumes substantial liabilities including all of those of an environmental nature. The transaction and RVO advance the remedial objectives of the **CCAA** of rehabilitating an insolvent business and avoiding the social and economic cost of large business failure: **Acerus** at para 43; **Rambler Metals and Mining Limited, Re CCAA**, 2023 NLSC 134 at para 67; and **CannaPiece Group Inc v Marzilli**, 2023 ONSC 3291 at para 19.
- No stakeholder is worse off due to the RVO. While RVO transactions often result in unsecured claims being transferred to a residual trust, resulting in zero recovery for those creditors, that is function of the insolvent state of the debtor, not the RVO process: **Acerus** at para 32; **Just Energy** at para 57; **Arrangement relatif à Blackrock Metals Inc**, 2022 QCCS 2828 at para 109.
- With regard to the adequacy of consideration, Hiking's stalking horse bid out of the multiple LOIs submitted was the only qualified bid, represents the best price for the debtor's assets and was the only proposal that enables Long Run to continue as a going concern.

[20] The Monitor submits that the **Harte Gold** test sets out the recognized legal criteria in Canada for approving an RVO and that the test is met in this case.

D. Releases

[21] As part of the transaction and RVO approval, the Monitor also seeks Court-ordered releases in respect of the Monitor, Hiking, the purchasers, Long Run and Calgary Sinoenergy and their respective current and former directors, officers, employees, contractors, agents, representatives and financial and legal advisers for any and all claims related to the transaction, Long Run and its insolvency (except the retained liabilities) and the **CCAA** proceedings.

[22] There is specific authority for release of the debtor's directors at section 5.1 of the **CCAA**. But for others, the Monitor says the plenary authority residing in section 11 allows such releases. The Monitor cites **Tacora Resources Inc (Re)**, 2024 ONSC 4436 at paras 17-25 and **Lydian International Limited (Re)**, 2020 ONSC 4006 at para 54 for the applicable legal criteria:

- whether the parties being released were necessary and essential to the restructuring of the debtor;
- whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it;
- whether the restructuring could succeed without the releases;
- whether the parties being released contributed to the restructuring; and
- whether the releases benefit the debtors as well as the creditors generally.

[23] The Court in *Tacora* says at para 17 that releases should be carefully scrutinized. The Monitor submits that the releases should be granted because the legal test set out above is satisfied, as follows:

- The proposed releasees were instrumental in all steps of the **CCAA** proceedings, including negotiating the DIP financing, operating Long Run as a going concern, preparing and conducting the SISP and will be involved in implementing the transaction and post-closing obligations.
- The proposed releases are rationally connected to and necessary for the transaction because they will reduce indemnification claims against the administration charge and directors' charge (refer to *Harte Gold* at para 82 and *Tacora* at para 25), provide certainty and finality to the transaction and the closing of the transaction is conditional upon the granting of the releases (*Harte Gold*, para 84).
- Regulatory and environmental liabilities are retained.

[24] After scrutinizing the rationale behind the releases, I am satisfied there is a critical connection between the releases and the generation, advancement and ultimately the culmination of the transaction.

[25] Before making a ruling on whether I approve the transaction with RVO (including the releases) as presented, I must deal with the objections of H Corp and Mr. Neufeld.

E. H Corp Objection

[26] H Corp's claim is designated as a transferred liability in the proposed transaction/RVO.

[27] The background to the H Corp lawsuit against Long Run, Calgary Sinoenergy and others is fully recounted in *Henenghaixin Corp v Deng*, 2021 ABQB 168 and *Henenghaixin Corp v Deng*, 2022 ABCA 271. In essence, it alleges that some individuals, while acting as directors and officers of the **CCAA** debtors, improperly induced the transfer of some \$44 million of H Corp's funds to either Long Run or Calgary Sinoenergy by fraud or misrepresentation, including presentation of false financial statements, bank records and a false shareholder declaration. Long Run reportedly received \$150,000 of these funds directly and a further \$11.5 million through Calgary Sinoenergy. I will briefly summarize the history here.

[28] The investment agreements among the general partners of the Chinese entities that funded H Corp show that the purpose of the investment was to acquire the assets of Twin Butte Energy Ltd in a receivership sale through H Corp's wholly owned subsidiary, West Lake Energy Corporation. West Lake did acquire those assets in March 2017.

[29] At the material time, Mr. Deng was one of four members of the H Corp board of directors and also a director of West Lake, Calgary Sinoenergy and Long Run. Ms. Deng, his daughter, was a director of West Lake and Long Run. Mr. Lam was a business associate of the Dengs.

[30] In early 2018, two of the Chinese investor parties became concerned that Mr. Deng would not be able to fund the acquisition of their equity interests and sent Mr. Zhang and two others to investigate West Lake's operations. At an October 2018 meeting in Calgary, with

Ms. Deng and Mr. Lam, the representatives were shown West Lake financial statements and bank statements that overstated West Lake's position.

- [31] PricewaterhouseCoopers (PwC) prepared a forensic report indicating that H Corp received \$354 million from the investment funds, of which \$276 million was used for the Twin Butte purchase and related operational costs, and that \$77 million in net payments not related to the Twin Butte assets were made to various other entities including Calgary Sinoenergy and Long Run.
- [32] Mr. Lam is said to be individual who caused the impugned transfers. He later produced a shareholders' declaration from H Corp and an investment agreement between Calgary Sinoenergy and a lender that purported to clothe him with proper authority. Both documents are alleged by H Corp to be falsified.
- [33] H Corp began its action in February 2020 and obtained a without notice Mareva Injunction/Attachment Order from this Court in April 2020 against the individuals, Long Run and Calgary Sinoenergy. The Order was vacated in March 2021 in respect of Long Run and Calgary Sinoenergy because the putative rogue individuals were no longer involved as directors and officers (at paras 94, & 96-97). The Court of Appeal then allowed the appeal in August 2022 in respect of the individuals on the basis that the evidentiary record consisted primarily of hearsay (at para 45).
- [34] At one point, H Corp asked the Court to direct a trial of an issue with respect to the falsification of records but was not successful. The litigation continued until it was stayed as a result of the Initial Order on July 4, 2024.
- [35] H Corp asserts in the **CCAA** proceedings that it has a *prima facie* case for unjust enrichment that results in a proprietary trust claim against the assets of Long Run and Calgary Sinoenergy. Relying on the classic formulation of unjust enrichment, H Corp says that Long Run was enriched by the wrongfully transferred funds, H Corp has been thereby deprived and there is no juristic reason to deny recovery: **Becker v Pettkus**, [1980] 2 SCR 834 at pg 848 and **Kerr v Baranow**, 2011 SCC 10 at para 36.
- [36] While H Corp does not oppose either the transaction or the RVO in principle, it submits that relegating H Corp's claims to the realm of transferred liabilities extinguishes its claim, which, being a constructive trust claim, is of a higher order. Justice cannot be done, says H Corp, unless its constructive trust claim is adjudicated on the merits. And since that cannot be completed in advance of the transaction closing, the claim must be preserved. That would be achieved, in H Corp's estimation, by the Court amending the transaction to designate the H Corp claim as a retained liability and securing that claim in one of two ways:
- Increasing the cash consideration payable by the Purchaser by \$44 million, to be held in trust pending adjudication; or
 - Alternatively, if H Corp is ultimately successful, the secured lender (as represented by CCBT), either advances the value of H Corp's claim or reduces its secured claim by the same amount, in either event with payment to H Corp of its claim as adjudicated.
- [37] H Corp's theory is that if constructive trust is proven then the assets comprising the trust were never Long Run's property, never secured to CCBT's principals and cannot be sold unless the trust claim is paid, i.e. the *nemo dat* rule.

[38] Since the trust assets are unidentifiable at this point, H Corp proposes a “tracing exercise” to determine if and how H Corp’s money turned into assets of Long Run. H Corp says the broad discretion under section 11 allows the Court to alter the transaction as requested by H Corp.

[39] Initially, H Corp had two further objections regarding aspects of the Subscription Agreement/RVO that it felt were detrimental and unfair to H Corp. The first was that the Subscription Agreement preserves as a retained asset the Third Party Claim against H Corp which, says H Corp, severs mutuality of debts and prejudices its rights of set-off. The Monitor and Hiking have voluntarily amended the Subscription Agreement so as not to impair any set-off rights that H Corp would otherwise have.

[40] The second further objection relates to the scope of the proposed Releases which, in H Corp’s submission, encompasses the three individual defendants in the H Corp action. H Corp submits that this purported release of liability in favour of the three individuals is contrary to section 5.1(2) of the **CCAA** (which excepts from a compromise or arrangement any claim against directors based on allegations of misrepresentation or wrongful or oppressive conduct by the directors) and further that **Lydian** factors do not apply to these individuals.

[41] The Monitor disagrees that the Releases can bear this broad an interpretation but in any event, and for greater certainty, has amended the Releases to specifically exclude the three individuals.

[42] As to H Corp’s main objection, the Monitor responds:

- H Corp’s claim cannot succeed as a constructive trust claim. First, there are no identifiable trust assets which are a legal requirement for a constructive trust: **Peter v Beblow**, [1993] 1 SCR 980, 1993 CarswellBC 1258 at para 24. The simple “knowing receipt” of funds is not sufficient to establish a constructive trust if specific property cannot be identified which is the subject of the enrichment. The failure to identify specific property effectively turns the claim into a request for a floating charge, which the Monitor says the Courts have consistently rejected.
- Moreover, there is a high threshold for recognition of constructive trust claims in the insolvency context that is not met here. The Monitor submits that the claimant must exhibit compelling or extraordinary grounds: **Credifinance Securities Limited v DLSC Capital Corp**, 2011 ONCA 160 at paras 32-33.
- Second, there is a juristic reason for not recognizing the claim, being its negative impact on other creditors within the **CCAA** proceeding, upsetting the priority scheme established by law and defeating the remedial objectives of the **CCAA**.
- This latter ground hinges on the fact that the SISP only produced Hiking’s Stalking Horse Bid as a qualified bid and, further, that Hiking is only prepared to enter into the transaction on the terms negotiated with the Monitor and presented to the Court, and not an amended transaction as suggested by H Corp or any other transaction: **Supplement to the Monitor’s Fifth Report**, Appendix H. The alternative then is bankruptcy, or the surrender of Long Run’s assets to the Orphan Well Association: **Supplement to the Monitor’s Fifth Report** at para 56.

- H Corp has incorrectly framed the issue as a “priority dispute” between H Corp and CCBT. The Monitor asserts that unless H Corp can prove its claim takes precedence over the DIP fund (which it has not attempted to do), there is no basis to require Hiking (the stalking horse bidder) to retain it, even if H Corp’s claim holds the same or higher priority than the CCBT debt.
- Accordingly, the feature that distinguishes the present case from the authorities cited by H Corp (where contingent property claims were either adjudicated on a summary basis² or preserved by funds in trust pending adjudication³), is that Hiking has made a credit bid by way of its DIP Fund (not at the secured creditor level as in H Corp’s authorities) and has chosen to retain some liabilities and shed others.
- Regardless, strictly on a timing basis, CCBT has priority over any subsequent claims by H Corp against the Debtors. CCBT perfected its security on January 26, 2017, before the first impugned transfer of funds by H Corp to the Debtors on April 13, 2017.
- There is no viable alternative to the Subscription Agreement with RVO advanced by Hiking. Hiking has staked its ground by saying that it will not proceed with the transaction if H Corp’s claim becomes a retained liability. The only other scenario is bankruptcy and the resulting loss for all stakeholders: *Invico* at para 26.

[43] CCBT by its counsel supported the Monitor’s approval application by arguing:

- CCBT’s security is first in time. Recognizing H Corp’s constructive trust claim would in effect confer upon H Corp a super-priority for its unproven claim, notwithstanding that CCBT fulfilled all statutory obligations to register and perfect its security.
- H Corp has nothing more than an unsecured claim. That there is no statutory distribution scheme within the *CCAA* does not entitle unsecured creditors to obtain enhanced security over secured creditors for pre-filing obligations. It is essential in Court-supervised proceedings to give due consideration to the priority rights of secured creditors: *Windsor Machine & Stamping Limited (Re)*, 2009 CanLII 39771 (ONSC) at para 43.
- H Corp has failed in four years of litigation to present any substantial evidence to support its claim.

[44] The Monitor’s application was supported by TC Energy and Nova Gas Transmission Ltd and Canadian Natural Resources Limited, whose contracts with Long Run are on the retained list, by the Orphan Well Association who would take on abandonment and reclamation obligations in the event of Long Run’s cessation of operations, by the municipalities of Birch Hills County, Big Lakes County and Lac Ste Anne County whose unpaid tax levies are proposed to be retained, and by Long Run and Calgary Sinoenergy themselves.

F. Analytic Framework for H Corp Claim

[45] H Corp took issue with the notion of the Monitor and the Purchaser “picking winners and losers” in terms of which liabilities are retained and which are transferred. However, the Monitor submits that Alberta law recognizes that a purchaser may choose which liabilities to

² *Invico Diversified Income Limited Partnership v NewGrange Energy Inc*, 2024 ABKB 214 at para 19.

³ *Bison Properties Ltd (Re)*, 2016 BCSC 793 and *American Iron v 1340923 Ontario*, 2018 ONSC 2810.

keep or disclaim in a credit bid context, as part of the advancement of the **CCAA**'s remedial objectives: *Canadian Overseas Petroleum Limited (Re)*, 2024 ABCA 190 (*COPL* case) at paras 24 & 38.⁴

[46] As stated in *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at para 101, many cases (cited therein) in Canada have considered the equities to determine whether a third-party interest should be extinguished. There is no prescribed list of factors and every case is contextual and fact-dependent.

[47] Having regard to the caselaw referred to immediately above, I conclude that a constructive trust claimant, such as H Corp in this case, must meet some kind of threshold on the merits in order for the Court to order that the claim survive the transaction/RVO in the manner suggested by H Corp. There has been an assessment of sorts found in the Monitor's Supplement to the Fifth Report. H Corp on the one hand and the Monitor and CCBT on the other were all content to have me consider the merits for the purposes of this application.

[48] Accordingly, in deciding whether I implement either of H Corp's proposals to amend the Subscription Agreement in order to preserve its constructive claim for later adjudication, I employ this analytic framework:

1. What standard must be met in terms of the strength of the fraud or misrepresentation claim?
2. Has the standard been met in this case?
3. Is this an appropriate case for the remedy of constructive trust?
4. What is the role of the equities?

[49] In effect, I am engaging in a form of summary adjudication that is necessitated by the circumstances of this case.

G. Standard to be met in terms of the strength of the fraud or misrepresentation case

[50] A standard is necessary because the mere assertion of a constructive trust claim should not be enough to derail or frustrate **CCAA** proceedings.

[51] When this question of threshold was posed during the hearing, counsel for the Monitor argued that a standard equal to that required of a Plaintiff in a summary judgment application, i.e. proof on a balance of probabilities, was necessary to control unmeritorious claims that could upset **CCAA** proceedings. The Monitor contends that given the factual ambiguity of the case and that H Corp cannot even point to any identifiable trust property mean that H Corp's claim is no where near that standard.

[52] H Corp says that the standard of *prima facie* case applies, that this standard was met for the purposes of a Mareva Injunction/Attachment Order as found by Romaine J and that this finding has never been assailed.

⁴ Note this is a leave decision. Justice Yamauchi had countenanced the credit bidder's selective assumption approach. Justice de Wit denied leave.

- [53] The cases state that the threshold for establishing constructive trust claims in the bankruptcy context is high: **Credifinance** at para 13; **Hoard (Re)**, 2014 ABQB 42 at para 23. It should be no different in the case of an insolvency where the **CCAA** applies.
- [54] The Monitor relies on Chief Justice Morawetz’s decision in **Laurentian University of Sudbury**, 2022 ONSC 3013 for the proposition that the standard to be met is proof on a balance of probabilities. In that case, a plaintiff sought to have an historical claim for sexual abuse adjudicated outside of the claims process that had been established under the **CCAA**. At issue was the interpretation of s 19(2) of the **CCAA** which exempts certain types of claims from compromises or arrangements under the **CCAA**, including civil judgments resulting from sexual assault claims and, notably, any debt or liability resulting from obtaining property by false pretences or fraudulent misrepresentation.
- [55] The University’s counsel had argued that (at para 29 of **Laurentian University**):
- ... It would mean that any claim of the types mentioned in s. 19(2) – which is a broad category of claims including fraud, misappropriation, and misrepresentation – would not be capable of being determined in the **CCAA** claims process and could proceed in ordinary litigation. This would create chaos and is precisely what the Supreme Court of Canada stated the **CCAA** was designed to prevent when it said that “the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt” (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 22).
- [56] In assessing the standard of proof to be met, Chief Justice Morawetz in turn relied on the Supreme Court of Canada’s decision in **Montreal (City) v. Deloitte Restructuring Inc.**, 2021 SCC 53 in relation to claims of fraud and misrepresentation. The Supreme Court stated at paras 24 & 25:
- [24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”), which is analogous in every respect to s. 19(2)(d) of the **CCAA**. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes “for[m] part of an integrated body of insolvency law” (para. 78; see also 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74).
- [25] To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006;

D. Brochu, *Précis de la faillite et de l'insolvabilité* (5th ed. 2016), at pp. 502-3). Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the CCAA applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, 2004 CanLII 30445 (QC CA), [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24).

(emphasis appears in the *Laurentian University* case.)

- [57] Chief Justice Morawetz considered the above ruling by the Supreme Court of Canada to be determinative and found that since the claimant had only asserted a claim of historical sexual assault (as opposed to having proven it on a balance of probabilities), the claim would not be separately adjudicated. He says at paras 44-46:

[44] The foregoing analysis sets out the proper framework for analyzing the issue before the Court. In my view, it confirms the argument put forth by LU and is a complete answer to the submissions of both BR and US.

[45] Simply put, the exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly and the elements of the exception set out in s. 19(2) must be proved.

[46] It is not sufficient to infer liability (*Montreal* para. 21). The burden of proof to establish a debt or liability and an award of damages for sexual assault is on the claimant (*Montreal*, para. 24, 25 and 28).

- [58] There are no statutory restrictions on the form, structure or content of a plan of compromise or arrangement. The RVO is a relatively new and still novel structure in Canada. As stated earlier, the Court's authority for approving the Subscription Agreement/RVO derives from section 11. Even if the transaction/RVO in this case does not, strictly speaking, form a compromise or arrangement under Part I of the CCAA, a Subscription Agreement with RVO is a recognized and legitimate vehicle for salvaging a business under the CCAA. Accordingly, either section 19(2) itself applies or its underlying logic as set out in *Montreal (City)* applies. This necessarily flows from the notion expressed in *Century Services* and *Callidus* that the BIA⁵ and CCAA comprise a complete code with regard to insolvency law in Canada.

- [59] Here, H Corp is doing the same thing that the applicant was seeking in *Laurentian University*, namely, to have an as-yet unproven claim preserved for later adjudication outside the CCAA regime. I appreciate that H Corp's claim is in a more advanced state. But there is no reason for me to apply a different standard than that established by the Supreme Court of Canada because a Subscription Agreement coupled with a RVO is the structure in this case. Consistent standards must be applied so that the CCAA regime overall has integrity and stability.

⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as am.

[60] I therefore conclude that H Corp must meet the standard of proof on a balance of probabilities, based on the record presented to the Court. In this case, the record includes the latest affidavit of Mr. Zhang which, with exhibits, comes in at 1051 pages.

H. Has the standard been met in this case?

[61] It was Mr. Zhang who provided the affidavit evidence for the original Mareva Injunction/Attachment Order application. As described by the Court of Appeal in 2022 ABCA 271 at para 32, he was “an employee of the general partner of one of limited partnerships, several entities removed from H Corp in the ownership chain.” The Court of Appeal determined at para 45 that his evidence was entirely hearsay and therefore an inadequate foundation for establishing the allegations to the required standard. The Mareva Injunction/Attachment Order was thus vacated by the Court of Appeal in respect of the individuals as well.

[62] Mr. Zhang, as of the date of the swearing of the more recent September 13, 2024 affidavit for this application, is the President of H Corp. This more recent affidavit revisits some of the evidence he gave in his previous affidavits in the H Corp action but also recounts in detail events subsequent to the Court of Appeal vacating the Injunction/Attachment Order.

[63] However, Mr. Zhang’s most recent affidavit does attach Mr. Neu’s affidavit from the H Corp action sworn May 21, 2021 as an exhibit. The submission of this affidavit, along with an affidavit from Mr. Middleton, is discussed at para 90 of 2021 ABQB 168 and paras 46 & 47 of 2022 ABCA 271. H Corp suggests in this application that Mr. Neu’s affidavit shores up any evidentiary deficiency found by the Court of Appeal and establishes a strong *prima facie* case of fraud.

[64] Mr. Neu was a director of H Corp and says he was, on paper at least, the President and CEO of H Corp. He worked for different companies “under the Calgary Sinoenergy umbrella” in the field as well as in the office of Long Run and affiliated companies as an engineering consultant. Mr. Neu’s affidavit supports H Corp’s claim in several respects:

- He believes that the companies under the Calgary Sinoenergy umbrella were affiliated and managed and controlled by Mr. Deng.
- He confirms the transfers that total some \$93 million between April 13, 2017 and September 5, 2017 from H Corp to Calgary Sinoenergy. Mr. Lam, one of the Defendants in the H Corp action, was described by Mr. Neu as the CFO of both H Corp and Calgary Sinoenergy. Mr. Lam set up Mr. Neu as a co-signor for H Corp’s bank account with ATB.
- He says that he did not believe Mr. Lam required his approval for any of the transfers. He confirmed the payments with ATB because he believed they were intercompany transfers authorized by Mr. Lam.
- He indicates that, contrary to what is stated in Mr. Lam’s affidavit in the H Corp action, he never gave instructions to Mr. Lam to conduct any transfers nor did Mr. Lam seek his approval to do so.
- He was never aware of the shareholder declaration and loan agreement, empowering Mr. Lam to do banking and transactions as H Corp’s “special representative”.

- Mr. Neu was asked in December 2018 by Mr. Lam to sign backdated indemnity agreements for Mr. Deng, Ms. Deng and Mr. Lam. One of the signatures on one of the agreements looked like a forgery to him. He was also asked by Mr. Lam to sign an authorization letter. He signed none of these. Mr. Lam later claimed that Mr. Neu had written the authorization letter.

[65] Mr. Neu's evidence primarily implicates Mr. Lam and to a lesser extent the two Dengs. It does not expressly implicate Long Run except to the extent it may have been used as an instrument in the same way H Corp was. I accept that Mr. Neu's evidence lends direct support to a case of fraud or misrepresentation but that is in respect of the individuals. While it is true that Mr. Deng and his daughter Ms. Deng were directors of Long Run at the time of the impugned transfers, Mr. Deng was also a director of H Corp. It is live issue as to the capacity in which they were acting, their own or as directors of H Corp, Long Run or some other entity.

[66] The Monitor notes from its review of H Corp's claim that:

- H Corp obtained \$352 million in funds from York City Enterprises Limited to acquire the assets of Twin Butte Energy Ltd in a receivership sale.
- H Corp alleges from approximately January to September 2017, Mr. Deng, while he was a director of H Corp and the Debtors, and assisted by Ms. Deng and Mr. Lam, wrongfully diverted net funds of \$43,765,669 from H Corp to the Debtors. H Corp further claims that the diversion of the funds was not discovered by H Corp until January 2019.
- The forensic report by PwC, an exhibit to Mr. Zhang's recent affidavit, outlines a complicated series of transactions whereby H Corp, York City, the Debtors and other related and unrelated entities advanced and received payments (or benefits) back and forth which net out to the aforesaid \$44 million.
- Of the \$77,006,491 in net advances, H Corp alleges that \$76,956,491 was made to Calgary Sinoenergy and \$150,000 to Long Run. H Corp acknowledges that because the Debtors made payments towards a deposit for the Twin Butte assets and interest payments against a York City loan, the net outflow from H Corp is the amount of the claim.
- The date of the transfers from H Corp is after the date of which CCBT's security was perfected and after the date of funds were advanced under the CCBT credit facilities.
- Calgary Sinoenergy and Long Run filed their Statement of Defence on February 11, 2021. Rather than the funds in question being wrongfully diverted, they say that if the claimed funds were paid, they were governed by contracts in place between Calgary Sinoenergy and Long Run, or with H Corp or York City.
- The Monitor refrains from commenting on whether fraudulent documents were uttered to support the impugned payments but notes in its review of the Calgary Sinoenergy financial statements the amounts received from H Corp are recorded as intercompany loans.
- The classification of the advances from H Corp is clearly a complicated issue that has resulted in protracted litigation since H Corp's claim was filed on February 28, 2020. A further complicating factor is that H Corp and the Debtors had common directors including the individual Defendants who appear to have been controlling finances and intermingling funds as among H Corp and the Debtors.

- PwC’s forensic report contains a specific limitation that it cannot verify the completeness of payments made by “unrelated entities” (which include Calgary Sinoenergy and Long Run) on behalf of the two parent partnerships of which H Corp is an indirectly wholly owned subsidiary.

[67] The Monitor’s special counsel, appointed to deal with H Corp’s claim, argues:

- The H Corp allegations are focused on fraudulent actions attributed to the individual defendants, acting within their roles at H Corp or its affiliates, including West Lake. The financial documents, especially the bank records and statements, said to be falsified relate to West Lake, not Long Run.
- Long Run is a distinct entity from both H Corp and West Lake. It is unreasonable to assume that the individual defendants were acting as agents of Long Run when presenting documents pertaining to West Lake. There is no factual basis on which to suggest that Long Run, on its own account, made any representations to H Corp in connection with the documents.
- Moreover, the motive behind whatever actions the individual defendants took was not to benefit Long Run, but rather for personal gain or some other business reason.
- H Corp has asserted but has not proven to the required standard of proof on a balance of probabilities, that the representations made were false. No Court has made that finding. As the Rule 7.1 application was denied, the factual issue of fraud (or not) remains unresolved.
- H Corp itself says that it was the individuals pretending to have authority that allowed them to effect the unauthorized transfers:

(from H Corp’s Statement of Claim at para 7)

Both Ms. Deng and Mr. Lam represented themselves as having authority to direct the affairs of H Corp. and West Lake as delegates of Mr. Deng. They held out Mr. Deng as being the ultimate owner or controller of H Corp. As outlined below, they had no such authority. However, under the pretenses of having such authority, Ms. Deng, Mr. Lam, and Mr. Deng wrongfully removed tens of millions of dollars from H Corp, as detailed below.

and

(from Mr. Zhang’s September 13, 2024 affidavit at paras 24-25)

Mr. Neu indicated he was a Calgary Sinoenergy employee who, at the direction of a cousin of Mr. Deng, accepted a role as a director of H Corp and was then appointed President and CEO. Further, at the direction of Mr. Lam, he stated he would confirm, if asked by the bank, transfers from H Corp to West Lake that Mr. Lam initiated via ATB. He assumed H Corp was one of the corporations controlled by Deng and that Mr. Lam had authority to initiate such transfers.

[68] Further to this last point, I note that the presentation of the supposedly false financial statements and bank records to H Corp’s representatives occurred in October 2018 and the supposedly false shareholders’ declaration and the investment agreements were presented by

Mr. Lam some time after that. The indemnity agreements were presented by Mr. Lam to Mr. Neu in December 2018. The last of the impugned transfers was made in September 2017. Therefore, the false documents did not induce the transfers. Rather, they were more in the nature of cover-up or attempts at after-the-fact justification.

[69] The facts support the Monitor's contention that it was the misrepresentations of status by the individuals in respect of H Corp, and not Long Run, that induced the transfers. It is not apparent on the record that the Individual Defendants made any supposed representations, either verbal or documentary, about or on behalf of Long Run.

[70] Even if Mr. Zhang's latest affidavit in this proceeding, which includes Mr. Neu's 2021 affidavit from the H Corp action, has the effect of remedying the evidentiary lacuna identified by the Court of Appeal in 2022 ABCA 271, the evidence of wrongdoing is on the part of the individual defendants. There is a clear, important and unresolved issue regarding on whose behalf the individuals were acting, given the multiplicity of "hats" they were wearing. There are credibility issues to be determined. The Court previously ruled in a Rule 7.1 application brought by H Corp that the determination of liability for fraud required a trial.

[71] In summary, H Corp has not met the threshold of the balance of probabilities set out in the Supreme Court of Canada's interpretation of section 19(2) in *Montreal (City)*.

I. Is this an appropriate case for the remedy of constructive trust?

[72] The imposition of a constructive trust is a remedy that the Courts consider only after a valid restitutionary claim has been made out: *Lac Minerals Ltd. v International Corona Resources Ltd.*, [1989] 2 SCR 574 at page 678. This Court also said in *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 809 (Romaine J) at paras 77-78:

[77] The onus of proving a constructive trust rests with the claimant. It is a discretionary remedy that will not be imposed without taking into account the interest of others who may be affected by granting the remedy: *Re Hoard*, 2014 ABQB 426 at para 26.

[78] As noted at para 23 of *Hoard*, given that the *BIA* provides a code by which legislators have balanced the interest of those adversely affected by the bankruptcy, the legal rights of creditors should not be defeated unless it would be unconscionable not to recognize a constructive trust. The same reasoning applies to the *CCAA*.

[73] Further, the Supreme Court of Canada has stated there are two broad categories of cases where constructive trusts may be recognized. In *Soulos v Korkontzilas*, 1997 CanLII 346 (SCC), [1997] 2 SCR 217 at para 43, McLachlin J as she was then writing for the majority, stated:

I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as

in *Pettkus v Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

[74] According to *Soulos* at para 45, there are four prerequisites for a constructive trust based on wrongful conduct:

- The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[75] For recent Alberta application, see *Hillsboro Ventures Inc v Ceana Development Sunridge Inc*, 2024 ABKB 658 at para 89 and *Zerbin v Vrbanek*, 2020 ABQB 797 at para 170, *aff'd* 2021 ABCA 317, leave to appeal *ref'd* 2022 CanLII 21684 (SCC).

[76] The wrongful conduct that engages the conscience of the Court must be that of the insolvent person, such that retention of the property by that person (or the creditors of that person) would be against conscience, as was the case in *Soulos* and *Credifinance*. It is not established on this record that Long Run received H Corp's funds on its own behalf or from Calgary Sinoenergy knowing the funds had been misappropriated from H Corp. That is an available inference from the evidence based on the fact that the Dengs, father and daughter, were directors of Long Run but it is also an equal inference that Long Run, along with H Corp, were merely the vehicles by which their machinations were carried out. I say that because H Corp's Statement of Claim at para 26 suggests that Calgary Sinoenergy and Long Run have siphoned H Corp's money elsewhere, as do paras 36 – 38 which allege fraudulent conveyance of the funds to payees unknown. By its own pleading, H Corp says it does not know whether Long Run even has the money. In other words, Long Run could also be a corporate dupe.

[77] H Corp posed its constructive trust claim on the basis of a wrongful act that results in unjust enrichment. It is not a case where the unjust enrichment is the result of gratuitous services provided by the plaintiff that increases the value of the defendant's assets in the vein of *Becker v Pettkus* or *Kerr v Baranow*. It is not a case where the defendant misappropriated a corporate opportunity that belonged to the plaintiff that resulted in the defendant acquiring a valuable property as in *Lac Minerals*. The latter case poses the important question about the type of case that ought to be recognized with a constructive trust. At page 678, La Forest J for the majority of the Supreme Court of Canada states:

- In the “vast majority” of cases, a constructive trust will not be the appropriate remedy. There is no need to award a constructive trust if the plaintiff’s claim can be satisfied by a monetary award.
- A constructive trust should only be awarded if there is a reason to grant the plaintiff additional rights that flow from a recognition of proprietary rights. One of the most important is the priority accorded to a property holder in a bankruptcy. Another is the change in value of the specific asset in question. The third is the taking by the defendant of a “specific and unique property” that the plaintiff would have otherwise acquired.

[78] Here, H Corp’s claim would be satisfied by a monetary judgment but for the fact that Long Run is insolvent. The fact that Long Run is insolvent cannot be a reason for awarding a constructive trust, particularly when there are other interests at stake: **Barnabe v Touhey**, 1995 CanLII 1672 (ONCA). Moreover, there is no specific fund in Long Run’s possession that H Corp can point to as being H Corp’s funds. There may have been comingling at one point and the transferred funds may or may not be within Long Run’s existing assets.

[79] The **Soulas** case involved the defendant realtor misappropriating an opportunity to acquire a certain piece of real estate from a client. The finding that a constructive trust is appropriate is founded upon recognized situations of equitable obligation, the existence of a duty of loyalty and the breach of that duty through the misappropriation of an opportunity to acquire a specific property. At paras 34-35, the Court notes:

[34] It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

[35] Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem “fair” in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.

[80] It is true that H Corp and Long Run are connected by a common director (Mr. Deng). The missing funds came from a \$352 million investment put together by H Corp to enable West Lake to acquire and operate the Twin Butte assets. Calgary Sinoenergy and Long Run were unrelated to the Twin Butte assets: 2022 ABCA 271 at para 12.

[81] In this case, where are the **Soulas** elements of a recognized situation of equitable obligation, the existence of a duty of loyalty and the breach of that duty? There is a legal (versus equitable) duty on all residents of Canada to not knowingly possess proceeds obtained by or derived from the commission of an offence (of which fraud and false pretences are an example): **Criminal Code**, section 354. No other particular situation of recognized equitable obligation between H Corp and Long Run nor duty by Long Run to H Corp are alleged, except that Long Run was the recipient or even only the conduit of the funds.

[82] The **Soulas** case gives an example of “intervening” creditors in a bankruptcy whose claims would be defeated by recognition of a constructive trust for wrongful conduct. It is named as a factor that prevents such recognition. A prior creditor, such as CCBT in this case, would be an equal example. See also **Barnabe v Touhey** where the Ontario Court of Appeal says:

While a constructive trust, if appropriately established, could have the effect of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that purpose. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

[83] In summary, I find that the reasons for denying that a constructive trust as a remedy here are:

- Insufficient proof that Long Run knowingly received funds obtained by fraud or misrepresentation, or played a role on its own account in perpetrating a fraud or misrepresentation against H Corp;
- Insufficient proof that the funds, formerly comingled, are still in Long Run’s possession;
- A monetary judgment would be sufficient, but for Long Run’s insolvency;
- The insolvency of Long Run is not a reason to award a constructive trust;
- There is no specific and unique, or even identifiable, property claimed by H Corp that engages the constructive trust concept;
- H Corp has not established a situation of recognized equitable obligation and breach of a corresponding duty that renders Long Run’s continued possession of the funds (if that is indeed the case) contrary to conscience.

J. The Role of the Equities

[84] Consideration of the equities of this case is the confluence point of all the theories for determining whether a constructive trust is indicated. Those theories in totality present these questions:

- Whether there is a juristic reason that negates an unjust enrichment claim;

- Whether there are factors (including the interests of other creditors) that would render imposition of a constructive trust unjust (the 4th **Soulas** factor);
- Whether it would be contrary to good conscience not to recognize a constructive trust in these circumstances.

[85] These may be variations of the same question of the role of the equities.

[86] Even where the strength of the case for wrongful conduct is established to the required standard, it would still be necessary to have regard to the equities to determine whether the claimant's claim should be preserved where there are **CCAA** proceedings. That is not the case here. Admittedly, in the case before me, the strength of H Corp's claim against Long Run features prominently in equitable considerations.

[87] In looking at the equities, I first ask myself the question of whether it is advisable or even legally possible to amend the transaction as suggested by H Corp?

[88] The authority to do so, says H Corp, lies in section 11 which gives a wide discretionary power to the Court to make any Order it considers appropriate in the circumstances. While making the requested Order may be theoretically possible, the question is whether I *should* make it. I am guided by the **CCAA**'s objective, summarized in the **COPL** case at para 17 as:

The objective of the **CCAA** is to attempt to avoid the social and economic losses which result from the liquidation of an insolvent company. The typical **CCAA** case involves an attempt to facilitate the reorganization and survival of a pre-filing debtor company so that it can remain in an operational state. Where such a goal cannot be accomplished liquidation, receivership or the **Bankruptcy and Insolvency Act** regime will apply. The **CCAA** also has the objectives of maximizing creditor recovery, the preservation of going concern value, the preservation of jobs and communities, and the enhancement of the credit system generally. See **9354-9186 Québec Inc v Callidus Capital Corp**, 2020 SCC 10 at paras 40-42.

[89] I need to be realistic about what would happen if I were to purport to change the transaction as H Corp asks that I do. I see these consequences:

- The Subscription Agreement is a comprehensive, complex and detailed series of inter-related promises and obligations, meticulously and intensely negotiated between sophisticated arms-length parties. I would be forcing those parties into a business arrangement that they did not agree to and do not want. The changes could have consequences, unforeseen by me, that adversely affect either or both parties or the viability of the transaction itself. I would be interfering with the right of parties to freely enter into commercial agreements. The Court should not step in here and rewrite the agreement.
- I would be forcing either Hiking or CCBT's principals to become unwitting (and unwilling) indemnitors of Long Run and Calgary Sinoenergy with regard their putative liability to H Corp, an unfair result when neither had anything to do with the transactions between H Corp and the Debtors giving rise to H Corp's action.

[90] Hiking states in no uncertain terms that it will not enter into a transaction that is not the one presented to the Court. It is a reasonable position to take. The parties have negotiated in good faith so far. Hiking is taking on a lot of risk as it is.

[91] The other equities that come into play are:

- The strength of H Corp's case: H Corp may have a triable issue but has not proven fraud or misrepresentation on a balance of probabilities based on the record. The facts are too ambiguous at this point. There are credibility issues to be tested.
- H Corp must meet the summary judgment standard. Otherwise, most any allegation of fraud or misrepresentation could have the effect of stopping a **CCAA** proceeding in its tracks. The integrity of the **CCAA** regime could be thereby compromised.
- There is no identifiable trust property. The amount of the trust claim is uncertain. H Corp's own forensic expert recognizes that not all outflows made by Calgary Sinoenergy and Long Run are necessarily accounted for.
- Neither Hiking nor CCBT (or its principals) are tainted by any alleged wrongdoing on the part of the Individual Defendants and it would be unjust to scuttle the transaction for them or make them indemnitors for wrongdoing yet to be proven.
- CCBT is not enriched by a failed (or in this case, disclaimed constructive trust claim) but is merely recovering (or in this case, continuing to be secured for) what it is owed: **3 Eau Claire Developments Inc (Re)**, 2015 ABQB 208 at para 51.
- While I concede that the Individual defendants did and said some suspicious things that suggest fraud on their part, H Corp has not shown that Long Run, either on its own or through the agency of the individuals, is responsible for the suspicious things and that it would therefore be unconscionable for H Corp not to recover its claim from the assets of Long Run. Compelling or extraordinary grounds have not been shown.
- In greater context, I would be violating the "single proceeding model" espoused in **Century Services** and **Laurentian University** by permitting the constructive trust claim to be separately litigated, potentially destabilizing Canada's insolvency regime.

[92] The main counterbalancing factor is the interests of Long Run's secured creditors, the Purchaser and the other financial stakeholders such as contractual parties, the municipalities owed taxes, the employees, suppliers and so on. The interests of the creditors and others, as represented in the Subscription Agreement and RVO, can be characterized in any of these ways:

- as a juristic reason for denying unjust enrichment;
- a factor that negates a constructive trust based on wrongful conduct, or
- as aligning with good conscience in a constructive trust analysis.

[93] However characterized, the same conclusion is reached. The equities favour approval of the Subscription Agreement/RVO in the present form, without amendment. I can stretch my imagination and contemplate amending the Subscription Agreement as H Corp requests under the authority granted by section 11. But I am not going to actually do it. I am not satisfied that is fair or not harmful to do so.

[94] Chief Justice Morawetz cautions at para 33 of *Harte Gold*:

The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the *CCAA* and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[95] Is H Corp being treated fairly and equitably by not preserving its claim? For all the reasons set out above, I conclude that its case is not proven to the required standard and that the circumstances do not give rise to a remedy of constructive trust. H Corp is then left with an unsecured claim. The fact that unsecured claims will not be paid is a function of Long Run's insolvency, not the Subscription Agreement and RVO. The same outcome would arise if Long Run were simply to go into bankruptcy.

[96] As stated, the *BIA* and *CCAA* are deemed to comprise a complete insolvency code in Canada. In a bankruptcy, H Corp would face the same issues of having to meet the required standard of proof and establishing the constituent elements of a constructive trust when its claim is adjudicated in a bankruptcy. H Corp is no further ahead but CCBT and other financial stakeholders are adversely affected in a severe way.

[97] While I say the test in *Harte Gold* is met, the equities also favour approval of the Subscription Agreement/RVO without amendment.

K. Neufeld Objection

[98] Abe Neufeld is a rural landowner who is the lessor under a registered surface lease with Long Run as lessee. The previous owner of the property had commenced Action # 2204 00354 in June 2022 against Long Run that purported to be a class action on behalf all Alberta Long Run lessors. In that action, the plaintiff claimed (as a representative plaintiff) that Long Run was in default of rentals under the surface leases and sought not just the unpaid rentals but also a further \$30 million in consequential damages, and then punitive damages. The statement of claim (paraphrasing here) accuses Long Run of deliberately withholding the rental payments as a corporate strategy to the financial detriment of the landowners.

[99] In August 2022, Mr. Neufeld was substituted as the representative plaintiff in an amended statement of claim. The claim for the additional \$30 million was clarified as consisting of damages for loss of investment opportunity. The plaintiff estimates that there are 6,415 members in the proposed class and says Long Run has been unjustly enriched by the use of money otherwise payable to the class members.

[100] No statement of defence has yet been filed and no certification application has been made.

[101] The outstanding rental payments are already shown in the Subscription Agreement as a retained liability in the amount of \$6.5 million. Mr. Neufeld himself has been fully paid.

[102] The law firm KMSC Law LLP says in its brief on behalf of Mr. Neufeld that it also represents 54 different landowners with, in total, 140 surface locations where Long Run is lessee. The brief says these clients, unnamed, support the relief sought by Mr. Neufeld and adopt his submissions. In the brief, “the Neufeld Claim” is defined as “outstanding lease rentals and interest Long Run knowingly withheld from Albertan landowners since 2020.”

[103] In this proceeding, Mr. Neufeld asks that the Subscription Agreement be amended to designate the Neufeld Claim as a retained liability and that the Purchaser be made to front additional cash of \$7.5 million (for outstanding rentals and interest) to be paid to landowners upon closing. During the hearing, counsel for Mr. Neufeld also suggested that the claim for consequential damages was also part of the Neufeld Claim sought to be retained. He described the claim for consequential damages as an “open question” and argued that the Neufeld Claim should be retained so that certification can proceed, and the question of consequential damages adjudicated.

[104] Mr. Neufeld’s grounds for this relief are:

- Making the Neufeld Claim a transferred liability is logically inconsistent with making the outstanding surface lease rentals a retained liability.
- Making the Neufeld Claim a retained liability is more favorable to the landowners.
- Should the Subscription Agreement with RVO not close, landowners will not be materially worse off than if the transaction proceeds in its current form.
- Designating the Neufeld Claim as a retained liability discourages exploitation of landowners and the land itself by O & G operators.

[105] The Monitor responds:

- KMSC Law has not disclosed who its other 54 clients are, so it is impossible for the Monitor to assess the validity of their claims. Furthermore, the class has not been certified and therefore the law firm cannot purport to speak on behalf of all Alberta landowners dealing with Long Run.
- The **Surface Rights Act**, which governs rights and obligations between landowners and operators, does not provide for the payment of interest and damages and so the claimed losses are not recoverable.
- Furthermore, recovery of surface lease rentals falls within the exclusive jurisdiction of the Surface Rights Board under section 36.
- The Court should not rewrite the Subscription Agreement.
- Mr. Neufeld’s suggested revisions will have adverse impact on the secured creditor.

[106] I find that:

- There is no logical inconsistency in making the Neufeld Claim a transferred liability while recognizing the outstanding rental arrears as a retained liability. The Purchaser is entitled to make the choice of which liabilities are necessary to be retained. The legal character of

the consequential damages portion of the claim and the contractual right to receive rent payments are essentially different such that separating them is not illogical.

- The Monitor is correct that the **Surface Rights Act** does not provide for interest or damages. Neither does the lease agreement between Mr. Neufeld and Long Run (both as successors) except for property damage. I assume the agreement is a prototype.
- I should not amend the Subscription Agreement for the same reasons cited earlier in this decision. Requiring the additional injection of cash from the Purchaser not only rewrites the agreement but allows landowners to jump the priority-queue, over CCBT's principals.
- Mr. Neufeld's claim of unjust enrichment fails on the basis that there has been no deprivation since the outstanding rentals are carried over as retained liabilities and, moreover, ultimately guaranteed by the Province under section 36 of the **Surface Rights Act**. While the claims for interest and consequential damages are not preserved, they are speculative and legally uncertain. Those latter claims fail for the same reason that H Corp's does in that they are not proven on a balance of probabilities.
- That the landowners are prepared to accept a "scorched earth" approach by allowing Long Run to go into bankruptcy or fall to the Orphan Wells Association because the landowners would not be worse off than under the Subscription Agreement runs counter to any and all objectives of the **CCAA**.
- That the oil and gas industry should stop exploiting landowners and blighting Alberta's agricultural landscape is not a message for this Court to deliver within a **CCAA** context. Such a message is political in nature and should be addressed by government, regulators, policymakers and lobby groups.

[107] Accordingly, Mr. Neufeld's requested to amend the Subscription Agreement is denied.

[108] Mr. Neufeld's final concern relates to a letter sent by the Monitor to landowners dated October 22, 2024 which, in contemplation of presenting the Subscription Agreement (with outstanding surface rentals designated as a retained liability) to the Court for approval, asks them if they are prepared to accept fifty cents on the dollar. The letter stipulates payment within 10 days of closing of the Subscription Agreement. Mr. Neufeld asks that I rescind the letter as part of my section 11 authority.

[109] Counsel for Mr. Neufeld expressed these objections about the letter:

- It is exploitative and seeks to gain an unfair advantage of a 50% discount for Long Run and the Purchaser, at the expense of the landowners.
- It was sent to represented clients (represented by KSMC LLP in the class action lawsuit) without directing them to seek independent legal advice.

[110] As of the date of the Third Supplement to the Monitor's Fifth Report (November 14, 2024), some 41 landowners had accepted the offer.

[111] I do not find the letter offensive for these reasons:

- The letter made a straightforward business proposal. It gave each recipient over a month to think it over or do something about it. It did not prevent any landowner from seeking independent legal advice.

- The class has not been certified. The Monitor at the time of sending the letter could not have known which landowners are clients of KSMC LLP. The law firm did not disclose the identity of any of its landowner clients apart from Mr. Neufeld prior to the letter being sent. After the letter was sent, the only further known client is a numbered company who was a recipient and whose letter was attached to a November 13, 2024 affidavit filed on behalf of Mr. Neufeld.
- As a Court-appointed officer, the Monitor presumptively acts in good faith. Acting in good faith is now a statutory element for consideration in **CCAA** proceedings: section 18.6; **Bellatrix** at para 99. I asked Mr. Neufeld's counsel if he felt the letter exhibited bad faith. He said he did not.
- It is within the Monitor's duty and function to attempt to compromise the Debtor's liabilities at any time before final disposition in **CCAA** proceedings. Nothing untoward occurred here.

[112] It is wrong for me to second-guess the Monitor's actions here. If such a thing as rescinding the letter is possible within section 11, I decline to do so for the reasons given.

L. Restricted Access Order

[113] The Monitor requests a Restricted Access Order (also known as a Sealing Order) over Confidential Appendix "A" to the Fifth Report of the Monitor (the "Confidential Appendix"). Since the Transaction has yet to close, and the Confidential Appendix contains confidential information regarding the bids received in the SISP, the Monitor submits that the disclosure of the information contained in the Confidential Appendix could prejudice any further efforts to market and sell the business and assets of the Debtors should the transaction fail to close. Such an outcome would be prejudicial to the Debtors and the public interest inherent in the sale of distressed companies and their assets via an insolvency process.

[114] The request for a Restricted Access Order, Sealing Order or any compromise of the open Courts principle is governed by **Sierra Club of Canada v Canada (Minister of Finance)**, [2002] 2 SCR 522, 2002 SCC 41 as refined by **Sherman Estate v Donovan**, 2021 SCC 25.

[115] The applicant must show on a balance of probabilities that:

- normal Court openness presents a serious risk to an important interest;
- the order is necessary to prevent the risk because alternative measures are inadequate; and
- as a matter of proportionality, the benefits outweigh the negative effects.

[116] It is recognized in Alberta and elsewhere that commercial interests, particularly in the context of Court supervised insolvency proceedings, are an important interest deserving of protection: for example, see **Alberta Treasury Branches v Elaborate Homes Ltd**, 2014 ABQB 350 at para 54.

[117] The risk here is that if the sale falls through or the information in the confidential appendix is disclosed, disclosure will adversely affect the value of the assets to the detriment of the stakeholders.

[118] The form of Order appears to be the least intrusive means of managing the risk, being specific in scope and limited in time (3 months after the date of hearing). The Court's process

for giving notice to the media has been complied with and no contrary representations have been presented.

[119] Accordingly, I find the legal test is met and I grant the order.

M. Summary of Rulings

[120] In the result, and to summarize:

- I accept the Monitor's submissions (Sections B & C above) that the Subscription Agreement/RVO as presented by the Monitor represents the optimal outcome for Long Run and its stakeholders, best advances the remedial objectives of the **CCAA** and meets the test and expectations set out in **Harte Gold**. I therefore grant approval of the Subscription Agreement and RVO in accordance with the form of Order presented to the Court on November 14, 2024.
- In so doing, I approve the Releases as requested by the Monitor as part of the transaction, for the reasons set out in Section D above.
- Necessarily implicit in my approval of the transaction, I deny the relief sought by H Corp and Mr. Neufeld to vary the transaction as they respectively requested, for the reasons set out in Sections E to J (H Corp) and Section K (Neufeld) above.
- I also deny Mr. Neufeld's request to rescind the Monitor's letter to landowners of October 22, 2024 as set out in Section K above.
- The Restricted Access Order (or Sealing Order) as requested is granted.

[121] Should the parties or some of them wish to address costs of this application, they may do so by January 3, 2025 by each submitting a letter no more than 3 single-spaced pages in length, excluding exhibits and authorities, and supported by a draft Bill of Costs.

Heard on the 14th day of November, 2024.

Dated at the City of Calgary, Alberta this 29th day of November, 2024.

Douglas R. Mah
J.C.K.B.A.

Appearances:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

Dustin Olver and Brett Wilson, FTI Consulting Canada Inc
for the Monitor

Kelly Bourassa, Warren Nishimura, Farrukh Ahmad, Blake Cassels & Graydon LLP
for China Construction Bank, Toronto Branch

John Regush, Dentons Canada LLP
for Long Run Exploration Ltd and Calgary Sinoenergy Investment Corp.

Wendy Barber, Interim Chief Executive Officer
for Long Run Exploration Ltd

Trevor Batty, Field LLP
for Henenghaixin Corp.

Ryan Zahara, MLT Aikins
for Orphan Well Association

Kristian Toivonen, KMSC Law LLP
for Abe Neufeld and unnamed surface lessors

Michael E. Swanberg, Reynolds Mirth Richard & Farmer
for Birch Hills County, Big Lakes County and Lac Ste Anne County

Jessica Cameron, Fasken Martineau Dumoulin LLP
for TC Energy and Nova Gas Transmission Ltd.

Alexander W. Yiu, Ackroyd LLP
for Paddle Prairie Metis Settlement

Curtis Auch, Brownlee LLP
for Mackenzie County, Flagstaff County, Lamont County, the Municipal District of Smoky River, and Sturgeon County (collectively, the “Municipalities”)

Randal Van de Mosselaer, Osler, Hoskin & Harcourt LLP
for Canadian Natural Resources Limited

Colin LaRoche, Department of Justice Canada
for Indian Oil and Gas Canada

Chase Van Sant, Burnet, Duckworth & Palmer LLP
for Obsidian Energy

Danielle Marechal and Danica Jorgenson, Cassels, Brock & Blackwell LLP
for Hiking Group Shandong Jinyue Int’t Trading Corporation and for the Purchaser

Peng Zuo, Genesis Law Professional Corp.
for Bank of China (Qingdao Branch)

Kristopher Lensink, Government of Alberta
for Alberta Energy and Minerals Energy Team

George Wong,
for Alberta Energy Regulator

**Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah**

Errors have now been corrected as follows:

- page 3, last bullet point, should be "are necessary" not "is"
- page 5, para 14, third bullet, should be "5th report" not "5h";
- page 7, para 27, second last line, insert "Calgary" before "Sinoenergy";
- page 15, para 66, second bullet, last line, insert the word "funds" between "the" and "was";
- page 16, para 67, fourth bullet, should be "No Court" not "No Courts";
- page 17, para 69, first line, insert the word "support" between "facts" and "the";
- page 17, para 72, end of first line, should be "the Courts consider" not "the Courts considers";
- page 20, para 80, last line, should be "para 12" not "paras 10 & 13",
- Counsel's first name corrected to "Farrukh" from "Farruk".

**Corrigendum of the Reasons for Decision
of
The Honourable Justice Douglas R. Mah**

List of counsel have been updated as follows:

Kelsey Meyer, Michael Selnes and Kaamil Khalfan, Bennett Jones LLP
for the Monitor, FTI Consulting Canada Inc.

Kyle Kashuba and Bilal Qureshi, Torys LLP
for the Monitor, FTI Consulting Canada Inc.

TAB 9

CITATION: Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al., 2022
 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF
 COMPROMISE OR ARRANGEMENT OF
 JUST ENERGY GROUP INC., JUST
 ENERGY CORP., ONTARIO ENERGY
 COMMODITIES INC., UNIVERSALE
 ENERGY CORPORATION, JUST
 ENERGY FINANCE CANADA ULC,
 HUDSON ENERGY CANADA CORP.,
 JUST MANAGEMENT CORP., JUST
 ENERGY FINANCE HOLDING INC.,
 11929747 CANADA INC., 12175592
 CANADA INC., JE SERVICES HOLDCO
 I INC., JE SERVICES HOLDCO II INC.,
 8704104 CANADA INC., JUST ENERGY
 ADVANCED SOLUTIONS CORP., JUST
 ENERGY (U.S.) CORP., JUST ENERGY
 ILLINOIS CORP., JUST ENERGY
 INDIANA CORP., JUST ENERGY
 MASSACHUSETTS CORP., JUST
 ENERGY NEW YORK CORP., JUST
 ENERGY TEXAS I CORP., JUST
 ENERGY, LLC, JUST ENERGY
 PENNSYLVANIA CORP., JUST
 ENERGY MICHIGAN CORP., JUST
 ENERGY SOLUTIONS INC., HUDSON
 ENERGY SERVICES LLC, HUDSON
 ENERGY CORP., INTERACTIVE
 ENERGY GROUP LLC , HUDSON
 PARENT HOLDINGS LLC, DRAG

)
)
) *Jeremy Dacks and Marc Wasserman*,
) Counsel to the Just Energy Group

) *Tim Pinos, Ryan Jacobs and Alan Merskey*,
) Canadian Counsel to LVS III SPE XV LP,
) TOCU XVII LLC, HVS XVI LLC, OC II
) LVS XIV LP, OC III LFE I LP and CBHT
) Energy I LLC

) *David H. Botter and Sarah Link Schultz*,
) U.S. Counsel to LVS III SPE XV LP, TOCU
) XVII LLC, HVS XVI LLC, OC II LVS XIV
) LP, OC III LFE I LP and CBHT Energy I
) LLC

) *Heather L. Meredith and James D. Gage*,
) Canadian Counsel to the Agent and the
) Credit Facility Lenders

) *Howard A. Gorman and Ryan E. Manns*,
) Counsel for Shell Energy North American
) (Canada) Inc. and Shell Energy North
) America (U.S.)

) *Danielle Glatt*, Counsel to U.S. Counsel for
) Fira Donin and Inna Golovan, in their
) capacity as proposed class representatives in
) *Donin et al. v. Just Energy Group Inc. et al.*
) and Counsel to U.S. Counsel for Trevor
) Jordet, in his capacity as proposed class
) representative in *Jordet v. Just Energy*
) *Solutions Inc.*

) *David Rosenfeld and James Harnum*,
) Counsel for Haidar Omarali in his capacity

MARKETING LLC JUST ENERGY	)	as Representative Plaintiff in <i>Omarali v. Just</i>
ADVANCED SOLUTIONS LLC,	)	<i>Energy</i>
FULCRUM RETAIL ENERGY LLC,	)	
FULCRUM RETAIL HOLDINGS LLC,	)	<i>Robert Kennedy</i> , Counsel for BP Energy
TARA ENERGY, LLC, JUST ENERGY	)	Company and certain of its affiliates
MARKETING CORP., JUST ENERGY	)	
CONNECTICUT CORP., JUST ENERGY	)	<i>Jessica MacKinnon</i> , Counsel for Macquarie
LIMITED, JUST SOLAR HOLDINGS	)	Energy LLC and Macquarie Energy Canada
CORP. and JUST ENERGY (FINANCE)	)	Ltd.
HUNGARY ZRT.	)	
	)	<i>Bevan Brooksbank</i> , Counsel for Chubb
Applicants	)	Insurance Co. of Canada
	)	
– and –	)	<i>Alexandra McCawley</i> , Counsel for Counsel
	)	to Fortis BC Energy Inc.
MORGAN STANLEY CAPITAL GROUP	)	
INC.	)	<i>Robert I. Thornton</i> , <i>Rebecca Kennedy</i> ,
	)	<i>Rachel B. Nicholson</i> and <i>Puya Fesharaki</i> ,
Respondents	)	Counsel to FTI Consulting Canada Inc., as
	)	Monitor
	)	
	)	<i>John F. Higgins</i> , U.S. Counsel to FTI
	)	Consulting Canada Inc., as Monitor
	)	
	)	<i>Ganesh Yadav</i> , self-represented
	)	
	)	<i>Mohammad Jaafari</i> , self-represented
	)	
	)	HEARD: November 2, 2022

ENDORSEMENT

MCEWEN J.

[1] The Applicants (collectively the “Just Energy Entities”) bring a motion seeking approval of a going-concern sale transaction (the “Transaction”) for their business. They seek to implement the Transaction through a proposed draft reverse vesting order (the “RVO”) and other related relief.

[2] The Just Energy Entities provided the court with two draft orders in furtherance of their position. The first is the RVO for the Transaction. The second is an order (the “Monitor’s Order”)

giving FTI Consulting Canada Inc. (the “Monitor”) enhanced powers to implement the RVO and other related relief, including a stay extension, approval of the Monitor’s reports and fees and a sealing order.

[3] I granted the two orders with reasons to follow. I am now providing those reasons.

BACKGROUND

[4] Just Energy Group Inc. (“Just Energy”) and its subsidiaries collectively form the Just Energy Entities. Just Energy is primarily a holding company that operates subsidiaries in Canada and the U.S.

[5] Just Energy is incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (“CBCA”). It maintains dual headquarters in Ontario and Texas. Just Energy’s shares are listed on the Toronto Stock Exchange and the New York Stock Exchange.

[6] The Just Energy Entities are a retail energy provider. Their principal line of business consists of purchasing retail energy and natural gas commodities from large energy suppliers and reselling them to residential and commercial customers. The Just Energy Entities service over 950,000 residential and commercial customers across Canada and the U.S. and employ over 1,000 employees.

[7] The Just Energy Entities’ business is highly regulated. This is because of its nature. The business depends on many licenses, authorizations and permits across multiple jurisdictions in both Canada and the U.S. Without these approvals the Just Energy Entities cannot market or sell energy to its customers.

[8] On March 9, 2022, the Just Energy Entities obtained protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c.C-36 (the “CCAA”) pursuant to an Initial Order under the CCAA.

[9] The Just Energy Entities were forced to file for protection under the CCAA after an extreme winter storm in Texas. The February 2021 storm, together with Texas regulators’ response to the storm, posed a significant liquidity challenge that precipitated the filing. In or about the time of the filing, the Just Energy Entities held an aggregate book value of approximately CDN \$1.069 billion, with an aggregate book value of liabilities around CDN \$1.28 billion.

[10] There is a complicated array of secured creditors. Insofar as the Transaction is concerned, the Pacific Investment Management Company LLC (“PIMCO”) manages a number of funds which comprise a portion of the secured creditors and/or the DIP Lenders. These entities constitute the purchaser in the Transaction (the “Purchaser”).

[11] There are also several other secured creditors, including the Credit Facility Lenders and secured suppliers. They have reached an agreement with the Just Energy Entities and the Purchaser with respect to the Transaction.

[12] In September 2021, this court granted a Claims Process Order to establish a process to determine the nature, quantum and validity of the claims against the Just Energy Entities.

[13] In May 2022, the Just Energy Entities brought a motion (the “Meetings Order Motion”) seeking, amongst other things, authorization to hold a creditors’ meeting to vote on their proposed Plan of Compromise and Arrangement.

[14] Some unsecured litigation claimants opposed the Meetings Order Motion: primarily, two uncertified U.S. class actions (together the “U.S. Class Actions”), a certified Ontario class action (the “Omarali Class Action”) and plaintiffs in four actions brought in Texas by approximately 250 claimants (the “Mass Tort Claims”).

[15] Following my June 10, 2022 Endorsement, the Plan Sponsor—that consisted of the DIP Lenders, one of their affiliates and other stakeholders—withdrew their support for the proposed Plan of Compromise and Arrangement.

[16] Thereafter, the Just Energy Entities, the Plan Sponsor and other supporting stakeholders pivoted to implementing a sales and investment solicitation process (the “SISP”) in accordance with the new Support Agreement dated August 4, 2022 (the “SISP Support Agreement”). The SISP included a stalking-horse bid by the Purchaser.

[17] On August 18, 2022, I granted an order (the “SISP Approval Order”) that, amongst other things, approved the SISP and SISP Support Agreement with modest modifications.

[18] The SISP was conducted over a 10-week period. It was conducted in accordance with the SISP Approval Order and was well-publicized. The Just Energy Entities negotiated non-disclosure agreements with potential bidders, facilitated access to the data room for those parties, responded to numerous due diligence requests and offered management presentation meetings. Four written notices of intention to bid (“NOIs”) were received. Ultimately, however, no bids were received; therefore, the Transaction was declared the successful bid, subject to court approval.

[19] It bears noting that, in addition to the SISP, the business of the Just Energy Entities was broadly and extensively marketed over the past approximately three years. No meaningful proposals were ever received.

[20] Also, at the time of the SISP Approval Order, the Just Energy Entities had been negotiating with their key stakeholders for roughly 1.5 years.

[21] Further, U.S. Class Actions were involved in the SISP but ultimately did not file a NOI or engage in further discussions with the Just Energy Entities in the SISP.

[22] The value that the Purchaser is paying for the Just Energy Entities is approximately U.S. \$444 million plus the assumption of several liabilities, all of which provides recovery for the approximately CDN \$1 billion in secured claims.

[23] Last, all equity interests of Just Energy and Just Energy (U.S.) Corp. (“JEUS”) that exist prior to the proposed implementation of the RVO will be deemed to be terminated, cancelled or redeemed following the closing. The Purchaser will own all the issued and outstanding shares of JEUS. In turn, JEUS will own all of the issued and outstanding shares of Just Energy and the other acquired entities. The Just Energy Entities will continue to control their own assets, other than the excluded assets, and will remain liable for their respective assumed liabilities.

THE ISSUES

[24] There are two issues on this motion:

- whether the Transaction should be approved, including the RVO and related relief; and
- whether the Monitor should receive the enhanced powers requested in the Monitor’s Order with respect to the implementation of the RVO and the related relief, including the stay extension, approval of the Monitor’s reports and fees and a sealing order.

[25] The secured creditors consent to the relief sought. Neither the U.S. Class Actions, the Omarali Class Action nor the Mass Tort Claims opposed the relief sought. The only opposition comes from Mr. Ganesh Yadav, a shareholder, and Mr. Mohammad Jaafari, a former employee of Just Energy who is pursuing a claim in the Tokyo District Court of Japan alleging wrongful termination.

[26] I will first deal with the issues surrounding the RVO and the Monitor’s Order. Thereafter I will outline the two specific claims of Mr. Yadav and Mr. Jaafari and explain why I do not believe their claims affect the relief sought by the Just Energy Entities.

REVERSE VESTING ORDERS

[27] A reverse vesting order generally involves a series of steps, whereby:

- (a) the purchaser becomes the sole shareholder of the debtor company;
- (b) the debtor company retains its assets, including key contracts and permits; and

- (c) the liabilities not assumed by the purchaser are vested out and transferred, together with any excluded assets, into a newly incorporated entity or entities.¹

The assets and liabilities are vested out in the separate entity or entities (which are referred to in the RVO as “Residual Cos.”) which may then be addressed through a bankruptcy or similar process. The reverse vesting order is therefore contrasted with a traditional vesting order in which the assets of a debtor company that the purchaser acquires are vested in the purchaser free and clear of any encumbrances or claims, other than those assumed by the purchaser, as contemplated by s. 36(4) of the CCAA. The purchase price stands in place of the assets and is available to satisfy creditor claims, in whole or in part, in accordance with their pre-existing priority.

The Law relating to Reverse Vesting Orders

[28] I begin my analysis with a general review of the law.

[29] The jurisdiction to approve a transaction through a reverse vesting order is found in s. 11 of the CCAA. Section 11 gives this court broad powers to make orders that it sees fit, subject to the restrictions set out in the statute. There is no provision in the CCAA that prohibits a reverse vesting order structure: see *Quest University (Re)*, 2020 BCSC 1883, at para. 157.

[30] Some courts have also held that s. 36 of the CCAA confers jurisdiction. Section 36 contemplates court approval for the sale of a debtor company’s assets out of the ordinary course of business: see *Black Rock Metals Inc.*; *Quest University (Re)*, at para. 40.

[31] In any event, it is settled law that courts have jurisdiction to approve a transaction involving a reverse vesting order. Moreover, courts agree that the factors set out in s. 36(3) of the CCAA should also be considered on a motion to approve a sale, including one involving a reverse vesting order. Section 36(3) stipulates that the court is to consider, among other things,

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

¹ *Arrangement relatif à Black Rock Metals Inc.*, [2022 QCCS 2828](#), at para. 85, leave to appeal to QCCA refused, 2022 QCCA 1073.

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

[32] In *Harte Gold Corp. (Re)*, 2022 ONSC 653, Penny J. held that the s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank of Canada v. Soundair Corp* (1991), 4 O.R. (3d) 1 (C.A) for the approval of the sale of assets in an insolvency. They are as follows:

- whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- the interests of all parties;
- the efficacy and integrity of the process by which offers have been obtained; and
- whether there has been unfairness in the working out of the process.

[33] Reverse vesting orders are relatively new structures. I agree that reverse vesting orders should not be the “norm” and that a court should carefully consider whether a reverse vesting order is warranted in the circumstances: see *Harte Gold Corp. (Re)*, at para. 38; *Black Rock Metals Inc.*, at para. 99. That said, reverse vesting orders have been deemed appropriate in a number of cases: see *Quest University (Re)*, at para. 168, *Harte Gold Corp. (Re)*, at para. 77 and *Black Rock Metals Inc.*, at para. 114.

[34] The aforementioned cases approved reverse vesting orders in circumstances where:

- The debtor operated in a highly-regulated environment in which its existing permits, licenses or other rights were difficult or impossible to reassign to a purchaser.
- The debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser.
- Where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction.

[35] Given the supporting jurisprudence, I will now discuss why the RVO should be granted and why the Transaction should be approved.

The RVO should be granted

[36] The Just Energy Entities' business, as noted, is highly regulated and depends almost entirely on a substantial number of licenses, authorizations and permits in multiple jurisdictions in Canada and the U.S.

[37] As set out in the affidavit of Mr. Michael Carter, the Chief Financial Officer to the Just Energy Entities (at para. 57), the value of the Just Energy Entities' business arises predominantly from the gross margin in their customer contracts. The business is wholly dependent on the Just Energy Entities holding several non-transferable licenses and authorizations that permit their operation in Canada and the U.S. and in their agreements with over 100 public utilities, which allow the Just Energy Entities to provide natural gas and electricity in certain markets to their customers.

[38] Currently the Just Energy Entities hold at least:

- Seventeen separate licenses and authorizations in five provinces in Canada which allows them to market natural gas and electricity in the applicable provincial markets, eight of which are non-transferrable and non-assignable, with the remaining nine only assignable with leave of the regulator.
- Five separate import and export orders issued by the Canadian Energy Regulator ("CER"), all of which are non-transferrable and non-assignable.
- Three separate registrations with the Alberta Electricity System Operator (the "AESO") in Alberta and with the Independent Electricity System Operator ("IESO") in Ontario, all of which are either non-transferrable or only assignable with leave.
- Six licenses in Nevada and New Jersey to allow them to market natural gas and/or electricity in the applicable states, all of which are non-transferrable.
- Twenty-five licenses in Connecticut, Delaware, Maine, Maryland, Ohio, Pennsylvania and Virginia to allow them to market natural gas and/or electricity in the applicable states, all of which may only be transferred with the prior authorization of the applicable regulator in each jurisdiction.
- Eighteen electricity and/or natural gas provider licenses or authorizations in California, Illinois, Massachusetts, Michigan, and New York, where no process for transferring the licenses or authorizations is prescribed in the applicable statutes.
- Five retail electricity provider certifications in Texas which may only be transferred with the authorization of the Public Utility Commission of Texas ("PUCT").

- Three separate export authorizations issued by the Department of Energy (“DOE”) in the U.S., all of which may only be transferred with the prior authorization of the DOE’s assistant secretary.
- Seven separate market-based authorizations issued by the Federal Energy Regulatory Commission (“FERC”) in the U.S. which may only be transferred with the prior authorization of FERC.

[39] As further deposed by Mr. Carter, all the provincial, state, market participation, export and import orders, licenses and authorizations held by the Just Energy Entities are either non-transferrable, capable of transfer only with the approval of the applicable regulator, or provide for no clear regulatory process for the transfer of such authorizations.

[40] On Mr. Carter’s analysis, the RVO would not hamper the existing licenses, authorizations, orders and agreements. As such, he deposes that the RVO structure is the only feasible structure for the Transaction (at para. 59). Any other structure would risk exposing most of the 89 licenses upon which the Just Energy Entities’ business is founded. Mr. Carter also deposes (at para. 75) that if a traditional vesting order was granted, the Purchaser would be required to participate in a separate regulatory process in five Canadian provinces, 15 U.S. states and with federal agencies in both Canada and the U.S. to try and obtain transfers of the 89 licenses, authorizations and certifications or the issuance of new licenses, authorizations and certifications. This risk and uncertainty would affect the value of a sale to any other purchaser. For this reason, the benefit of the RVO is clear: it preserves the necessary approvals to conduct business.

[41] Additionally, Mr. Carter (at para. 60) deposes that the Just Energy Entities are party to a myriad of hedging transactions. This includes hedge transactions with commodity suppliers to minimize commodity and volume risk, foreign exchange hedge transactions and hedges for renewal energy credits, many of which are fundamental to the Just Energy Entities’ ability to effectively operate their business and non-transferrable. Moreover, any U.S. tax attributes resident in the Just Energy Entities would generally be unable to be utilized in the go-forward business where the Transaction structure has a traditional asset sale vesting order.

[42] No stakeholder disputes Mr. Carter’s evidence. More specifically, no stakeholder disputes the importance of maintaining the 89 current licenses, authorizations and certifications listed above. And, no stakeholder disputes the fact that under a traditional asset sale and approval and vesting order structure, a purchaser would have to apply to the various agencies and regulators for transfers of the aforementioned licenses, etc.

[43] I agree with the Just Energy Entities, who are supported by the Monitor. Given the above, the RVO sought is the only way to achieve the preservation of the licenses, authorizations and certifications necessary for the ongoing business operations of the Just Energy Entities. This includes transferring the excluded assets into the two Residual Cos., one in Canada and one in the U.S. as is typically the case in reverse vesting orders.

[44] The fact that the Just Energy Entities has been operating for approximately 19 months since the CCAA filing is critical. As noted by Penny J. in *Harte Gold Corp. (Re)*, at para. 72, time is not on the side of a debtor company facing financial challenges. I agree.

[45] For all the reasons above, I am satisfied that the RVO is appropriate.

[46] I now turn to the s. 36(3) factors.

The Transaction is fair and reasonable

The process leading to the proposed sale was reasonable

[47] The Transaction was developed by the Just Energy Entities in consultation with the Monitor and its financial advisor, Mr. Mark Caiger, the Managing Director, Mergers & Acquisitions at BMO Nesbitt Burns Inc., as well as the Purchaser and other secured lenders. As noted, the SISP was approved by this court and thereafter conducted as per the provisions of the SISP Approval Order. As set out in Mr. Carter's affidavit, the SISP was undertaken in accordance with the SISP Approval Order in two stages.

[48] The overview of the SISP structure is well described in Mr. Caiger's October 19, 2022 affidavit. Amongst other things, in the first stage, the Just Energy Entities and Mr. Caiger prepared a list of potential bidders, established a data room and published a press release announcing the SISP. Mr. Caiger contacted 41 potential bidders, non-disclosure agreements were negotiated and four NOIs were received.

[49] The process then moved into the second stage. The Just Energy Entities prepared a form of transaction agreement that included a form of approval and RVO for completion by bidders as part of receiving submissions of a qualified bid. Three of the four second stage participants eventually indicated that they were not going to proceed. The remaining party did not submit a bid. It advised the Monitor that it saw no value beyond the stalking-horse bid.

[50] The Transaction before this court is therefore the only going-concern Transaction available to the Just Energy Entities. I am satisfied in the circumstances that the market was thoroughly canvassed and, as noted, in addition to the SISP, the business of the Just Energy Entities has been marketed broadly and extensively for approximately three years. The U.S. Class Actions previously indicated that they may advance their own restructuring plan for consideration and voting by the Just Energy Entities creditors. During this process, they were allowed full participation but ultimately did not file a NOI or further engage in the SISP process.

The Monitor has approved the process

[51] As noted, the Monitor approved the process that lead to the Transaction. The Monitor concluded that the RVO is the only efficient means to ensure that all the licenses, authorizations and agreements remain in place. The Monitor is also of the view that any potential prejudice to the individual creditors is far outweighed by the overall benefit of the Transaction. Importantly,

the Monitor also believes that the RVO represents the only viable alternative to implement the Transaction for the benefit of the Just Energy Entities' stakeholders.

The Transaction is more beneficial to the creditors than a sale or disposition in bankruptcy

[52] The Monitor assisted the Just Energy Entities in preparing a liquidation analysis when the Just Energy Entities were pursuing approval of the Plan of Compromise and Arrangement. The analysis has been updated. The Monitor and the Just Energy Entities concluded, on the basis of the updated liquidation analysis, that not only would a liquidation produce no recovery for unsecured creditors, but it would result in a shortfall to secured creditors. This, of course, would be less beneficial than closing the Transaction.

The creditors were consulted

[53] As noted in this endorsement, extensive consultation was undertaken both with the secured creditors, the U.S. Class Actions, the Omarali Class Action and the Mass Tort Claims. There is no suggestion in the record that any creditors were ignored or overlooked.

The effect of the Transaction on creditors and other interested parties

[54] I am of the belief that the RVO is the only viable option for a going-concern exit from the CCAA proceedings.

[55] No other offers have been obtained, not only during the SISP but also in the past three years when the Just Energy Entities' business was being broadly and extensively marketed. No other plan or proposal has been put forward.

[56] The Transaction, in my view, provides a number of positive benefits, including:

- preserving the going-concern value of the business for the benefit of stakeholders;
- maintaining the Just Energy Entities' relationships with the majority of its commodity suppliers, vendors, trade creditors and other counter-parties;
- providing for the continued operation of the Just Energy Entities across Canada and the U.S.;
- continuing to supply uninterrupted energy to the Just Energies Entities approximately 950,000 customers;
- preserving the ongoing employment of most of the more than 1,000 employees of the Just Energy Entities;

- maintaining the aforementioned regulatory and licensing relationships across Canada and the U.S.;
- satisfying or assuming in full all secured claims and priority payables;
- preserving U.S. tax attributes and tax pools; and
- permitting the Just Energy Entities to exit these proceedings with a significantly deleveraged balance sheet and a U.S. \$250 million new credit facility bringing an end to the CCAA proceedings aside from the limited matters related to the Residual Cos.

[57] As discussed, the Transaction does not provide any recovery for unsecured creditors or shareholders. I accept the submissions of the Just Energy Entities, however, that this is not a result of the RVO structure. Rather, this reflects the fact that the Just Energy Entities' value, as tested through the market through the SISP and through previous marketing attempts over three years, is not high enough to generate value for the unsecured creditors and shareholders. This was also the situation in *Black Rock Metals Inc.* (see paras. 109, 120). I agree with the comments in *Black Rock Metals Inc.* wherein Chief Justice Paquette stated that the unsecured creditors and shareholders are therefore not in a worse position with the reverse vesting order than they would have been under a traditional asset sale. Either way, they have no economic interest because the purchase price would not generate any value for the unsecured creditors and shareholders.

[58] There is no other viable option being presented to this court. Further, it bears noting that the shareholders' interests amount to claims in equity. As noted in *Harte Gold Corp. (Re)*, at para. 64, shareholders have no economic interest in an insolvent enterprise and therefore they are not entitled to a vote in any plan. The portion of the order requested relating to the cancellation of the existing shares is, therefore, justified in the circumstances.

[59] The consideration to be received for the assets is fair and reasonable. The Just Energy Entities' business was extensively marketed both prior to and during the CCAA. There have been no offers, except that put forth by the Purchaser. Therefore, I accept that the consideration is fair and reasonable.

[60] While it is unfortunate that there is no recovery for unsecured creditors or shareholders, this is a function of the market. In this regard, it is noteworthy that PIMCO holds over U.S. \$250 million in unsecured debt that it will not recover.

[61] There is also evidence above that the purchaser is paying more than the Just Energy Entities would be worth in a bankruptcy. Furthermore, the Monitor is satisfied that the consideration is fair in the circumstances.

Other considerations

[62] Based on the foregoing analysis of the s. 36(3) provisions, I am also satisfied that the criteria set out above in *Soundair* have been met: there has been a sufficient effort to obtain the best price; the debtor has not acted improvidently; the interests of the parties have been properly considered; the process has been carried out with efficacy and integrity; and there is no unfairness in the circumstances.

[63] The Transaction will provide for a fair and reasonable resolution of the Just Energy Entities' insolvency and obtain the best value for its assets. In sum, employment is preserved for most employees and energy will continued to be provided for approximately 950,000 customers.

Related relief

[64] With respect to the shareholdings in the Just Energy Entities, it is reasonable to cancel the existing shares and issue new common shares to the Purchaser via JEUS. Similar approaches have been used in other reverse vesting order transactions: see *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at paras. 59-64. Since the existing shareholders have no economic interest in the company, there is no entitlement to recovery unless all creditors are paid in full: *Canwest Global Communications Corp. (Re)*, 2010 ONSC 4209, 70 C.B.R. (5th) 1.

[65] The *CBCA* provides that the share conditions of a *CBCA* corporation under *CCAA* protection can be changed by articles of reorganization. Section 191(1) of the *CBCA* recognizes that a "reorganization" includes a court order made under any Act of Parliament that affects the rights among the corporation, its shareholders and other creditors (see s. 191(1)(c)). This includes the *CCAA*: see *Canwest*, at para. 34; *Black Rock Metals Inc.*, at para. 122; *Harte Gold Corp. (Re)*, at para. 61 (dealing with the equivalent provision of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16. (*OBCA*)).

[66] Pursuant to ss. 173, 176(1)(b) and 191(2) of the *CBCA*, courts have accepted that, under a *CCAA* proceeding, they can approve the cancellation of outstanding shares as part of a corporate reorganization that gives effect to a *CCAA* restructuring transaction and that the shareholders are not entitled to vote: see *Harte Gold Corp. (Re)*, at para. 62; *Black Rock Metals Inc.*, at para. 122; *Canwest*, at para. 34.

[67] There are also a number of other orders requested in the RVO that I have approved. I will briefly deal with the noteworthy ones below, as follows:

- It is appropriate that the RVO provides that all former employees of the Just Energy Entities be transferred to the Canadian Residual Cos. This will assist these former employees in relation to their entitlements under the *Wage Earner Protection Program Act*, S.C. 2005, c.47, s.1. Similar relief was granted in *Quest University (Re)*, which also involved a reverse vesting order.
- The releases sought are proportional in scope and consistent with releases granted in other similar *CCAA* proceedings. I have analyzed the factors set out by Penny J.

in *Harte Gold Corp. (Re)*, at paras. 81-86. As in that case, the releases are rationally connected to the purposes of the restructuring; the releasees contributed to the restructuring; the releases are not overly broad; the releases will enhance the certainty and finality of the Transaction; the releases benefit the Just Energy Entities, its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification; and all creditors on the service list were made aware of the releases sought and the nature and effect of the release.

- The specific relief in the RVO concerning the ongoing litigation with the Electric Reliability Council of Texas Inc. (“ERCOT”) is fair and reasonable. The wording was negotiated with ERCOT and preserves the Just Energy Entities’ and ERCOT’s rights in the ongoing litigation between them as set out para. 11.
- Similarly, the paragraphs of the RVO concerning the Omarali Class Action are fair and reasonable and have been negotiated with the Omarali Class Action solicitors and are not prejudicial to the insurers noted therein.
- All remaining ancillary relief is fair and reasonable. I have simply touched upon the most significant ancillary relief above.

THE MONITOR’S ORDER

[68] As outlined, I granted the Monitor’s Order.

[69] First, it is necessary that the Monitor carry on in order to implement the steps required with respect to the Residual Cos. in Canada and the U.S. and to implement the provisions of the RVO.

[70] Second, the stay extension to January 31, 2023 is also necessary given the steps that must be undertaken.

[71] I have reviewed the activities of the Monitor’s reports and fees and they are fair and reasonable.

[72] Last, I agree that a sealing order should be issued with respect to confidential Exhibit “F” of Mr. Caiger’s affidavit. Exhibit “F” is comprised of the four NOIs received by the Just Energy Entities. The NOIs contain confidential, commercially sensitive information regarding the identities of the four participants and their respective corporate, operational and financial information disclosed in support of the requirement of each NOI. Additionally, the NOIs contain confidential and commercially sensitive information regarding the scope and subject matter of each proposed bid. Dissemination of this information at this time, would pose a legitimate risk to the commercial interests of the SISP participants and the Just Energy Entities and their stakeholders should the Transaction fail to close. Thus, the public’s interest in maintaining the confidentiality of this commercially sensitive information creates an important commercial interest. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada*

(*Minister of Finance*), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, as recast in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, has been met. The sealing order is being made on an interim basis pending further order of the court.

CLAIMS OF BP ENERGY COMPANY

[73] At the request of the Just Energy Entities and the BP Energy Company, I will now turn to agreed-upon terms as between the Just Energy Entities and the BP Energy Company.

[74] The Just Energy Entities and BP Energy Company and certain of its affiliates (collectively “BP”) and the Just Energy Entities have reached an agreement, which is not opposed by any other stakeholders, that BP, being beneficiaries of the Priority Commodity/ISO Charge in these proceedings, are not opposing this motion on the basis that the New Intercreditor Agreement will be on terms consistent with those set forth in the term sheet included in Exhibit “I” to the Affidavit of Mr. Carter sworn August 4, 2022 (the “ICA Term Sheet”).

[75] To the extent that the terms of the New Intercreditor Agreement are inconsistent with the ICA Term Sheet or contain material changes to the current Intercreditor Agreement that are not specifically set forth in the ICA Term Sheet, BP is reserving its rights to return to this Court to (a) oppose the future release of the Priority Commodity/ISO Charge contemplated by the Reverse Vesting Order and (b) take such action as it reasonably deems necessary to assure its future extensions and credit and accommodations are terminated.

[76] I have reviewed this agreement with counsel and find it to be fair and reasonable in the circumstances of the Transaction.

THE OPPOSING STAKEHOLDERS

[77] As noted, two stakeholders raised objections to the orders sought by the Just Energy Entities. I will deal with each in turn.

Ganesh Yadav

[78] Mr. Yadav is a shareholder.

[79] Mr. Yadav did not file any affidavit evidence or any other evidence in a proper form. Rather, he filed what he described as a “motion record” in which he attached various documents relating to the Just Energy Entities’ financial performances and outlined his objections.

[80] Essentially, he submits that the Just Energy Entities have significant liquidity, far in excess of the stalking-horse bid and the calculations performed by the Just Energy Entities and the Monitor. He primarily submits that the Just Energy Entities have significant future equity in its hedges, that energy prices are increasing and that the hedges are placed at very attractive prices. To support this argument, he relies upon the Just Energy Entities’ 2022 annual report describing

the derivative instruments. Mr. Yadav stresses that there are significant cash flows and that the future value of the Just Energy Entities is very promising.

[81] The difficulty with Mr. Yadav's submissions, however, is the fact that there is no evidentiary basis for these submissions other than a loose connection of documents that, in and of themselves, do not support his argument.

[82] More importantly, the Just Energy Entities' business was marketed for over three years and was widely canvassed during the SISP. During this entire time period there has not been a single offer in excess of the stalking-horse offer. Further, Mr. Yadav's submissions concerning value run contrary to the Just Energy Entities and the Monitor's valuation of the company and are unsupported by any other stakeholder.

[83] Based on the foregoing, there is no cogent evidence in the record to support Mr. Yadav's submissions, nor has he adduced proper evidence to this court by way of affidavit or expert's report.

[84] As a shareholder, he has an equity claim for which there is no recovery in the Transaction.

Mohammad Jaafari

[85] Mr. Jaafari also did not file any affidavit evidence at this motion. He, too, simply provided a number of documents.²

[86] Mr. Jaafari is a former Director and Representative Director of Just Energy Japan Kabushiki Kaisha ("JEJKK"), a former subsidiary of Just Energy. JEJKK operated the Just Energy Entities' businesses in Japan.

[87] Mr. Jaafari was terminated from his position in August 2018, allegedly for cause.

[88] In November 2018, he commenced litigation in the Tokyo District Court against Just Energy and JEJKK.

[89] In April 2020, the Just Energy Entities sold their Japanese business. Mr. Jaafari submitted a Proof of Claim in the CCAA proceeding that was disallowed by the Monitor.

[90] Mr. Jaafari apparently has continued his litigation in Tokyo. As noted above, although there is no affidavit evidence, the documentation that he has filed with this court includes apparent

² Mr. Jaafari continued to improperly send documents directly to me, after I signed the two orders, which I have not considered in preparing these reasons.

endorsements by the Tokyo District Court which, if accurate, accept that Mr. Jaafari was an employee of Just Energy.

[91] Mr. Jaafari submits that as part of the RVO, I should order that money be paid in trust until the litigation in Tokyo is resolved. As I understand it, he is seeking a payment of approximately CDN \$2 million.

[92] The Just Energy Entities submit that Mr. Jaafari's ongoing litigation is in violation of the Initial Order and that he was never an employee of Just Energy. Counsel also advises that they recently heard from their former Japanese counsel (although there is no evidence to support this) that Mr. Jaafari's action against Just Energy was dismissed.

[93] In any event, the Just Energy Entities submit that, at best, Mr. Jaafari has an unsecured claim that is incapable of recovery since unsecured creditors are receiving no money as a result of the Transaction. Therefore, even if he is successful, there is no recovery.

[94] The Monitor, in support of the Just Energy Entities' submissions, confirms that there is no recovery for Mr. Jaafari even if he is successful. The Monitor further submits that a payment into court or into some sort of trust would constitute a preference, which is inappropriate where other unsecured creditors are not receiving any money as a result of the Transaction.

[95] Based on the incomplete record in front of me, there is no meaningful way to determine the status and legitimacy of Mr. Jaafari's claim for wrongful dismissal.

[96] In any event, I accept the submissions of the Just Energy Entities, supported by the Monitor, that Mr. Jaafari's claim constitutes an unsecured claim for which there will be no recovery in the circumstances of this case.

[97] As the Monitor points out, Just Energy no longer has any assets or operations in Japan and no longer owns JEJKK. The stay of proceedings does not extend to JEJKK, which is now owned by another corporation. The Monitor submits that Mr. Jaafari is free to pursue such claims in Japan without the involvement of the Just Energy Entities. To allow Mr. Jaafari's claim to continue against the Just Energy Entities in Japan would require the Just Energy Entities to incur expenses, perhaps make a payment into court or into trust and would deplete the Just Energy Entities' estate to the detriment of the other stakeholders with no foreseeable benefits to Mr. Jaafari.

[98] I therefore accept the Monitor's submission that this court order that Mr. Jaafari's claim can be addressed by the Just Energy Entities, in consultation with the Monitor, in accordance with the terms of the Claims Procedure Order. I am specifically not making an order that any money be paid into court or into a trust account.

CONCLUSION

[99] For the reasons above, the RVO and the Monitor's Order should be approved. A reverse vesting order is permitted pursuant to the above provisions of the CCAA. Given the nature of the

Just Energy Entities' business, the RVO structure is necessary and appropriate to preserve the going-concern value of the business. The Transaction is the only viable transaction that has emerged in the 19 months since the CCAA filing. It is currently the only option for a going-concern exit from the CCAA proceedings. The Transaction is the product of months of negotiations between the Just Energy Entities' key stakeholders as well as a robust court-approved SISP.

[100] Overall, the Transaction provides tangible benefits to the Just Energy Entities and their stakeholders. The fact that the Transaction provides no recovery for the general unsecured creditors or shareholders is a function of the market, not the RVO structure.

DISPOSITION

[101] For the reasons above, I grant both the RVO and the Monitor's Order.

McEwen, J.

Released: November 14, 2022

CITATION: Just Energy v. Morgan Stanley et. al., 2022 ONSC 6354
COURT FILE NO.: CV-21-00658423-00CL
DATE: 20221114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

– and –

IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF JUST ENERGY GROUP INC., JUST
ENERGY CORP., ONTARIO ENERGY COMMODITIES
INC., UNIVERSALE ENERGY CORPORATION, JUST
ENERGY FINANCE CANADA ULC, HUDSON ENERGY
CANADA CORP., JUST MANAGEMENT CORP., JUST
ENERGY FINANCE HOLDING INC., 11929747 CANADA
INC., 12175592 CANADA INC., JE SERVICES HOLDCO I
INC., JE SERVICES HOLDCO II INC., 8704104 CANADA
INC., JUST ENERGY ADVANCED SOLUTIONS CORP.,
JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS
CORP., JUST ENERGY INDIANA CORP., JUST ENERGY
MASSACHUSETTS CORP., JUST ENERGY NEW YORK
CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY,
LLC, JUST ENERGY PENNSYLVANIA CORP., JUST
ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS
INC., HUDSON ENERGY SERVICES LLC, HUDSON
ENERGY CORP., INTERACTIVE ENERGY GROUP LLC ,
HUDSON PARENT HOLDINGS LLC, DRAG MARKETING
LLC JUST ENERGY ADVANCED SOLUTIONS LLC,
FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL
HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY
MARKETING CORP., JUST ENERGY CONNECTICUT
CORP., JUST ENERGY LIMITED, JUST SOLAR
HOLDINGS CORP. and JUST ENERGY (FINANCE)
HUNGARY ZRT.

Applicants

ENDORSEMENT

Released: November 14, 2022

McEwen J.

TAB 10



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 September 1, 2025

À jour au 1 septembre 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

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

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

compagnie Toute personne morale constituée par une loi fédérale ou provinciale ou sous son régime et toute personne morale qui possède un actif ou exerce des activités au Canada, quel que soit l'endroit où elle a été constituée, ainsi que toute fiducie de revenu. La présente définition exclut les banques, les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*, les compagnies de télégraphe, les compagnies d'assurances et les sociétés auxquelles s'applique la *Loi sur les sociétés de fiducie et de prêt*. (*company*)

compagnie débitrice Toute compagnie qui, selon le cas :

a) est en faillite ou est insolvable;

b) a commis un acte de faillite au sens de la *Loi sur la faillite et l'insolvabilité* ou est réputée insolvable au sens de la *Loi sur les liquidations et les restructurations*, que des procédures relatives à cette compagnie aient été intentées ou non sous le régime de l'une ou l'autre de ces lois;

c) a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité*;

d) est en voie de liquidation aux termes de la *Loi sur les liquidations et les restructurations* parce que la compagnie est insolvable. (*debtor company*)

contrat financier admissible Contrat d'une catégorie réglementaire. (*eligible financial contract*)

contrôleur S'agissant d'une compagnie, la personne nommée en application de l'article 11.7 pour agir à titre de contrôleur des affaires financières et autres de celle-ci. (*monitor*)

convention collective S'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre la compagnie débitrice et l'agent négociateur. (*collective agreement*)

créancier chirographaire Tout créancier d'une compagnie qui n'est pas un créancier garanti, qu'il réside ou soit domicilié au Canada ou à l'étranger. Un fiduciaire pour les détenteurs d'obligations non garanties, lesquelles sont émises en vertu d'un acte de fiducie ou autre acte fonctionnant en faveur du fiduciaire, est réputé un créancier chirographaire pour toutes les fins de la présente loi sauf la votation à une assemblée des créanciers relativement à ces obligations. (*unsecured creditor*)

domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

Meaning of *related* and *dealing at arm's length*

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

R.S., 1985, c. C-36, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 4; 1992, c. 27, s. 90; 1993, c. 34, s. 52; 1996, c. 6, s. 167; 1997, c. 12, s. 120(E); 1998, c. 30, s. 14; 1999, c. 3, s. 22, c. 28, s. 154; 2001, c. 9, s. 575; 2002, c. 7, s. 133; 2004, c. 25, s. 193; 2005, c. 3, s. 15, c. 47, s. 124; 2007, c. 29, s. 104, c. 36, ss. 61, 105; 2012, c. 31, s. 419; 2015, c. 3, s. 37; 2018, c. 10, s. 89.

Application

3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than \$5,000,000 or any other amount that is prescribed.

Affiliated companies

(2) For the purposes of this Act,

(a) companies are affiliated companies if one of them is the subsidiary of the other or both are subsidiaries of the same company or each of them is controlled by the same person; and

(b) two companies affiliated with the same company at the same time are deemed to be affiliated with each other.

a) Dans les provinces de la Nouvelle-Écosse, de la Colombie-Britannique et de l'Île-du-Prince-Édouard, la Cour suprême;

a.1) dans la province d'Ontario, la Cour supérieure de justice;

b) dans la province de Québec, la Cour supérieure;

c) dans les provinces du Nouveau-Brunswick, du Manitoba, de la Saskatchewan et d'Alberta, la Cour du Banc de la Reine;

c.1) dans la province de Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême;

d) au Yukon et dans les Territoires du Nord-Ouest, la Cour suprême et, au Nunavut, la Cour de justice du Nunavut. (*court*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

Définition de *personnes liées*

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

L.R. (1985), ch. C-36, art. 2; L.R. (1985), ch. 27 (2^e suppl.), art. 10; 1990, ch. 17, art. 4; 1992, ch. 27, art. 90; 1993, ch. 34, art. 52; 1996, ch. 6, art. 167; 1997, ch. 12, art. 120(A); 1998, ch. 30, art. 14; 1999, ch. 3, art. 22, ch. 28, art. 154; 2001, ch. 9, art. 575; 2002, ch. 7, art. 133; 2004, ch. 25, art. 193; 2005, ch. 3, art. 15, ch. 47, art. 124; 2007, ch. 29, art. 104, ch. 36, art. 61 et 105; 2012, ch. 31, art. 419; 2015, ch. 3, art. 37; 2018, ch. 10, art. 89.

Application

3 (1) La présente loi ne s'applique à une compagnie débitrice ou aux compagnies débitrices qui appartiennent au même groupe qu'elle que si le montant des réclamations contre elle ou les compagnies appartenant au même groupe, établi conformément à l'article 20, est supérieur à cinq millions de dollars ou à toute autre somme prévue par les règlements.

Application

(2) Pour l'application de la présente loi :

a) appartiennent au même groupe deux compagnies dont l'une est la filiale de l'autre ou qui sont sous le contrôle de la même personne;

b) sont réputées appartenir au même groupe deux compagnies dont chacune appartient au groupe d'une même compagnie.

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.

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.

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.

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.

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.

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.

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 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.

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.

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.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, es qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Assets may be disposed of free and clear

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

Restriction — employers

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

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

Preferences and Transfers at Undervalue

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to “date of the bankruptcy” is to be read as a reference to “day on which proceedings commence under this Act”;

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.

Traitements préférentiels et opérations sous-évaluées

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Interprétation

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78.

Factors to be considered

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

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

Additional factors — related persons

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

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

Related persons

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

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

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la justification des circonstances ayant mené au projet de disposition;
- b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
- d)** la suffisance des consultations menées auprès des créanciers;
- e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
- f)** le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

- a)** d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;
- b)** d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

- a)** le dirigeant ou l'administrateur de celle-ci;
- b)** la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;
- c)** la personne liée à toute personne visée aux alinéas a) ou b).

TAB 11

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653

COURT FILE NO.: CV-21-00673304-00CL

DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

- [2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

- [3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.
- [4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.
- [5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.
- [6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated \$7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

- [7] At the time of its initial application to the court, Harte Gold's assets were valued at \$163.8 million. Its liabilities were valued at \$166.1 million. On a balance sheet basis, therefore, Harte Gold was insolvent.
- [8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.
- [9] This pre-filing strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.
- [10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.
- [11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.
- [12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.
- [13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.
- [14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the \$10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the pre-filing cure costs; and, (c) the undertaking to pay an additional cash deposit of US\$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all pre-filing trade amounts (estimated at \$7.5 million but with a \$10 million cap) and post-filing trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contracts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction. The employment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and post-filing trade amounts, interim financing and the like, totals well over \$160 million.

Issues

[17] There are three principal issues:

- (1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;
- (2) Whether the stay should be extended; and,

- (3) Whether the Monitor's mandate should be extended to include additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

- [18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

- [19] Section 36(1) of the CCAA provides:

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

- [20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

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

- [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

- [22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a “reverse vesting order” under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.
- [23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:
 - (a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,
 - (b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

- [24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re)*, (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found “the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise.”
- [25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.
- [26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.
- [27] In *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCS 3218 at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc*, 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc*, 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

- [28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that “the terms ‘sell or otherwise dispose of assets outside the ordinary course of business’ under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*”: *Nemaska QCCA* at para 19.
- [29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court’s authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent “with the remedial purposes of the CCAA” and consistent with the Supreme Court of Canada’s ruling on CCAA jurisdiction in 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is “appropriate” in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.
- [30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.
- [31] Fitzpatrick J. relied on *Callidus* to the effect that:
- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the “broad reading of CCAA authority developed by the jurisprudence”. On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

by restrictions set out in the CCAA itself, and the requirement that the order made be “appropriate in the circumstances”

- the CCAA generally prioritizes “avoiding the social and economic losses resulting from liquidation of an insolvent company”
- Where a party seeks an order relating to a matter that falls within the supervising judge’s purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 “for the most part supplants the need to resort to inherent jurisdiction” in the CCAA context
- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence
- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

- [32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor’s insolvency; preserving and maximizing the value of a debtor’s assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.
- [33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.
- [34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not “meritorious”, also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. “reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings”: *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

- [35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.
- [36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor ‘selling or otherwise disposing of assets outside the ordinary course of business’, as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and “vesting out” from the debtor to a new company, of unwanted assets, obligations and liabilities.
- [37] I am, therefore, not sure I agree with the analysis which finds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.
- [38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the “norm” or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:
- (a) Why is the RVO necessary in this case?
 - (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
 - (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

- [40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.
- [41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.
- [42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.
- [43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.
- [44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the pre-filing strategic process and the SISP.
- [45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

- [46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.
- [47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.
- [48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.
- [49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

- [50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately \$28 million in respect of its hedge agreements. Silver Lake has claims of approximately \$95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US\$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.
- [51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.
- [52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

- [53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.
- [54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

- [55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:
- (a) the retention and payment in full of the claims of almost all creditors of Harte Gold;
 - (b) continued employment for all except four of the Harte Gold's employees;
 - (c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and
 - (d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.
- [56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.
- [57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.
- [58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).
- [59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

- [60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful pre-filing strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.
- [61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.
- [62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.
- [63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.
- [64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re)*, 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.
- [65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

- [66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.¹
- [67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.
- [68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the pre-filing strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".
- [69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

- [70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.
- [71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

¹ The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

- [72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to \$10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.
- [73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.
- [74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.
- [75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counterparties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.
- [76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

- [77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

- [78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.
- [79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.
- [80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.
- [81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.
- [82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISF and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

- [83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.
- [84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.
- [85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.
- [86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

- [87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.
- [88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

- [89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.
- [90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

- [91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.
- [92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.
- [93] I approve the grant of the requested powers to the Monitor.

Conclusion

- [94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

TAB 12

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re)*,
2020 BCSC 1883

Date: 20201202
Docket: S200586
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 **SEA TO SKY UNIVERSITY ACT, S.B.C. 2002, c. 54**

- and -

In the Matter of A **PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST**
UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
Counsel for the Monitor PricewaterhouseCoopers Inc.:	V.L. Tickle
Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada (“Quest”), applied for various orders in these *Companies’ Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (“CCAA”) proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. (“Primacorp”) and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest’s plan of arrangement dated November 1, 2020 (the “Plan”). I also approved Quest’s agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest’s application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. (“Southern Star”) has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a “reverse vesting order” (“RVO”), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star’s application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

[7] This CCAA proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately \$30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching \$11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons").

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

- a) Creditor recovery from the purchase price or other consideration under the proposal;
- b) That the proposal would result in a completed transaction;
- c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and
- d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the “Academic Partner”. Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as “Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the “Primacorp PSA”).

[20] The Primacorp transaction, as originally presented, provided for:

- a) Sufficient funds to pay Quest’s secured creditors’ claims, including claims secured by the CCAA charges;
- b) Funding for a plan of arrangement to be voted on by Quest’s unsecured creditors;
- c) Funds for these insolvency proceedings; and
- d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor’s Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

- a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;
 - b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;
 - c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;
 - d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;
 - e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and \$1.35 million under Quest's Plan; and
 - f) Primacorp will provide Quest with a \$20 million secured working capital facility to support its operations.
- [22] The Primacorp transaction was subject to a number of significant conditions:
- a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;
 - b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;
 - c) Creditor approval of Quest's Plan under the CCAA. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the CCAA.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these CCAA proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the CCAA. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

- a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;
- b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;
- c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;
- d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and
- e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the CCAA.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the “LP”) to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star’s lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star’s rights, if any, under the Lot E Ground Lease.

[34] At present, Quest’s title to Lot E remains clear of any registration relating to Southern Star’s Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

- a) This Court has no jurisdiction to do so under the CCAA. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the CCAA expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the CCAA, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

. . . in respect of real property or of an immovable if the company is the lessor.

- b) If such jurisdiction exists under the CCAA, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the CCAA. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the CCAA to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the CCAA that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the CCAA requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the CCAA, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "*status quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-CCAA cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

[55] It is common ground, however, that different considerations may also apply in the CCAA context. Having said that, there is little case authority on the ability of a court in CCAA proceedings to vest off a ROFR, whether triggered or not.

[56] In “Rights of First Refusal and Options to Purchase in Insolvency Proceedings” (2019) 8 J.I.I.C. 103 (the “ROFR Article”), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

. . . Section 11 of the CCAA grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the CCAA court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia*, the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

While jurisprudence on this matter is not conclusive, it appears that a CCAA court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.

. . .

In summary, common law CCAA courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re)*, 2004 SKQB 213, additional reasons 2004 SKQB 216. In that CCAA proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in CCAA proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that CCAA relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp.* (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a CCAA proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the CCAA to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

- a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

- b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of “Bona Fide Offer to Purchase” means, in part, an offer that is:

(iii) only for the entirety of the Property [the lands] and all chattels thereto and no other property, rights or assets

[Emphasis added.]

The definition of “Purchased Assets” in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

- c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, “change of control” provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp’s expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest’s assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe “chilling effect” on the market, with potentially disastrous results for Quest’s restructuring efforts;

- d) The 60-day period within which CapU is entitled to consider any “Bona Fide Offer to Purchase” is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU’s ROFR rights will be illusory at best;
- e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;
- f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest’s assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest’s lands and chattels;
- g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;
- h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a “better, higher offer”;
- i) I conclude that Quest has given proper regard to and has not ignored CapU’s rights under the ROFR in the context of these proceedings.

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

- j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and
- k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills*, similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the CCAA to avoid

the “social and economic losses resulting from liquidation of an insolvent company”: *Century Services* at para. 70 and 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when “all stakeholders are treated as advantageously and fairly as the circumstances permit”.

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the CCAA in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest’s assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex’s interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the “Landrex PSA”) providing for a purchase price of \$51 million for most of Quest’s assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star’s rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which “another party” (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were “not currently at a stage such that they are capable of being accepted by Quest”, those “other proposals” included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest’s counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor’s Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for \$53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of \$20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

[88] In the overall circumstances here, I see no reason to delay, if not risk, the “bird in hand” transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the “Disclaimers”) to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest’s rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately \$236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest’s Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO’s security is registered against Southern Star’s interest under the Ground Leases; in addition, Fivestone Capital Corp. (“Fivestone”), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the CCAA, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the CCAA lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

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

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in CCAA proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

[49] These CCAA provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the CCAA requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the CCAA as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

- 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
- 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
- 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone's guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately \$41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately \$220,000. The outstanding balance of the BMO loan facility is \$34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

[117] In early November 2020, known unsecured creditor's claims were estimated at approximately \$2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or \$1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated \$1 million) and the Association for the Advancement of Scholarship (estimated \$5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

RVO Structure & Impact

- 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
 - 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
 - 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
 - 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
 - 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
 - 2.6.5 All of Quest's right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
 - 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
- 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
- 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
 - 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

- 2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and
- 2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the CCAA. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the CCAA.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the CCAA. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its CCAA proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

5. The CCAA Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the CCAA Plan.
6. Under the CCAA Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the CCAA Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a CCAA Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those CCAA proceedings,

an agreement was approved that “effectively” transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel’s endorsement stated:

The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as “New Plasco”, which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. ...

[132] Justice Gouin granted an RVO in the CCAA proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor’s assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the CCAA proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor’s motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and “non-operational related unsecured claims” had no value. As in the RVO sought here, the court’s order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the CCAA proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey’s brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the CCAA as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the CCAA proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary CCAA debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the CCAA proceedings, with the result that the CCAA debtor held its assets free and clear of all claims and encumbrances and was then removed from the CCAA proceedings. The purchaser and the primary CCAA debtor then amalgamated. The new CCAA debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the “only option” to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the CCAA proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to “Residualco”, which will then become one of the Applicants in the CCAA proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp.* . . .

The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group’s assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the CCAA and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the CCAA proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor’s bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the CCAA debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

24. In recent CCAA proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to “cleanse” the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same CCAA proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be “laying in the weeds”; and, (ii) allow the purchaser to make use of the debtor company’s tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor’s secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested CCAA proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entities (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

[38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at \$8,160 million out of a total value of provable claims of \$200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the CCAA and that the Court should grant the RVO pursuant to ss. 11 and 36 of the CCAA.

[151] As with the structures approved in the above CCAA proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the CCAA proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this CCAA proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the CCAA allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of CCAA jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus*. The Court was there addressing a different issue – whether a CCAA judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is “acting for an improper purpose” – but the Court's comments on the exercise of jurisdiction under the CCAA ring true in relation to the RVO structure:

[49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three “baseline considerations” (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the CCAA context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the CCAA, which provides:

Good faith

18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

...

[65] There is no dispute that the CCAA is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, CCAA supervising judges are often called upon “to sanction measures for which there is no explicit authority in the CCAA” (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a “hierarchical” approach to determining whether jurisdiction exists to sanction

a proposed measure: “courts [must] rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding” (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the CCAA will be sufficient “to ground measures necessary to achieve its objectives” (para. 65).

...

[67] Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the “broad reading of CCAA authority developed by the jurisprudence” (Century Services, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be “appropriate in the circumstances”.

[68] Where a party seeks an order relating to a matter that falls within the supervising judge’s purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 “for the most part supplants the need to resort to inherent jurisdiction” in the CCAA context (para. 36).

...

[70] . . . The exercise of this discretion must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an “improper purpose” — the supervising judge has the discretion to bar that creditor from voting.

...

[75] We also observe that the recognition of this discretion under the CCAA advances the basic fairness that “permeates Canadian insolvency law and practice” (Sarra, “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.*

(“The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law”, at p. 30 (emphasis added))

In this vein, the supervising judge’s oversight of the CCAA voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the CCAA necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

[Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their “self-interest” subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is “appropriate” in the circumstances and that all stakeholders are treated as fairly and reasonably “as the circumstances permit”: *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable “assets” that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest’s ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the “*Sea to Sky Act*”). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation “composed of the members of the board” and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the “board” means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these CCAA proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

... whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana’s unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the CCAA.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the CCAA. To use the words of Dr. Sarra, quoted above in

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the CCAA by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the CCAA.

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the CCAA lists the relevant non-exhaustive factors to be considered:

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

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

- a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

- b) Quest 's Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the CCAA process toward finding a suitable academic partner and/or a purchaser/developer for Quest's lands;
- c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;
- d) The Primacorp transaction will see the repayment of Quest's secured creditors, now totalling approximately \$42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;
- e) Since August 7, 2020, the Interim Lender and VF, Quest's major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;
- f) There has been significant community and stakeholder involvement throughout the sales process;
- g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;
- h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

- i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;
- j) The Primacorp transaction will fund a Plan for unsecured creditors;
- k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the \$20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;
- l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;
- m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;
- n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;
- o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and
- p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest's creditors and preserves Quest's university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest's current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

"Fitzpatrick J."

TAB 13

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

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

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

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

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

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

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

Held, the appeal should be dismissed.

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

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

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

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

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

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

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

Cases referred to

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

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

Statutes referred to

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

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

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

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

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

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

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

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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

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

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Consideration of the interests of all parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Emphasis added)

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

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

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

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

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

4. Was there unfairness in the process?

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

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

purchaser would require in order to make a serious bid.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To the extent that approval of the OEL agreement by Rosenberg

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

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

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

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

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

29, 1990.

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

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

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

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

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

include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I accept that statement as being an accurate statement of the

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

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

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

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

procedure adopted by the receiver.

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

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

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

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

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

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

Appeal dismissed.

TAB 14

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

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

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

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

I. Introduction

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

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

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

II. Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Applicable Law

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

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

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

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

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

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

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

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

monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

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

IV. Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;
- (b) Sanjel could confirm a plan without the consent of the Syndicate; and
- (c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

[105] Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

[106] This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

- D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

[107] The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

[108] What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

[109] The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

[110] The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

- (a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;
- (b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

- (c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.
- (d) Creditors, other than trade creditors, were consulted and involved in the process.
- (e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.
- (f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

[113] On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are “duty bound” to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel’s board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

[114] The letter asserts the following:

- a) There are “substantial and material” connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald’s daughter and an employee and “executive in residence” of ARC Financial Corp., STEP’s financial sponsor in the sale;
- b) Mr. Hooker is “an intimate beneficiary of all that is and all that belongs to the MacDonald family.” In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;
- c) Mr. Hooker is “the loyal son-in-law and brother-in-law” of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;
- d) By reason of Mr. Hooker’s relationship with the “MacDonald family”, the proposed STEP transaction and the entirety of the SISP process “is tainted and worse”. “(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order”;
- e) “Mr. Hooker’s personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel’s Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company”.

[115] The letter repeats previous allegations that the SISP was “driven by self-interest and self-dealing”, “riddled with conflicts of interest”, “inappropriate and flawed in every respect”, “chilled, inadequate” and “not conducted in good faith and efforts were undertaken to mislead and misdirect the company’s stakeholders”. It alleges:

- a) “That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose.”
- b) “Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients hereby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such

claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability.”

- c) “... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts.”

[116] The letter comments that “(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order.”

[117] The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

[118] On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

[119] The Monitor was satisfied by its rapid but thorough investigations that:

- a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;
- b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC’s fundraising efforts or fund deployment and he has no ownership interest in ARC;
- c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;
- d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;
- e) The senior Mr. MacDonald has not had an active role in Sanjel’s management for years, was not involved in the SISP and does not own shares in STEP or ARC;
- f) Mr. Hooker’s involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;
- g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

- h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;
- i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

[120] This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

[121] When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

[122] The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

[123] The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

[124] This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders' complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

[125] Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

[126] With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

[127] Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

[128] I accept the Monitor's advice on this issue.

[129] With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

[130] The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

[131] A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

[132] There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

[133] Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

[134] In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

[135] The issue of who should bear the cost of the investigation into these allegations is reserved.

Heard on the 28th day of April, 2016.

Dated at the City of Calgary, Alberta this 16th day of May, 2016.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Chris Simard/Alexis Teasdale
for the Sanjel Group

Robert Anderson Q.C./Emily Paplawski
for the Trustee

Josef Kruger Q.C./Robyn Gurofsky/Jessie Cameron
for the Monitor

Kelly Bourassa/Kelly Peters
for the Syndicate

David Mann
for the Canadian Purchasers

Sean Collins/Walker Macleod
for the US Purchasers

Daniel Gilborn
for the TR Transport Inc.

Katherine Reiffenstein
for Aspen Air Corp. and Aspen Air US Corp.

Brian Davison/Ryan Algar/Karen Fellowes
for MacBain Properties Ltd. and MacBain Group

Melanie Gaston
for TAQA

Caireen Hanert
for Weir Group PLC

Heather Ferris
for GCC of America Inc.

Jennifer Davis
for CT Logics

Mary Buttery
for ARI Fuel Services

TAB 15

CITATION: Acerus Pharmaceuticals Corporation (Re), 2023 ONSC 3314

COURT FILE NO.: CV-23-00693595-00CL

DATE: 2023-06-02

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ACERUS PHARMACEUTICALS CORPORATION, ACERUS BIOPHARMA INC., ACERUS LABS INC., AND ACERUS PHARMACEUTICALS USA, LLC

BEFORE: Penny J.

COUNSEL: *Elizabeth Pillon, Lee Nicholson and Philip Yang* for the Applicants

Stuart Brotman and Mitch Stephenson for the Monitor

Mervyn D. Abramowitz for the United States of America

Alex MacFarlane and Xiaodi Jin for First Generation Capital Inc.

D.J. Miller and Alexander Soutter for Jones Day

Kristina Bezprozvannykh for The Canada Life Assurance Company

Troels Keldmann as principal of Keldmann Healthcare and Keldmann Innovation

Brian Gilderman as principal of Precision Clinical Research, Inc.

HEARD: May 30, 2023

ENDORSEMENT

Overview

- [1] On May 30, 2023 I granted a sale approval and reverse vesting order, extended the stay and granted other ancillary relief, with reasons to follow. These are my reasons. The capitalized terms used in these reasons reflect the meanings attributed to those terms in the relevant documents submitted to the court on this motion.

Background

- [2] APC is an Ontario public company listed on the TSX and the OTCQB Exchange. APC operates out of its registered head office in Mississauga, Ontario. ABI and ALI are also OBCA corporations. APL was formed under the laws of the State of Delaware. There is a cross border component to these proceedings.

- [3] Each of the subsidiaries (ABI, ALI, and APL) are wholly owned by APC. The applicants comprise one corporate group which is operated and controlled by the management of APC at its head office in Mississauga, Ontario.
- [4] The applicants are in a specialized pharmaceutical business, focused on the commercialization and development of prescription men's health products. Their primary products are (a) Natesto, which is currently the sole source of revenue; and (b) Noctiva, which is currently not in distribution. There are also a number of secondary products.
- [5] The procedural history is uncontroversial. It is well laid out in the supporting material, the Monitor's Third Report and the applicants' factum. I will not repeat any of that here, other than to note that the proposed transactions are the result of both a pre-filing strategic process and SISP, initialed by the applicants and overseen by E&Y, and a subsequent court approved SISP, also overseen by E&Y, which had been appointed Monitor by the initial order in these proceedings.
- [6] The proposed transactions which are before the Court are structured in the form of a Subscription Agreement, with the consideration or purchase price in the form of a credit bid of all secured debt obligations owing to First Generation Capital (FGC). FGC is the majority shareholder of APC. It is also the first in priority secured creditor of the applicants and the court approved DIP Lender. It is owed over \$60 million in secured debt.
- [7] The proposed transaction structure provides for available funding to remain with the applicants and court officers, as necessary, to implement the transactions, address ancillary post-closing steps, and emerge from the CCAA proceedings. The transactions contemplated in the Subscription Agreement have been structured as a "reverse vesting" (or RVO) transaction. The transactions provide for a share transaction under which:
 - (a) FGC will subscribe for and purchase new shares of APC, who will, in turn, cancel and terminate all of its existing shares so that FGC may become the sole shareholder of APC and ultimately, each of the subsidiaries of APC (including APL); and
 - (b) all excluded contracts, excluded assets, and excluded liabilities with respect to the Companies (including APL) will be transferred and "vested out" to corporations (Residual Cos.) to be incorporated by APC in advance of the closing date, so as to allow FGC to indirectly acquire APC's business and assets on a "free and clear" basis.

Issues

- [8] The issues to be determined on this motion are whether this Court should:
 - (a) approve the Subscription Agreement and proposed transactions in the form of an Approval and Reverse Vesting Order;

- (b) grant the requested releases in favour of the applicants' directors, officers, employees and advisors, FAAN as CRO, the Monitor and its advisors and FGC and its directors, officers and advisors;
- (c) grant ancillary relief in respect of the shares being cancelled and the articles of reorganization;
- (d) grant the sealing order over the bid comparison chart in the Monitor's Third Report; and
- (e) extend the stay period.

Analysis

Jurisdiction and Factors

- [9] Section 11 of the CCAA confers jurisdiction on the court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".
- [10] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. While this motion is not for approval of a traditional asset sale, the s. 36(3) factors have been applied in an ARVO context. The factors include:
 - (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the monitor approved the process leading to the proposed sale or disposition;
 - (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which the creditors were consulted;
 - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [11] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

- (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers have been obtained; and
- (d) whether there has been unfairness in the working out of the process: see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.

[12] Use of the ARVO structure is an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an ARVO structure must be preceded by close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of the ARVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must address questions such as:

- (a) Why is the ARVO necessary in this case?
- (b) Does the ARVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the ARVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the ARVO structure?

The ARVO Structure is Necessary

[13] The applicants operate in the pharmaceutical industry which is heavily regulated. In order for the applicants to carry on business, therefore, they are required to maintain various licenses. These licences are essential to the viability of the business. The insolvent circumstances of the applicants rules out a simple share purchase. In a traditional asset transaction, the purchaser would have to apply to transfer existing licences or apply for new ones. The purchaser in this case is not prepared to take the risk or invest the time and money to go through that process which is, by its very nature uncertain at best. There is no other comparable or viable transaction on offer.

[14] The Subscription Agreement was structured as an ARVO transaction which is necessary to provide the following benefits:

- (a) the applicants will maintain the multiple licenses that are required to maintain operations;
 - (b) the applicants have several in-progress trials and testing programs that are proceeding under and in the name of the applicants;
 - (c) the applicants hold various contracts with government entities; and
 - (d) the applicants have net operating losses in the approximate amount of \$215 million.
- [15] The evidence is that it was not possible to structure the transaction in a different manner. The Monitor canvassed the possibility of structuring the transaction with FGC by way of a plan of arrangement. However, FGC was not willing to consider that approach.

More Favourable Economic Result

- [16] The benefits of the transactions include:
- (a) based on the price payable under the Subscription Agreement, all of the applicants' secured liabilities will be satisfied by way of the credit bid (which, including advances under the DIP Facility, totals over \$65 million), which would not otherwise be satisfied by any other potential alternative;
 - (b) various unsecured and contingent liabilities will be assumed, in comparison to the other potential alternatives which do not; and
 - (c) sufficient liquidity to provide for post-filing obligations incurred to date and those necessary to exit the CCAA proceedings, in comparison to the other potential alternatives which do not provide comparable funding.
- [17] The only other bid options available to the applicants were what is referred to in the material as Unsuccessful Bid 1 and Unsuccessful Bid 2. Neither of the unsuccessful bids was a better or even viable option because:

Unsuccessful Bid 1 offered nominal consideration for a minor asset owned by the applicants, where the consideration being offered was insufficient to cover even the expected professional fees related to closing that bid; and,

in respect of Unsuccessful Bid 2:

- (i) the cash payment provided by Unsuccessful Bidder 2 was insufficient to repay the DIP Facility and amounts secured by charges in order to permit the applicants to exit the CCAA proceedings and the applicants are unable to generate liquidity from the excluded assets;
- (ii) the vast majority of the offer value was driven by future sales, which are subject to a high degree of uncertainty and risk;

- (iii) the Bid was only for a single product of the applicants and did not provide for a going-concern solution related to the remaining business of the applicants; and
- (iv) the Bid does not assume any liabilities of the applicants nor provide for the potential employment of any existing employees.

The Transactions Do Not Disadvantage Any Stakeholder Relative to Any Other Viable Transaction

- [18] Under the proposed transactions, the applicants, some of the unsecured creditors and all of the existing shareholders will have no recovery. However, the evidence makes it clear that these stakeholders would not realize any recovery in any other available restructuring alternative either (i.e., under either of the unsuccessful bids or in a bankruptcy/liquidation).
- [19] The proposed transactions, by contrast, assure a going concern result. This will result in:
 - (a) an opportunity for each of the pharmaceutical products previously held by the applicants to be pursued and determine if they can be successfully brought to market at a future date;
 - (b) potential for several of the applicants' employees preserving their employment; and
 - (c) suppliers of goods and services having the opportunity to maintain their business relationship with the applicants on an ongoing basis in the future.

Is the Consideration Fair and Reasonable?

- [20] The consideration payable for the purchased shares under the Subscription Agreement is fair, reasonable, and reflects the importance of the assets being preserved under the RVO structure. The purchase price for the purchased shares will be satisfied through FGC's credit bid and the financing of post-filing obligations, which, as noted, together total in excess of \$65 million. The fairness and reasonableness of the consideration is confirmed by the results of the pre-filing strategic process, the pre-filing SISP, and the court approved SISP (discussed in more detail below). The consideration allows for the satisfaction of all the applicants' secured liabilities and assumption of some unsecured liabilities. Further, the consideration provides the applicants with the ability to implement the transactions and exit the CCAA proceedings as a going-concern.
- [21] As noted earlier, the applicants' licenses and contracts with government entities may be difficult to transfer. Further, the applicants' tax attributes are also an important asset being preserved under the ARVO structure. The evidence is that the tax attributes were an important consideration for FGC in making its credit bid for all of the applicants' secured debt.
- [22] The market (and the evidence) has shown that there is no other bidder out there who is willing to pay more for these assets.

Section 36 CCAA Factors

The Process Leading Up to the Subscription Agreement and the Transactions

- [23] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investments beginning from March 2022 and a robust sales process conducted by the applicants and E&Y beginning from September 2022. These efforts include:
- (a) the applicants seeking refinancing or investment options;
 - (b) the pre-filing SISP which commenced in September 2022 and concluded in November 2022, with E&Y having canvassed its global network for prospective bidders;
 - (c) during the course of the CCAA the Monitor broadly canvassed the market under the SISP by approaching known potential bidders from prior processes and contacting 20 additional parties;
 - (d) the careful consideration of all the bids by the Special Committee, the applicants, the Monitor, the CRO, and their respective advisors and counsel of all available options; and
 - (e) negotiations between the Monitor, APC, and FGC in respect of the Subscription Agreement and the proposed transactions.
- [24] The SISP appears to have been well structured and, when combined with the pre-filing strategic processes, resulted in a broad canvassing of the market for potential purchasers of the applicants' business.

The Monitor Approved the Process Leading up to the Subscription Agreement and the Transactions

- [25] E&Y assisted with the pre-filing strategic initiative and the pre-filing SISP. The court approved SISP was developed in consultation with and supported by E&Y as Monitor. Further, the Monitor administered the SISP in accordance with its terms and the SISP order of this court. The Subscription Agreement is the product of the applicants' and the Monitor's continued efforts to solicit interest in the applicants' business and/or assets and is supported by the Monitor. It is the best alternative available.

More Beneficial to Creditors Than a Sale or Disposition Under a Bankruptcy

- [26] The Monitor has conducted an analysis of whether the completion of the proposed transactions contemplated by the Subscription Agreement would be more beneficial to the applicants' creditors and other stakeholders as compared to a sale or disposition of the business and assets of the applicants under a bankruptcy. The Monitor determined that:

- (a) a potential bankruptcy could cause significant disruption in operations and delay the market launch of Noctiva, thus adversely impacting the value of the business. The uncertainty surrounding the timeline for transferring the patents and license to a purchaser during bankruptcy proceedings adds to the uncertainty and complexity. This, coupled with the bankruptcy procedure itself, could result in a substantial delay in closing any transaction;
- (b) the RVO structure is a condition of closing the Subscription Agreement. The reverse vesting structure is unlikely to be available in a potential bankruptcy given the vesting of the assets in the trustee. Furthermore, even if FGC was willing to proceed based on an asset sale structure, instead of the RVO, the Monitor believes it is unlikely that the recovery could be enhanced by pursuing a sale transaction in a bankruptcy;
- (c) accordingly, it is the Monitor's view that a sale or disposition of the business and assets of the applicants in a bankruptcy would most likely result in a lower recovery. In the Monitor's view, the market has been sufficiently canvassed and the FGC bid is the only viable bid in the circumstances. It is unlikely that there is any material value to the assets of the applicants in any transaction other than the FGC bid.

Stakeholders Were Consulted During the Sale Process

- [27] The applicants consulted with their largest secured creditor, FGC, throughout the pre-filing strategic process. FGC, and FGC in its capacity as the DIP Lender, was given the opportunity to submit a bid in respect of the applicants' business and assets, which FGC did. This was through a court approved process on notice to all stakeholders. In addition, notice of this motion was given to a broad spectrum of the applicants' stakeholders as well.
- [28] In this context, I will address three specific situations which arose before and/or during the hearing of the motion.

Jones Day has an existing action against APL in the U.S. for outstanding professional fees owed by an APL predecessor. One of the issues raised by Jones Day in this CCAA proceeding involved a potential challenge to FGC's security beyond the amount advanced in December 2022 and pursuant to the DIP, in respect of the Applicants other than APC. The applicants, FGC and Jones Day were able to negotiate a specific carve-out of the Jones Day claim from the proposed releases and agreed that the following language would be approved by the court in this endorsement:

For greater certainty, in providing the releases as outlined in paragraph 31 of the proposed Approval and Reverse Vesting Order, such relief shall not be used or raised by APL or any individual defendants in the course of the Jones Day Litigation, to limit or

adversely affect the Jones Day Litigation as against APL or any individuals that have been named as defendants.

This language is so approved.

- [29] Dr. Troels Keldmann attended the hearing. He is a principal of Keldmann Healthcare and Keldmann Innovation which sold certain product rights to a predecessor of APL in 2009. Part of the payment to Keldmann Innovation A/S was to be in the form of royalties under the Amended Product Development Agreement between Trimel Biopharma SRL, Keldmann Healthcare A/S and Keldmann Innovation A/S dated December 30, 2009. This agreement, however, is one of the Excluded Contracts being transferred to a ResidualCo under the terms of the Subscription Agreement. Dr. Keldmann was concerned that, although the Keldmann counterparties would lose the right to any future payments, should the product sold to APL be successfully developed at some future point, they would remain subject to a non-compete provision embedded in that agreement. The applicants immediately made it clear that they had no intention of relying on enforcement rights under this excluded contract and proposed that they would issue a formal disclaimer of rights under that contract. This appeared to satisfactorily address Dr. Keldmann's concern.
- [30] Mr. Brian Gilderman also attended the hearing. Mr. Gilderman is a principal of Precision Clinical Research, Inc., which is conducting clinical trials on an APL product. Mr. Gilderman expressed concern about a potential mis-match between his obligation to continue to perform contractual services under the court's CCAA order while being at risk of not being paid for those services. This situation was complicated by the existence of "hold back" provisions in the service agreement. There was insufficient evidence before the court to address this issue properly. The applicants and the Monitor undertook to pursue the matter with Mr. Gilderman. If a satisfactory understanding cannot be reached, the parties may return to court for further direction.

The Subscription Agreement and the Proposed Transactions Allow Various Stakeholders to Maintain their Rights

- [31] As noted earlier, the analysis of the applicants and the Monitor is that none of the applicants' creditors will be materially disadvantaged by the Subscription Agreement and the proposed transactions relative to any other viable alternative. In addition, the Subscription Agreement maintains many of the rights that creditors would otherwise have in an asset sale transaction. In the case of parties with existing contracts with the applicants, though no assignment of contracts (consensual or through an assignment order) is contemplated as part of the proposed transactions, the Subscription Agreement provides for all contracts, other than the Excluded Contracts, to remain with the applicants. The contracting parties, therefore, have the opportunity to continue supplying goods and services to the applicants post-CCAA proceedings if they choose to do so. While the Subscription Agreement does not require FGC to cure pre-filing arrears under the Retained Contracts, all contract counterparties have also been served with the applicants' motion record to provide them with notice that their contracts are either being retained or excluded as part of the proposed transactions.

- [32] While the Excluded Contracts, Assets and Liabilities will be vested out into Residual Cos in this structure, this outcome is no different from the result that would obtain if the proposed transactions had been carried out using a typical asset purchase structure. Nor will there be any inter-company transfer of assets and liabilities among the existing applicants prior to closing. Therefore, the proposed transactions will not result in any material prejudice or impairment of any creditors' rights which might have been avoided in an asset purchase transaction.

Sufficient Effort has been Made to Obtain the Best Price and the Applicants have not Acted Improvidently

- [33] The execution of the Subscription Agreement represents the culmination of extensive solicitation efforts for investment or sale opportunities beginning in March 2022 and a robust sales process conducted by the applicants and E&Y from September 2022, both privately and under a court approved SISP post-filing. There is no evidence, or suggestion, that the process was less than fair and robust. Nor is there any prospect that a "better deal" was somehow available but not pursued.

The Share Transactions

- [34] Consistent with ARVOs previously granted by this court, the proposed order in this case will terminate and cancel all options, securities and other rights held by any person that are convertible or exchangeable for any securities of APC. APC, previously publicly traded on the TSX, will be taken private as a result of the proposed transaction. The purchaser, FGC, currently holds approximately 89% of the issued and outstanding shares of APC. The other shareholders have been notified of the CCAA proceedings and the proposed transactions by way of various press releases and notices issued by the applicants and/or the Monitor.
- [35] The jurisdictional and legal basis for these orders has been canvassed extensively in prior decisions of this court so I will not repeat that analysis here: *Harte Gold (Re)*, 2022 ONSC 653; *Just Energy Group Inc. v. Morgan Stanley Capital Group Inc.*, 2022 ONSC 6354. In essence, equity claims must be subordinate to the claims of creditors. In no possible scenario, on the record before me, would there be any recovery for the shareholders of APC. The OBCA provides the relevant authority to order the restructuring of the shares and the articles as contemplated in the proposed Approval and Reverse Vesting Order.

The Releases

- [36] The Release covers any and all present and future claims against the Released Parties based upon any fact or matter of occurrence in respect of the transactions or the applicants, its assets, business or affairs or administration of the applicants, except any claim that is not permitted to be released under s. 5.1(2) of the CCAA. For avoidance of doubt, as noted above, the Releases will not release APL or the individuals named as defendants in the Jones Day litigation from liability in respect of that action.

- [37] A non-exhaustive list of relevant factors to consider in determining court approval of proposed releases was laid out by Chief Justice Morawetz in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54.
- [38] Considering those factors, I conclude the Release is reasonable and appropriate in the circumstances and that they should be granted for the following reasons:
- (a) The claims released are rationally connected to the applicants' restructuring. The Release will have the effect of diminishing claims against the Released Parties, which in turn will diminish indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the applicants' restructuring.
 - (b) The Released Parties made significant contributions to the applicants' restructuring, both prior to and throughout the CCAA proceedings. Among other things, the extensive efforts of the directors and management of the applicants were instrumental to the conduct of the pre-filing strategic process, the pre-filing SISF, the court-approved SISF and the continued operations of the applicants during the CCAA proceedings. The proposed transactions will maintain the applicants as a going concern; in this sense at least, the CCAA proceedings have had a successful outcome for the benefit of at least some of the applicants' stakeholders. This is an outcome which is, as discussed above, better than any other reasonably available alternative. The Released Parties have contributed time, energy and resources to achieve this outcome; they are deserving of the Release.
 - (c) The Release is fair and reasonable. The applicants, for example, are unaware of any statutory liabilities in respect of the Released Parties (particularly, the directors and officers of the applicants) and to date, no stakeholder of the applicants have made the applicants or the Monitor aware that they intend to assert a claim against any of the Released Parties in respect of any claims covered by the Release. Further, the Release is sufficiently narrow in circumstances as the Release carves out and preserve claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA, claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced to allow the applicants and the Released Parties to move forward with the Subscription Agreement and the transactions and work to conclude the CCAA proceedings.
 - (d) The Release will bring certainty and finality for the Released Parties. Additionally, the applicants, the Monitor, and FGC all believe that the Release is an essential component to the transactions.
 - (e) The Release benefits the applicants' creditors and other stakeholders by reducing the potential for the Released Parties to seek indemnification from the applicants, thus minimizing further claims against the applicants.

- (f) Creditors had knowledge of the nature and effect of the Release. All creditors on the Service List were served with materials relating to this motion. The applicants also made additional efforts to serve all parties with excluded claims under the transactions. To date, no creditor has objected to the Release. At this point, and in these circumstances, requiring a specific claims process for claims against the Released Parties would only result in additional costs and delay without any apparent corresponding benefit.

Sealing Order

- [39] The applicants seek a limited sealing order regarding the results of the bids under the SISP. Preservation of the confidentiality of bid information is recognized as meeting the requirements of the test for sealing court documents in *Sherman Estate*. It is in the public interest that the ability of the applicants and the Monitor to maximize value be preserved until the transactions contemplated by the Subscription Agreement have closed. The request for a sealing order of the bid information is granted.

Extension of the Stay

- [40] The applicants need further time to close the proposed transactions and implement the remaining steps to bring these proceedings to their conclusion. As detailed in Updated Cash Flow Forecast at Appendix B to the Third Report of the Monitor, the applicants are expected to maintain liquidity to fund operations up to July 2, 2023. The stay is extended to June 30, 2023.

Monitor Support

- [41] I will say, in summary fashion to the extent not specifically mentioned in connection with the issues addressed above, that the Monitor has deep familiarity and experience with the applicants and their circumstances, dating back to March 2022. The Monitor has worked closely with the stakeholders, the CRO and other players. The Monitor, appointed by the court and answerable to the court, fully supports all the relief being sought by the applicants and has explained the basis for its support in detail in its Third Report.

Conclusion

- [42] For the forgoing reasons, the motion is granted. The Subscription Agreement and proposed transactions, including the ARVO, are approved. The sealing order regarding the bid summary is granted. The stay of proceedings is extended to June 30, 2023.

Penny J.

Date: June 2, 2023

TAB 16

Court of King’s Bench of Alberta

Citation: Invico Diversified Income Limited Partnership v NewGrange Energy Inc, 2024 ABKB 214

Date: 20240412
Docket: 2301 16260
Registry: Calgary

Between:

Invico Diversified Income Limited Partnership, by its general partner, Invico Diversified Income Managing GP Inc.

- and -

Newgrange Energy Inc.

Applicant

Respondent

**Reasons for Decision
of the
Honourable Justice M.H. Hollins**

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1. Introduction

[1] Free Rein Resources Ltd. (Free Rein) is an insolvent company in proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985, c.C-36 (CCAA). Invico Diversified Income Limited Partnership (Invico) has applied for approval of a Reverse Vesting Order (RVO) authorizing its purchase of the business and property of Free Rein, its debtor.

[2] The primary issue on this application was not the use of the reverse vesting mechanism itself but rather what interests could be “vested out” i.e. removed from title to the assets being purchased. Specifically, Invico seeks to remove two Gross Overriding Royalties (GORs) from title to the lands it is purchasing and to transfer, or vest out, those GORs to a residual trust as unsecured claims. It is conceded by Invico that there will not be sufficient funds paid into the residual trust to provide any payment to those royalty holders from the trust.

[3] NewGrange Energy Inc (NewGrange) objects on its own behalf and on behalf of the Shareholders (defined later), both of them holding GORs, to those GORs being vested out, arguing that they are interests in land which run with the land and which cannot or should not be stripped from title passing to Invico. Invico argues that these GORs are not interests in land and even if they are, they should be vested out in any event.

[4] For the reasons that follow, Invico’s application is granted. Its credit bid and resulting acquisition of the business and assets of Free Rein is the best option available and satisfies the statutory and common law requirements for approving the sale. Further, this is an appropriate

case for employing the reverse vesting mechanism, largely because of the existing oil and gas permits and licences in place. Lastly, the NewGrange GOR and the Shareholders' GOR will be among the claims vested off into the residual trust as they do not constitute interests in land.

[5] After a brief review of the factual and procedural background, I will explain why the RVO is the appropriate mechanism in this case and then will address the request to vest out the GORs.

2. Background

[6] In June of 2018, NewGrange purchased oil and gas assets (called the Golden Spike Asset, herein the "Asset") out of the receivership of Questfire Energy Corporation. NewGrange paid \$250,000 in addition to assuming some liabilities associated with the Asset. Purvida Exploration Inc (owned by Sean Addison) and 1591195 Alberta Ltd (owned by Andy Prefontaine) contributed to the purchase price. NewGrange (owned by Terry McCallum) borrowed its share of the contribution to the purchase price, which it has since repaid.

[7] NewGrange, assisted by Purvida and 1591195, then attempted to sell the Asset for \$2M plus a 5% GOR but could not find any buyers at that price. With no prospective buyers, Mr. McCallum decided to raise money to produce the oil and gas himself. To do this, he purchased the majority of shares of Free Rein, a company with regulatory licences in place that made it easier for Free Rein to find investors. Free Rein ultimately purchased the Asset from NewGrange in November, 2018 for \$750,000 cash plus a 5% GOR granted back to NewGrange.

[8] Another GOR was granted by Free Rein in March of 2023, this time to the Free Rein Shareholders (defined as those individuals and companies listed in Exhibit "I" to the McCallum Affidavit filed February 15, 2024) who collectively provided \$150,000 that Free Rein needed to recomplete a particular well.

[9] By a loan agreement dated September 21, 2022 and amended on April 18, 2023, Invico advanced funds to Free Rein. Free Rein defaulted on those loan obligations shortly thereafter. Free Rein filed a Notice of Intention on June 12, 2023 to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c.B-3 (*BIA*). A sale and investment solicitation process (SISP) was approved on August 25, 2023 which resulted in two bids, in addition to Invico's stalking horse bid.

[10] However, before that process could be concluded, the gas plant which processes all of Free Rein's gas, Tidewater Midstream and Infrastructure Ltd, terminated its contracts with Free Rein, claiming force majeure. Because no other gas processing option is feasible for this Asset, the gas wells were shut in. Since then, the regulator has allowed only isolated production to flare off the sour gas. The oil wells continue in production but they are only approximately 1/3 of Free Rein's total production. The Tidewater termination was therefore a material adverse change which caused the prospective purchasers to withdraw their bids. The *BIA* proceeding was then converted into a proceeding under the *CCAA* and FTI Consulting Ltd. (FTI) was appointed as Monitor.

[11] As the SISP process has effectively been exhausted, ultimately resulting in no viable third party purchasers, Invico now proposes to acquire 100% of Free Rein's shares by way of credit

bid, in exchange for the forgiveness of approximately \$6.5M in debt owed to Invico.¹ In addition, Invico will assume certain liabilities attached to the assets being transferred and make a cash payment of approximately \$650,000 for court-ordered charges and statutory priorities.

[12] I will first address the suitability of the RVO mechanism and then address Invico's request to vest out the NewGrange and Shareholders' GORs.

3. Reverse Vesting Orders

[13] RVOs can be an appropriate vehicle for the sale of insolvent companies or their assets in CCAA proceedings. Because an RVO vests title to shares and/or assets directly in the purchaser, as opposed to offering them to open market, additional scrutiny is required to ensure that the sale is fair and reasonable. Further, because RVOs generally involve the creditor taking some assets and liabilities while disclaiming others, courts have a heightened role in ensuring that doing so does not work an avoidable unfairness to affected parties.

[14] Any sale in a CCAA proceeding, whether through an RVO or otherwise, must answer the questions in s.36(6) CCAA as follows (paraphrased):

- (a) Was the process leading to the proposed sale reasonable?
- (b) Does the Monitor approve the proposed sale?
- (c) Has the Monitor opined that the proposed sale would be more beneficial to creditors than a sale under a bankruptcy?
- (d) Were the creditors consulted?
- (e) How will the creditors and other interested parties be affected?
- (f) Is the consideration offered fair and reasonable?

[15] These factors were reviewed in *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 at para.16, in which the Ontario Court of Appeal also focussed on the efficacy, integrity and fairness of the process generally.

[16] The SISP was granted by this Court on August 25, 2023. FTI has filed its Reports outlining its compliance with the SISP Order, including going through both Phase I and Phase II of the SISP process. That resulted, as mentioned, in three bids; two independent bids and Invico's own stalking horse bid.

[17] The process was conducted fairly and over an appropriate length of time, allowing numerous potential offerors to participate. The only reason the sales process under the SISP did not proceed to conclusion was Tidewater's termination of the processing contracts, leading to the shutting in of the majority of the wells in the Asset and the existing bidders aborting their bids. The Monitor has been supportive of all the steps in the proceeding, including the conversion to a CCAA proceeding, the SISP and now the RVO in the form sought. I am satisfied that the relevant factors in s.36(6) CCAA and *Soundair* have been sufficiently and fairly addressed.

¹ Invico's debt is quantified differently in different places in the filed material, ranging from \$6.3-\$6.7M. I have not attempted to discern this with certainty because the debt, at either end of that range, vastly exceeds the value of the assets which are the subject of the proposed transaction.

[18] However, as mentioned, there are additional factors to consider in granting an RVO. Neither the *BIA* nor the *CCAA* explicitly authorize an RVO, it is now accepted that ss.11 and 36(6) *CCAA* (in this case) provide the authority to grant an RVO where it is “appropriate in the circumstances”; see *Southern Star Developments Ltd v Quest University Canada*, 2020 BCCA 364 at para.11.

[19] Notwithstanding that authority, an RVO is still supposed to be an “extraordinary” measure; *Harte Gold Corp (Re)*, 2022 ONSC 653 at para.38. Presumably this is because, while it creates favourable conditions for the RVO purchaser, it has the potential of being unfair to other stakeholders. For example, an RVO circumvents the debtor making a plan or a proposal and may therefore be misused to thwart particular creditors or stakeholders who would otherwise have a right to participate in the approval or rejection of the proposal in the creditor class vote. Further, where the proposed purchase under an RVO is a credit bid, there may be a concern about fair value being paid for what is being purchased because, *inter alia*, the RVO structure affords intangible benefits to the purchaser that would not be enjoyed under the more conventional Sales and Vesting Order (SAVO).

[20] As a result, the following additional questions must be answered:

- (a) Why is the RVO necessary?
- (b) Does the RVO structure produce an economic result that is at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under another viable alternative? and
- (d) Does the consideration being paid reflect the value of the intangible assets being preserved under the RVO?

Harte Gold (Re), *ibid*.

[21] An RVO may be necessary where the debtor is operating in a highly regulated industry and holds regulatory permits and licences that a purchaser would, in the normal course, have to obtain in its own name, by application or assignment. This involves a great deal more time and cost than assuming the existing permits and licences, with all the attendant obligations of course.

[22] The same may be true of existing contracts to which the debtor is a party and of existing tax attributes that would be lost if the assets were simply sold to a new purchaser under a SAVO; *Just Energy Group Inc v Morgan Stanley Capital Group Inc*, 2022 ONSC 6354 at para.34.

[23] Chris Wutzke, Invico’s Chief Investment Officer, has deposed that Invico is proposing to retain all oil and gas licences, all software licences, all agreements relating to specific projects and all regulatory attributes of Free Rein; Paragraphs 19, 28 of Wutzke Affidavit #3 sworn and filed February 2, 2024.

[24] Is Invico paying a fair price for the Free Rein assets? A credit bid in these circumstances can be hard to evaluate. On one hand, Invico is receiving an asset that the free market valued at something less than \$2M, excluding the GOR, in exchange for the forgiveness of \$6.5M in debt. But if Free Rein is put back into bankruptcy proceedings with no imminent purchaser, the remaining producing wells will likely be shut in and devolve to the Orphan Well Association, leaving Invico with no recovery at all. Accordingly, the actual value of the debt forgiveness may be something less than \$6.5M, given that the only other option is for Invico to receive nothing.

[25] However, Invico would also be assuming the liabilities associated with operating these wells, hopefully allowing them to stay or come back into production. There is additional value in that, as well as in retaining the existing employees.

[26] In terms of alternative scenarios, there simply are none, which is why the Monitor is supporting the current proposal. In the proposed RVO, Invico is better off than in a bankruptcy, but so are any employees, the priority creditors and even the industry, to the extent that the Orphan Well Association's costs and liabilities are so funded.

[27] NewGrange and the Shareholders are not actually any worse off in the RVO than they would otherwise be. They will recover nothing in either the proposed RVO or in a bankruptcy. However, that is not because of the RVO structure. Whether this was a standard SAVO or an RVO, the amount of Invico's debt would always have meant that there was nothing left for subordinate creditors.

[28] In fact, neither NewGrange nor the Shareholders oppose the RVO in principle. They simply oppose their GORs being vested out to the residual trust, which is dealt with later in these Reasons.

[29] Given the foregoing, I find that the *Harte Gold* factors have been met and this is an appropriate case to employ the RVO format.

4. Gross Overriding Royalties

[30] The primary dispute in this case was whether the NewGrange and Shareholder GORs are interests in land which "run with the land". If so, then the court's ability to vest them out would be restricted and subject to further considerations. If not, those claims could be vested out as unsecured contractual claims against the residual trust and the assets would pass to Invico free and clear.

[31] There are two ways in which Invico can establish its entitlement to vest out the GORs; (1) by proving that the GORs are not an interest in land; or (2) by proving that, even if the GORs are an interest in land, it is equitable and appropriate to vest them out anyway.

[32] NewGrange and the Shareholders maintain that the language of their Royalty Agreements, defined *infra*, makes it clear that the parties intended to and did convey an interest in land. Invico says that, looking at the Royalty Agreements themselves and the circumstances of the transaction, these GORs were not treated as interests in land.

(a) GOR as an Interest in Land: The *Dynex* Test

[33] It is now settled law that a GOR can be an interest in land. Justice Bourque recently did a comprehensive review of this legal evolution, which I will not repeat here; *Prairiesky Royalty Ltd v Yangerra Resources Ltd*, 2023 ABKB 11 at paras.23-40. See also, D. LeGeyt et al "Let's Talk About Royalties: The Continued Uncertainty Surrounding the Creation and Legal Status of the Overriding Royalty", 57 Alta. Law Rev. 335 (2019).

[34] However, a GOR can also be a contractual right to receive royalty payments without constituting an interest in land. In *Vandergrift v Coseka Resources Ltd*, (1989) 95 AR 372, Virtue, J of this Court set out a two-part test for determining whether a GOR was, in fact, an interest in land. That test, set out below, was adopted by Major J of the Supreme Court of Canada and is often called the *Dynex* test:

A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

Virtue J. in *Vandergrift*, *supra*, at p. 26 succinctly stated:

... it appears reasonably clear that under Canadian law a "royalty interest" or an "overriding royalty interest" can be an interest in land if:

- 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
- 2) the interest, out of which the royalty is carved, is itself an interest in land.

Bank of Montreal v Dynex Petroleum Ltd, 2002 SCC 7 at paras.21-22

(i) Dynex Part I – Contractual Interpretation

[35] To ascertain the intentions of the parties, we must employ the principles of contractual interpretation. I can do no better than the summary from Horner, J in *Accel Canada Holdings Limited (Re)*:

When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: *Sattva* at para 57.

It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": *Sattva* at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 (Alta. C.A.) at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018) [2018 CarswellAlta 666 (S.C.C.)].

...

The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: *Sattva* at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have

been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: *Sattva* at para 58.

Determining what constitutes surrounding circumstances is a question of fact: *IFP Technologies* at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: *Alberta Union of Provincial Employees v. Alberta Health Services*, 2020 ABCA 4 (Alta. C.A.) at para 25 [AUPE]. Relevant background facts include those that speak to:

- 1) the genesis, aim or purpose of the contract;
- 2) the nature of the relationship created by the contract; and
- 3) the nature or custom of the market or industry in which the contract was executed: *IFP Technologies* at para 83.

Accel Canada Holdings Limited (Re), 2020 ABQB 182 at paras.17-18 and 20-21 (NB: leave to appeal was refused on an alleged error in applying the law of contractual interpretation; *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160).

(ii) Dynex Part II – *Nemo Dat Quad Non Habet*

[36] The second arm of the *Dynex* test for whether a GOR is an interest in land is whether the interest of the grantor, from which the GOR is carved out, is itself an interest in land. I have averted to the maxim '*nemo dat quad non habet*' which simply means that one cannot give what one does not have.

[37] While the origin of this part of the *Dynex* test concerned itself with the nature of what was owned in relation to what was granted, the application of this principle to the NewGrange GOR is concerned with the timing of granting something you do not own yet. This is discussed below in paras.90-105.

[38] Accordingly, I will examine the language of the Royalty Agreements, including how each GOR was treated within the contracts and within the transaction. Although the *Dynex* test applies equally to the NewGrange and the Shareholder GOR, the language used and the surrounding circumstances of each is different, so I will address them in turn.

(b) The NewGrange GOR

(i) The 2018 Transaction

[39] Terry McCallum is the principal actor here. He is the sole owner of NewGrange. In order to buy the Asset from the Questfire receivership in 2018 for \$250,000, he got money from his associates Sean Addison of Puravida (\$50,000) and Andy Prefontaine of 1591195 Alberta Ltd (\$75,000). McCallum borrowed the rest of the funds himself, which he subsequently repaid.

[40] NewGrange then signed Work Agreements and Marketing Agreements with Puravida and 1591195 Alberta Ltd, promising them 20% and 30% respectively, of any financial benefit

derived by NewGrange, whether in cash or in the form of a royalty². Those companies, represented at this hearing, supported NewGrange's position that the GORs were interests in land.

[41] Unable to find a buyer for the Asset on an "as is" basis for \$2M plus a 5% GOR (which would have been a 700% profit less the GOR), McCallum elected to put the Asset into production to make it more attractive to prospective buyers. He did this by selling the Asset to Free Rein. Free Rein had no oil and gas assets of its own but held AER licences that NewGrange did not have. Free Rein was owned by McCallum's friend, Edward Jakubowsky, who agreed to transfer 98% of the shares of Free Rein to McCallum for \$1.00, effectively making McCallum the grantor and the grantee of the GOR.

[42] Free Rein resolved to sell \$1 shares. There was no evidence of what third party investments were made in 2018, if any but by the fall of 2018, McCallum was satisfied that they would eventually raise enough money to develop the Asset. NewGrange then sold the Asset to Free Rein for \$750,000 plus a 5% GOR granted back to NewGrange.

[43] The Asset Purchase Agreement (APA) was signed on November 1, 2018 and closed on November 30, 2018. Schedule "C" to the APA was the Royalty Agreement between Free Rein and NewGrange, which had been signed previously, on October 30, 2018.

[44] The evidence of this background comes from the Affidavits of Terry McCallum and of Chris Wutzke. NewGrange objected to the admission of Wutzke's evidence because it was largely hearsay. This is true. The GOR was granted in the course of a 2018 transaction before Invico loaned any money to Free Rein. However, Mr. Wutzke was not purporting to give evidence about what Mr. McCallum and his associates subjectively thought or intended in 2018. He could not, firstly because he was not there but also because evidence of subjective intent is inadmissible.

[45] There is no danger to admitting Mr. Wutzke's evidence, which is either his own knowledge of the current state of the Asset and the proposed RVO or which attaches documents from the 2018 transaction between Free Rein and NewGrange. Although this would be admissible under the principled exception to hearsay anyway – being both necessary and reliable – it may be preferable to simply emphasize that the intentions of the parties must be gleaned from a review of the known and agreed facts and documents from that time, not from evidence about the parties' subjective thinking; *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras 57 and 127.

(ii) The Granting Clause

[46] In this case, NewGrange relies completely on the language of Clause 2(a) of the NewGrange Royalty Agreement:

[NewGrange] does hereby reserve to itself and [Free Rein] does hereby grant to [NewGrange] the Overriding Royalty on the Royalty Lands as described in this Royalty Agreement and based upon the working interest of the Royalty Payor [Free Rein] as set forth in the attached Schedule "A" or Schedule "A-1". The

² This arrangement is the subject of other litigation. I do not intend for my passing comments on it to indicate any opinion on the merits of any positions taken in that lawsuit.

Overriding Royalty is intended to be an interest in land in the Royalty Lands and to be a covenant running therewith.

[47] The “Overriding Royalty” is defined as the percentage of Petroleum Substances produced from the Royalty Lands calculated in accordance with the provisions of the Royalty Agreement.

[48] Simply calling something an interest in land does not, by itself, make it so. However, where parties have used clear language to describe their mutual intention to create an interest in land, that can be overcome only by clear and objective evidence which indicates otherwise; what Bourque, J has characterized as a rebuttable presumption; *PrairieSky* at para.63.

[49] The granting language in the NewGrange Royalty Agreement could fairly be characterized as the “magic words” which evidence the parties’ intention to create an interest in land. However, it was our Court of Appeal in *Dynex* that warned that focussing only on “magic words” without considering the substance of the transaction was an improper approach; *Bank of Montreal v Dynex Petroleum Ltd*, 1999 ABCA 363 at para.73; see also *Prism Resources Inc v Detour Gold Corporation*, 2022 ONCA 326 at paras.13-14.

[50] NewGrange objected strenuously to consideration of anything outside the granting language. Its Brief wrongly conflates surrounding circumstances with parol evidence (paras.30-31 of that Brief) and simply declares that the surrounding circumstances are “irrelevant” in the face of Clause 2(a) of the GOR. The law is clear that surrounding circumstances cannot be irrelevant. In fact, failing to consider them would be a reviewable error:

One error of law reviewed for correctness is where the trial judge fails to consider the "surrounding circumstances" or "factual matrix" of a contract. A trial judge must consider the factual matrix in interpreting a contract regardless of whether the contract is ambiguous. Therefore, it is an error for a trial judge to discount the factual matrix on the basis that the contract itself is not ambiguous: *British Columbia (Minister of Technology, Innovation and Citizens' services) v. Columbus Real Estate Inc.*, 2016 BCCA 283 (B.C. C.A.) at paras 40, 51, (2016), 402 D.L.R. (4th) 117 (B.C. C.A.); *Starrcoll Inc. v. 2281927 Ontario Ltd.*, 2016 ONCA 275 (Ont. C.A.) at paras 16-17, (2016), 68 R.P.R. (5th) 173 (Ont. C.A.).

IFP Technologies (Canada) Inc v EnCana Midstream and Marketing, 2017 ABCA 157 at para.58

[51] This type of clear granting language, along with evidence of registration of the GOR on title (which was done here), has generally been sufficient to declare a GOR to be an interest in land. However, in most of those cases, there was no evidence of any contrary intention.

[52] For example, In *Third Eye Capital v Dianor Resources Inc*, the challenging party relied on the outdated argument that an interest in land must be accompanied by a right of the royalty holder to enter onto the land and produce the substance themselves, an argument rejected by the Ontario Court of Appeal; 2018 ONCA 253 (*Dianor #1*) at para.56.

[53] Similarly, in *PrairieSky*, Yangerra argued that a share of substances recovered from the land was necessarily a contractual right and could not be an interest in land. Bourque J rejected that argument as well, saying “Yangerra’s position embraces precisely the type of anachronisms the Alberta Court of Appeal in *Dynex* ABCA and the Supreme Court in *Dynex* sought to do away with”; *PrairieSky* at para.85.

[54] In another case before our Court, *Manitok*, the landowner and the receiver were opposed to the royalty remaining on title. They argued, *inter alia*, that because the royalty was a right to share in production which decreased on a sliding scale over time, with no right of entry onto the land, the royalty could not be an interest in land. Relying on *Dynex*, Horner J concluded that “even a “net profits interest” could be an interest in land if the parties made the intention to make it so sufficiently clear”; *Manitok Energy Inc (Re)*, 2018 ABQB 488 at paras. 19 and 22.

[55] A case finding otherwise was *Accel (Re)*, the 2020 case also before Horner J. In that case, despite clear granting language, she found that the GOR was a security interest, not an interest in land. Among other things, the GOR was only triggered by non-payment of the installment purchase price and thus was characterized as a security interest rather than an interest in land. Leave to appeal on this issue was refused; 2020 ABCA 160.

[56] Is Clause 2(a) of this Royalty Agreement contradicted by other language or aspects of the transaction to the extent that the GOR cannot be an interest in land, notwithstanding the granting language?

(iii) Inconsistencies Relied on by Invico

[57] As mentioned, Invico argues that a number of elements of the transaction, including within the Royalty Agreement itself, are inconsistent with the grant of an interest in land and are indicative of an intention to grant only a contractual right to a royalty payment. Summarized, these are:

- (a) The Royalty Agreement purports to grant interests in AMI lands, not identified or owned by the grantor;
- (b) The Free Rein Directors’ Resolution authorizing the purchase from NewGrange and the granting of the GOR to NewGrange said the royalty would only be paid while “commercially reasonable” for Free Rein to do so; and.
- (c) The assignment clause of the Royalty Agreement describes a contractual obligation that follows Free Rein, not the land.

A. The AMI Issue

[58] Free Rein granted to NewGrange “the Overriding Royalty on the Royalty Lands as described in this Royalty Agreement and based upon the working interest of the Royalty Payor as set forth in the attached Schedule “A” or Schedule “A-1”; Clause 2(a) of the Royalty Agreement.

[59] The Royalty Lands are defined as the “lands set out in Schedule “A” (or that may hereafter be made subject to a gross overriding royalty...by virtue of Area of Mutual Interest or otherwise)”.

[60] Schedule “A” to the Royalty Agreement lists the five Crown leases. These leases correspond to the registrations of the GOR against four of the five leases (Exhibit “D” to Wutzke Affidavit #3). The last, NW 35-51-27 W4M, in which Free Rein holds a 5% ownership interest, was on a schedule to the APA. In any event, I understood the NewGrange GOR to be registered against all subject Crown leases.

[61] There is no Schedule A-I to the Royalty Agreement, notwithstanding that reference in Clause 2(a). There is a Schedule B titled “Mutual Interest Lands”. Clause 16 of the Royalty

Agreement says that if Free Rein acquires any mutual interest lands within 2 years of the “Acquisition Date” (which purports to be set forth in Schedule “A” but is not), Free Rein must notify NewGrange of any such acquisition. Any such interest acquired is deemed to be subject to NewGrange’s GOR and the parties would be obligated to amend Schedule “A-1” (non-existent) in writing.

[62] Clause 16 also provided that if further areas, outside the Mutual Interest Lands, were acquired (no time limit on this), the parties could agree in writing to amend Schedule “A” to the Royalty Agreement to incorporate such acquisition(s). If they did, they were also to amend Schedule “B” to “incorporate this [new] area of mutual interest”. It was acknowledged that unless and until the parties mutually amended Schedules “A” and “B”, there were no royalty obligations created in any additional, non-AMI, lands.

[63] Invico argued that this future unidentified interest in land could not give rise to an interest in land capable of being granted on October 30, 2018. Free Rein had no interest in any AMI lands on October 30, 2018, and there was no certainty as to what, if anything, it would ever acquire under Clause 16 to the Royalty Agreement.

[64] This is a variation of the application of the principle of *nemo dat quod non habet* – one cannot grant what one does not have – that is discussed in more detail later.

[65] I agree with Invico. The most that could be created with respect to future acquisitions was a contractual right of NewGrange to have the Royalty Agreement amended to include such acquisitions in the lands generating a royalty (i.e. under Schedule “A”).

[66] However, once that contractual right was exercised and Schedule “A” amended, conceptually, the additional lands and the royalties derived therefrom would be treated in the same manner, legally, as the original GORs. They would either be interests in land or they would not be. In other words, if the original GOR was truly an interest in land, the Royalty Agreement envisioned that the later-acquired royalty in later-acquired land would similarly be an interest in land, once the Royalty Agreement was amended to include it.

[67] This does not necessarily assist NewGrange with the underlying issue of whether the original royalty was an interest in land to begin with. However, neither does it operate the way that Invico suggests; that any reference to the possibility of acquiring future royalty rights meant that those granted on October 30, 2018 were not true interests in land. An option on future acquisitions might not itself be an interest in land but it does not impact the proper characterization of interests existing at the time of granting. In other words, this is a neutral factor.

B. The Directors’ Resolution

[68] Another of Invico’s arguments was that the Free Rein Directors’ Resolution authorizing the purchase of the Asset and the granting of the GOR to NewGrange did not treat the royalty as an interest running with the land.

[69] Edward Jakubosky and Terry McCallum, as the two directors of Free Rein, signed a Directors’ Resolution dated December 15, 2018, resolving:

That [Free Rein] acquire an Asset, as of October 27, 2018, known as the Questfire Asset, being mineral rights in the Golden Spike area, from NewGrange Energy.

*In exchange for the Questfire Asset, the Corporation agrees to pay \$750,000, grant a gross overriding royalty to Terry McCallum (or his nominee), paid **as long as it is commercially reasonable to do so**, and will assume all liabilities associated with the Questfire Asset.*

Following the acquisition of the Questfire Asset, [Free Rein] shall issue all future shares for \$1.00. [emphasis added]

[70] Invico says that Free Rein’s reservation of the right to pay the royalty only “as long as it is commercially reasonable to do so” is incompatible with a true interest in land that runs with the land. It makes the payment of the royalty conditional on something discretionary and, at least potentially, extraneous to the land. This is compatible, Invico says, with a contractual right to receive the GOR but not with an interest in land because the GOR could be terminated while the underlying working interest continued uninterrupted. In other words, the working interest and the gross overriding royalty therein could run for different lengths of time.

[71] In the decision of our Court of Appeal in *Dynex*, one of the factors for determining whether an overriding royalty was an interest in land or not was whether or not the overriding royalty was capable of lasting for the duration of the underlying interest:

As gleaned from the authorities, various indicia could be used to identify whether or not an interest in land was intended. The set of indicia, which is not exhaustive but may be relevant, is:

1. The underlying interest is an interest in land (corporeal or incorporeal);
2. The intentions of the parties, as evidenced by the language of the grant and any admissible evidence of the surrounding circumstances or behaviour, indicate that it was understood that an interest in land was created/conveyed;
3. The interest is capable of lasting for the duration of the underlying estate.

Dynex, ABCA, 1999 ABCA 363 at para.84.

[72] The Supreme Court of Canada upheld the Court of Appeal’s decision in *Dynex* but articulated its test somewhat differently, incorporating the first and second of these suggested indicia (in reverse order) but not mentioning the third at all.

[73] I therefore conclude that while it may not be a requirement that an overriding royalty be capable of lasting for the duration of the underlying estate, it is still a factor to consider in characterizing an overriding royalty as an interest in land. It has been treated thus by our Court in *PrairieSky* and in *Manitok*.

[74] In *Manitok*, it was argued that because the royalty decreased over time, it could not be an interest in land. Horner J said:

This leaves the Respondents’ arguments that the fact that the Producing Royalty decreases over time, and includes lands from which Freehold may never receive Oil Volumes, weigh against the determination that the Producing Royalty is an interest in land. With respect to the former: the Royalty Agreement is carefully drafted so as to preserve the existence of the Producing Royalty until such time as the Documents of Title expire, while recognizing the reality of reservoir

depletion. This suggests a conscious effort and careful drafting with a view to ensuring that the Producing Royalty meets the requirements for an interest in land.

Manitok at para.24.

[75] While this Free Rein Directors' Resolution was not particularly careful to treat the GOR as an interest in land, it should be distinguished from cases like *Manitok* where the issue around contemporaneous interests was found in the royalty agreement itself.

[76] This Directors' Resolution was a document signed by the representatives of only one party to the agreement, Free Rein. Its enforceability, at least in terms of unilateral discretion to terminate the royalty payments to NewGrange, must be questionable. Other than the fact that Terry McCallum was also the sole shareholder of NewGrange, and therefore knew that Free Rein was so resolving, there is no evidence that NewGrange formally agreed to Free Rein reserving this discretion.

[77] One might say that "commercially reasonable" in the context of this transaction must simply refer to Free Rein's discretion to shut in wells where continued production was not commercially feasible. If that were the case, one might expect "commercially reasonable" to expressly modify production as opposed to the payment of the royalty. As drafted, this could conceivably refer to Free Rein's general financial health or commodity prices or labour availability or regulatory issues. One might also expect it to have been included in the Royalty Agreement so as to indicate some acceptance by the royalty holder of this discretion reserved to the royalty payor.

[78] Further, if it only refers to feasible production on which to pay the royalty, the clause is unnecessary as NewGrange only got a percentage of what was produced. If production was less or non-existent, there would be less or no royalty by the terms of the Royalty Agreement. Free Rein did not need to incorporate that causal connection between production and royalty payments in a Directors' Resolution.

[79] However, in the available jurisprudence dealing with the phrase "commercially reasonable" in the context of royalty payments on everything from oil and gas to books to patents, it has invariably been interpreted to mean a reference to the commercial feasibility of whatever underlying activity is generating the royalty.

[80] Whatever was meant by this unilateral Directors' Resolution, even to the extent that it may be inconsistent with the granting language in Clause 2(a), it cannot overwhelm the clear language used by both parties in the actual Royalty Agreement.

C. The Assignment Clause

[81] Clause 14 of the GOR reads, in part, as follows:

In the absence of an assignment in accordance with the foregoing [the 1993 CAPL Assignment Procedure] or Royalty Owner's written consent, Royalty Payor shall remain liable for the payment of the Overriding Royalty notwithstanding that it may no longer have any interest in the Royalty Lands from which such Petroleum Substances are produced, or that it may not be receiving the production or proceeds of production therefrom.

[82] This language clearly envisions an independent right for NewGrange to receive the GOR that is separate and apart from the Free Rein's working interest in the land. If Free Rein assigns any of its interests in these leases without NewGrange's consent, it is liable to continue paying a gross overriding royalty to NewGrange whether or not it has the lands or even the proceeds of production.

[83] If the GOR truly ran with the land, this protection for the royalty holder would not be necessary because the assignee of Free Rein's interest would take title to the lands subject to NewGrange's GOR. In fact, in that event, this language creates the possibility of double recovery, at least conceptually. Obviously, such a claim advanced against Free Rein when it no longer owns the interest in land itself can only be a contractual claim.

[84] The assignment provisions of the royalty agreements in *Manitok* and *PrairieSky* were also argued to be inconsistent with clear granting language. In neither case did that argument prevail.

[85] In *Manitok*, the assignment clause said that if Manitok assigned its interest, it was obligated to provide the royalty holder with a substitute property producing a comparable royalty; *Manitok* at para.11

[86] In *PrairieSky*, Bourque J had an assignment clause that expressly contemplated a subsequent obligation to execute an assignment and novation agreement (recognition of the obligation by the assignee), reflecting "the industry practice of perfecting the assignment of the payor's interest in a royalty agreement, regardless of whether the royalty would presumptively run with the lands"; *PrairieSky* at paras.109-115.

[87] The language of the assignment clause in the NewGrange Royalty Agreement does neither of these things; it does not obligate Free Rein to find substitute land nor does it contemplate a novation by a new working interest owner/assignee. It simply says that the royalty will continue to be paid by a party no longer holding an interest in land, which then also fails the second arm of the *Dynex* test.

[88] I note that NewGrange argued that its Royalty Agreement was modelled on the 2015 CAPL template and thus, a finding that it did not successfully create an interest in land would be problematic for the entire oil and gas industry. Clause 14 of the NewGrange Royalty Agreement contains some similar language to the template but the sentence reproduced above does not appear in the 2015 version.

[89] I find that this language is fundamentally inconsistent with the granting language purporting to create an interest in land. Is it sufficiently inconsistent to overwhelm the language in Clause 2(a), to rebut the presumption created by that language?

D. Nemo Dat Quad Non Habet

[90] The second arm of the *Dynex* test for whether a GOR is an interest in land is whether the interest of the grantor, from which the GOR is carved out, is itself an interest in land.

[91] The Asset Purchase Agreement by which Free Rein acquired the Asset was signed on and dated November 1, 2018 but the defined "Closing Date" was November 30, 2018. By the terms of the APA, title to the Asset did not transfer from NewGrange to Free Rein until November 30, 2018. The APA did not purport to be effective on any other or prior date.

[92] Invico argues that that Free Rein could not grant an interest in land to NewGrange on October 30, 2018 because it did not have an interest of its own to grant at that time. Although Invico concedes that Free Rein's leasehold interests are interests in land, Free Rein did not take title to those leasehold interests until November 30, 2018. Free Rein had no interest to grant on October 30, 2018.

[93] It might have been possible to consider this argument under the first arm of the *Dynex* test, where we reviewed the language and circumstances of the transaction. Had I proceeded that way, I would have found that this factor weighed heavily against the parties' objective intentions to create an interest in land in the GOR.

[94] However, on reflection, I believe that this *nemo dat* argument properly belongs in the second arm of the *Dynex* test, as proposed by Invico. While, as I will explain, it is a somewhat different application of *nemo dat* than that in *Dynex*, it falls from the same inquiry, namely what did the grantor have to give? The import to this is that the two arms of the *Dynex* test are conjunctive. Both must be satisfied. Thus, even if I had found that the parties intended to create and transfer an interest in land, that did not happen.

[95] The second part of the *Dynex* test did not originate from a party purporting to convey a part of an interest to someone else before acquiring the underlying interest itself. In *Dynex*, Major, J was speaking of the fact that the grantor's interest must itself be an interest in land. It was a comment on the *nature* of the grantor's interest; that a grantor cannot create an interest in land from something that was never an interest in land e.g. a contractual right. It was not, at least not in *Dynex*, about the *timing* of acquiring that interest.

[96] In most post-*Dynex* cases, the question posed has been only whether the grantor's interest was fairly characterized as an interest in land or not. However, Vandergrift does address a timing issue similar to the case at bar. In the 1989 case of *Vandergrift*, Virtue J said the royalty interest in that case was not an interest in land because it was expressed as an interest in petroleum substances produced from the land not within the land; *Vandergrift* at para.40. That reasoning was disavowed later by the Supreme Court of Canada in *Dynex*.

[97] However, *Vandergrift* is still worth considering for its jurisprudential value on the second arm; did the grantor have an interest in land to alienate? Virtue J also found that the grantor of the royalty had not yet earned its working interest in the leasehold at the time of granting the royalty. Under the subject farmout agreement, the grantor had to drill a well in order to earn its working interest which did not happen until two years later, as explained in these passages:

When the royalty agreement was entered into, the grantor, Suffolk, had an interest in the farmout agreement from Imperial and it had a natural gas licence from the Crown. At that time, Suffolk, which granted the royalty, did not have a lease and it would not acquire a lease until it earned it by drilling a well.

...

The effect of this was that Suffolk, at the time it granted the royalty, had the right to earn an interest in land by drilling a well, but it had not yet earned it. Suffolk did not acquire the lease until 13th August 1973, that is, more than two years after the royalty agreement was executed.

....

The result is that when Suffolk granted the royalty it did not own an interest in land and could not, therefore, “carve out” or convey an interest in land to the plaintiffs.

Vandergrift v Coseka Resources Ltd, 1989 CarswellAlta 76 at paras.45, 46 and 49.

[98] In *Vandergrift*, this was fatal to the grantee’s argument that it had received an interest in land.

[99] Similarly in *Quest University*, Quest owned lands and had partnered with Southern Star to build residences thereon. Southern Star had a ground lease under this arrangement, which it objected to having vested off in Quest’s CCAA proceedings. Fitzpatrick J concluded that Quest was not a lessor under s.32(9) CCAA because the parties had intended the lease to be valid and effective between them only once construction commenced and the lease became registerable. Those conditions had not yet been satisfied so Southern Star was not a lessee and could be restrained from attempting to register any encumbrance; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras.35-40; leave refused 2020 BCCA 364. While not dealing with a GOR, it is authority for the *nemo dat* principle applied to the conveyance of an interest in real property.

[100] In responding to this argument, NewGrange’s Brief says that the signing of the documents “occurred simultaneously”. The practice of signing various documents related to one transaction in close succession is not only reality, but it has also been recognized at law. While the argument was not successful in *Gauvin v Irving Oil*, where Irving Oil signed two different and contradictory agreements with Ms. Gauvin and her husband, the “one transaction” principle itself was cited thus:

Counsel for the defendant cites *Manks v. Whiteley*, [1912] 1 Ch. 735 at 754 (C.A.) (81 L.J.Ch. D. 457), where Lord Moulton held:

[W]here several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed.

Gauvin v Irving Oil Co Ltd, 1985 CarswellNB 47, 64 NBR (2d) 306 at paras.10-11.

[101] Clearly the Royalty Agreement and the APA are part of one transaction. But they were not executed contemporaneously. I agree with Myers J:

As to the argument that "contemporaneously" can mean "in four days," I was presented with no law to suggest that the meaning of a word can be changed to fit a party's position. There is no ambiguity to the meaning of "contemporaneously". Its ordinary and grammatical meaning is "occurring at the same time."

(*Reserve Properties Ltd. v. 2174689 Ontario Inc.* (2015), 43 B.L.R. (5th) 114, 56 R.P.R. (5th) 131, 2015 ONSC 3469, 2015 CarswellOnt 7890 (Ont. S.C.J.) at para. 17.

[102] The Royalty Agreement may have created a contractual right to a royalty once Free Rein was in the position to pay it but it could not create an interest in land. Nor could it create a

contractual right that could later morph into an interest in land, at least not in the absence of any language whatsoever referencing the APA or the subsequent transfer of title.

[103] In this case, the delay in Free Rein acquiring the Asset made no practical difference because the grantor and the grantee were effectively the same party. However, had they not been, the royalties due for the intervening month would have been problematic. Where the grantee has a royalty but the grantor does not have the land, is anything payable? Is the grantor obligated to pay the royalty on production from which it does not receive revenue? Is the grantor obligated to calculate and reserve royalties to pay later, when it does take title to the interest in lands or production?

[104] Parties to a transaction that purport to convey an interest in land from one to the other must be careful to treat that disposition as a disposition of an interest in land, not as a mere contractual right. That means care with the language across all aspects of the transaction, including care in the timing of execution.

[105] The granting of a royalty on October 18, 2018 in respect of an underlying interest not acquired until November 30, 2018 cannot be a true interest in land.

(iv) Conclusion on the NewGrange GOR

[106] I find that the NewGrange GOR is not an interest in land. In my opinion, the treatment of the GOR in the Royalty Agreement, specifically the assignment provision, along with discretion reserved to the royalty payor, rebuts the presumption created by the language of the granting clause (Cl.2(a) Royalty Agreement). However, even if this were not so, NewGrange's argument fails on the principle of *nemo dat quod non habet*, as captured in the second arm of the *Dynex* test. Free Rein had no interest in the subject Crown leases on October 30, 2018 so it could not grant an interest in those lands to another.

(c) Shareholders' GOR

[107] The Shareholders' GOR arose in different circumstances and uses different language. While all the principles of contractual interpretation as canvassed in the relevant jurisprudence is equally applicable to the Shareholders' GOR, the facts are different.

(i) The 2023 Transaction

[108] In early 2023, Free Rein was in financial difficulty and in default of its Invico Loan Agreement. It identified an existing well (100/06-26-051-27W4M) that could be capable of production if recompleted but it lacked the funds to do this. It collected \$150,000 from a group of 19 existing shareholders listed on Exhibit "I" to the McCallum Affidavit filed February 15, 2024 and in exchange, granted the Shareholders a GOR on production from that specific well. The GOR was divided among the Shareholders according to their respective shareholdings.

(ii) The Language of the Shareholder Royalty Agreement

[109] The Shareholder GOR is dated March 8, 2023. Clause 2 of the Shareholder Royalty Agreement reads as follows:

(a) The Royalty Owner does hereby reserve to itself and the Royalty Payor does hereby grant to Royalty Owner the Overriding Royalty on Petroleum Substances produced from the Royalty Well as described in this Royalty Agreement and based upon the interest of the Royalty Payor as set forth in the attached Schedule "A".

The Overriding Royalty is intended to be an interest in land in the Royalty Well and to be a covenant running therewith.

(b) *The Overriding Royalty will be calculated at the Point of Measurement as follows:*

- (i) *For all Petroleum Substances 5% of the gross monthly production for the first 36 months of production and 2.5% of the gross monthly production thereafter.*

[110] The granting language is therefore not the same and not as clear as the NewGrange Royalty Agreement. The Shareholders' interest is not in land or in substances in or produced from the land but in substances produced from a particular well.

[111] The Assignment Clause (Cl.8) is identical to the Assignment Clause in the NewGrange Royalty Agreement (see paragraph 81 above). It therefore suffers from all the same issues arising from the description of a contractual right to the royalty that follows Free Rein as opposed to an obligation attached to the land and owing from whoever takes the assignment of the land/leasehold interest.

[112] In addition, Clause 6 of the Shareholders' Royalty Agreement provides that, in the event of a corporate sale of Free Rein, the overriding royalty would terminate and the Shareholders would receive a cash payment calculated according to a formula in that clause. This is indicative of an interest in the operator, not an interest in the land that would follow the land and not the working interest owner.

[113] Lastly, there was no evidence that the Shareholders' GOR was registered or was even a registerable interest.

(iii) Conclusion on the Shareholder GOR

[114] Neither the language of the Shareholder Royalty Agreement nor the surrounding circumstances of this transaction support a characterization of this as an interest in land.

(d) The "Dianor" Discretion

[115] Invico argued that, even if the NewGrange and Shareholders' GORs were interests in land, they could be vested out anyway by the exercise of the court's discretion under the CCAA or by virtue of its inherent discretion; *Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508 (*Dianor #2*).

[116] Given that I have found that neither GOR is a true interest in land but are rather contractual rights held by NewGrange and the Shareholders against Free Rein, there is no need to review the scope of the court's discretion to vest out an interest in land.

5. Conclusion

[117] This Court's discretion to vest out an interest in land comes from statute. In this case, Invico relies on sections 11 and 36 of the CCAA.

[118] Neither the NewGrange nor the Shareholders GORs are interests in land. The NewGrange GOR, notwithstanding its granting language did not treat the interest as running with

the land, particularly in view of the assignment clause in the Royalty Agreement. But more importantly, Free Rein did not have the interest from which it purported to carve out the GOR on the date on the Royalty Agreement. For the Shareholder GOR, it did not even purport to be an interest in the land nor was it treated that way in any aspect of the transaction for which evidence was available.

[119] The NewGrange and Shareholder GORs are contractual claims against the debtor. Having considered all the circumstances, including:

- the lengthy sales process which resulted in no other bidder for these assets,
- the possibility of putting these wells back into production again and avoiding a devolution thereof to the Orphan Well Association,
- the possibility of retaining employees and using existing licences,
- the fact that no stakeholders are worse off in this proposal than they would be in a bankruptcy or a non-RVO transaction; and
- the support of the Monitor;

I find that it is appropriate to issue the RVO as proposed by Invico.

Miscellaneous

[120] A stay of proceedings in this matter was extended to April 30, 2024 by consent. If that needs to be revisited, the parties may contact my office or the Commercial Coordinator. If the parties cannot agree on costs or on any ancillary issues with the RVO not addressed herein, they may contact my office.

Heard on the 28th day of February, 2024.

Dated at the City of Calgary, Alberta this 12th day of April, 2024.

M.H. Hollins
J.C.K.B.A.

Appearances:

Robyn Gurofsky and Anthony Mersich
for the Applicant, Invico Diversified Income Limited Partnership,
by its general partner, Invico Diversified Income Managing GP Inc.

Byron W. Nelson
for the Respondent, NewGrange Energy Inc.

Beth P. Younggren
for Purvida Exploration Inc. and 1591195 Alberta Ltd.

Jeffrey Oliver
for the Monitor FTI Consulting Ltd.

TAB 17

Arrangement relatif à Blackrock Metals Inc.

2022 QCCS 2828

SUPERIOR COURT

(Commercial Division)

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No.: 500-11-060598-212

DATE: July 8, 2022 (**RECTIFIED July 13, 2022**)

 BY THE HONOURABLE MARIE-ANNE PAQUETTE, Chief Justice

IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT UNDER THE
COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36 OF:

BLACKROCK METALS INC.
BLACKROCK MINING INC.
BRM METALS GP INC.
BLACKROCK METALS LP.

Debtors

-and-

DELOITTE RESTRUCTURING INC.

Monitor

-and-

INVESTISSEMENT QUÉBEC
OMF FUND II H LTD.

Secured Creditors

-and-

13482332 CANADA INC.

Shareholder Bidder

-and-

WINNER WORLD HOLDINGS LIMITED**4470524 CANADA INC.****GOLDEN SURPLUS TRADING****PROSPERITY STEEL**

Intervenors

RECTIFIED JUDGMENT
ON THE AMENDED SHAREHOLDER BIDDER'S APPLICATION TO EXTEND THE
PHASE 2 BID DEADLINE (SEQ. 23)
AND
ON THE DEBTORS' APPLICATION TO APPROVE A VESTING ORDER (SEQ. 17) ¹

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OVERVIEW

[1] The debtors BlackRock Metals Inc., BlackRock Mining Inc., BlackRock Metals LP and BRM Metals GP Inc. (collectively: **BlackRock**) were established in 2008. They are developing a metals and materials manufacturing business with a mine in Chibougamau, and a metallurgical plant to be located at the Port of Saguenay (**Project Volt**).

[2] The mine and plant to be built under Project Volt will eventually supply vanadium, high purity pig iron and titanium products, three specialty metals which are, according to

¹ Reasons in support of orders issued on May 31, 2022 and rectified on June 1, 2022

BlackRock, central to the green materials transition in North America. BlackRock's business plan contemplates a forty-one year project life generating strong returns, with a small-scale mining operation.

[3] As of now, BlackRock has been in the process of raising the necessary capital to start the construction and implementation of Project Volt, which is now being estimated to cost approximately US\$1.02 billion. Considering the early stage of its development, no revenues have ever been generated by the project.

[4] BlackRock's only secured creditors are OMF Fund II H Ltd. (**Orion**) and Investissement Québec (**IQ**). On January 18, 2019, BlackRock signed a loan credit agreement with Orion and IQ to supply the necessary working capital required to continue Project Volt. This loan was due and payable on December 1, 2022 and, as of now, Orion and IQ's secured claim amounts to approximately \$100M, which constitutes the best part of BlackRock's pre-filing obligations. Orion and IQ also own, respectively, 18% and 12% of BlackRock's shares.

[5] On December 22, BlackRock filed an Application for an Initial Order and other ancillary relief in the present *Companies' Creditors Arrangement Act* (**CCAA**)² restructuring proceedings.

[6] On January 7, 2022, the Court issued a two-part order in view of the sale of the assets of BlackRock. Firstly, the Court established the parameters of a sale and investment solicitation process (**SISP**) for the sale of such assets.

[7] Secondly, the Court approved the Agreement of Purchase and Sale signed by Orion and IQ as purchaser (**Stalking Horse Agreement**) and ordered that this agreement be considered as constituting the "Stalking Horse Bid" under the SISP. The agreed purchase price under the Stalking Horse Agreement is to be equal to the fair market value of BlackRock's secured debt towards Orion and IQ (approximately \$100M).

[8] Pursuant to the January 7, 2022 orders, Phase 2 Bids under the SISP were to be submitted before May 11, 2022, as will be discussed below.

[9] Two Applications are before the Court in relation to the above:

9.1. Amended Application by the Shareholder Bidder, 13482332 Canada Inc. (**Canada Inc.**) to extend the Phase 2 Bid Deadline (**Bid Extension Application**); and

9.2. BlackRock' Application to approve a vesting order (**RVO application**)

[10] In the Bid Extension Application, Canada Inc. seeks to extend the deadlines provided for in the January 7, 2022 orders, with the view of continuing to canvass the

² R.S.C. 1985, c. C-36.

market for financial partners that would allow it to submit a Phase 2 Bid after the Phase 2 Bid deadline.

[11] In the RVO Application, BlackRock seeks an order approving the sale of its assets essentially along the terms of the IQ and Orion's Stalking Horse Agreement (**Proposed Transaction**).

[12] On May 31, 2022, due to time constraints, the Court rejected the Bid Extension Application and granted the RVO Application, with reasons to follow. The reasons are found below.

1. PROCEDURAL BACKGROUND (COURT ORDERS)

[13] On December 22, 2021, BlackRock filed an Application for an Initial Order and other ancillary relief.

[14] On December 23, 2021, the Court issued a First Day Initial Order pursuant to the CCAA and, *inter alia*, appointed Deloitte Restructuring Inc. as the monitor (**Monitor**).

[15] On January 7, 2022, the Court issued an *Amended and Restated Initial Order* and an *Order Approving a Sale and Investment Solicitation Process (SISP) and Approving a Stalking Horse Agreement of Purchase and Sale*.

[16] The January 7, 2022 orders (**Initial Orders**) provided that BlackRock was authorized to borrow from Orion and IQ, as interim lenders, such amounts from time to time as BlackRock may consider necessary or desirable, up to a maximum principal amount of \$2M outstanding at any time, to fund the ongoing expenditures of BlackRock and to pay such other amounts as may be permitted (**Interim Facility**). The Court also authorized a corresponding Interim Charge, for a maximum amount of \$2.4M, in favor of IQ and Orion.

[17] The Initial Orders also approved a SISP to be conducted in accordance with the approved procedures (**Bidding Procedures**);

17.1. authorized the Monitor and BlackRock to implement the SISP;

17.2. approved the Stalking Horse Agreement, solely for the purposes of:

- (i) constituting the "stalking horse bid" under the SISP; and
- (ii) approving the Expense Reimbursement (as defined in the Stalking Horse Agreement), and subject to further Order of this Court.

[18] Pursuant to the Initial Orders and at the request of the Intervenor (shareholders), the Court extended the SISP by an additional 30 days beyond what was originally contemplated.

[19] The Stay of proceedings was thereafter extended to June 30, 2022, in accordance with further requests made and in accordance with the debate arising from the two Motions identified above.

2. PHASES OF THE SISP

[20] The objective of the SISP was to solicit interest either (i) in one or more sales or partial sales of all, substantially all, or certain portions of the BlackRock's business; and/or (ii) for an investment in a restructuring, recapitalization, refinancing or other form of reorganization of BlackRock or its business.

[21] The Bidding Procedures provide that a party interested in participating in the SISP must sign and deliver to the Monitor a non-disclosure agreement (**NDA**) and upon doing so, is considered a "**Phase 1 Qualified Bidder**", following which the Monitor will provide to such party a confidential information memorandum (**CIM**) and access to the confidential virtual data room (**VDR**) set up by BlackRock and the Monitor.

[22] The Bidding Procedures further provide that if a Phase 1 Qualified Bidder wishes to submit a bid, it must deliver to the Monitor a non-binding letter of intent (**LOI**) which must conform to certain specified requirements (**Phase 1 Qualified Bid**) no later than 5:00 p.m. on March 9, 2022 (**Phase 1 Bid Deadline**).

[23] Following the Phase 1 Bid Deadline, BlackRock shall determine, in consultation with the Monitor, if an LOI qualifies as a "**Phase 1 Successful Bid**", in which case the bidder is thereafter deemed a "**Phase 2 Qualified Bidder**".

[24] Phase 2 Qualified Bidders shall thereafter submit their Phase 2 Qualified Bid no later than 5:00 p.m. on May 11, 2022, or such other date or time as may be agreed by the Monitor in consultation with BlackRock and with the authorization of Orion and IQ as Stalking Horse Bidders, acting reasonably (**Phase 2 Bid Deadline**).

[25] Also pursuant to the Bidding Procedures, the Stalking Horse Bidders are Phase 2 Qualified Bidders for all purposes under the SISP.

[26] Therefore, Canada Inc. had until May 11, 2022, 5:00 p.m. (Eastern Standard Time) to submit its Phase 2 Qualified Bid (**Phase 2 Bid Deadline**).

3. TASKS PERFORMED BY THE MONITOR IN ACCORDANCE WITH THE SISP

[27] Further to the Initial Orders, the Monitor undertook the following steps to conduct the solicitation process in accordance with the SISP:

- a. the Monitor contacted 415 potentially interested parties;
- b. 374 potentially interested parties received the Teaser according to email confirmations received by the Monitor;

- c. 232 potentially interested parties were contacted directly by the Monitor, in addition to the general distribution that occurred on January 10, 2022;
- d. 65 potentially interested parties participated in more serious discussions about the opportunity or confirmed that they were not interested;
- e. 7 interested parties executed an NDA and were granted access to the VDR; and,
- f. 1 interested party (Shareholder Bidder) submitted a non-binding Letter of Interest (LOI) prior to the Phase 1 Bid Deadline.³

4. CANADA INC.'S LOI

[28] Canada Inc. was incorporated on March 8, 2022, as a special purpose vehicle to participate in the SISP and submit a bid.

[29] Canada Inc.'s shares are owned by 3 individuals, Mr. Edward Yu, Mr. Solomon (Sam) Pillersdorf and Mr. Leslie A. Wittlin, who, directly or through corporate entities under their control, own approximately 50% of the outstanding shares of BlackRock. Mr. Yu, Mr. Pillersdorf and Mr. Wittlin also act as directors and officers of the company. Canada Inc.'s representatives submit that they have well established links into the mining industry and, based on same, have assembled a team of experienced advisory professionals in the field.

[30] The Monitor did not receive any other LOI on or before the Phase 1 Bid Deadline. Therefore, Canada Inc.'s non-binding LOI⁴ of March 9, 2022 is the only Phase 1 Successful Bid.

[31] In its LOI, Canada Inc. proposes a purchase price for BlackRock's shares that shall be either the sum of \$100M or such greater amount as would be required to exceed the minimum purchase price as defined in the Initial Order.

5. ORDERS SOUGHT AND CONCLUSIONS OF THE COURT

5.1 The Bid Extension Application

[32] Canada Inc. argues that its tremendous efforts to submit a bid to the Monitor are on the verge of bearing fruit, albeit slightly past the Bid Deadline. Canada Inc. therefore begs the Court to extend the Phase 2 Bid Deadline (which expired on May 11, 2021) for an extra thirty days after the present judgment.

[33] The Monitor, BlackRock and Orion and IQ object to such extension.

³ Fifth Report, par. 27.

⁴ Exhibits A-2, R-3.

[34] For the reasons below, the Court refused the extension sought.

5.2 The RVO Application

[35] The only pending bid therefore is the one made by Orion and IQ, the Stalking Horse Bidders. With the support of BlackRock and of the Monitor, they beg the Court to approve the drafted agreement.⁵

[36] The **Intervenors**, who own approximately 50% of the shares of BlackRock, object to the structure of the Proposed Transaction, as it would amount to an illegal appropriation of their shares, without their consent. They also object to the granting of a release to Orion and IQ, as contemplated under the Stalking Horse Agreement.

[37] For the reasons below, the Court dismissed the Intervenors' objection and approved the transaction in accordance with the RVO.

ANALYSIS

6. BID EXTENSION APPLICATION

6.1 Facts relevant to the issue

[38] As indicated above, Canada Inc.'s LOI⁶ is the only Phase 1 Successful Bid. Therefore, only IQ and Orion (Stalking Horse Bidders) and Canada Inc. (Shareholder Bidder) were permitted to proceed to Phase 2 of the SISF.

[39] More particularly, on March 8-9, 2022, before the Phase 1 Bid Deadline, Canada Inc. was incorporated and delivered to the Monitor a non-binding LOI, which was confirmed as a Phase 1 Successful Bid. Canada Inc. therefore qualified for Phase 2 of the SISF.

[40] To assist in making such a decision, BlackRock and the Monitor requested and received clarifications, particularly with respect to the ability of Canada Inc.'s representatives to fund its bid from their own assets or from third-party financing (**Clarification Letter**)⁷, which will be discussed below.⁸

[41] At a later meeting, held on May 9, 2022, Canada Inc. informed the Monitor and BlackRock that despite having initiated, with the help of its own financial advisors, a solicitation process to identify financial partners that would support its bid, it would not be in position to file a qualified bid by the Phase 2 Deadline.

⁵ Exhibit R-2.

⁶ Exhibits A-2, R-3.

⁷ Exhibit R-5.

⁸ See par. [68] and following of the present judgment.

[42] Canada Inc. therefore verbally requested that the Phase 2 Bid Deadline be extended for an additional 30 days in order to continue to canvass the market for financing.⁹

[43] The Monitor consulted with BlackRock and requested the position of Orion and IQ, as Stalking Horse Bidders, in accordance with paragraph 21 of the approved Bidding Procedures. They expressed serious concerns but were agreeable to considering an extension of the Phase 2 Bid Deadline, subject to several conditions. These conditions included the financing (subordinate to the DIP and to the approximately \$100M of secured debt held by the Orion and IQ) of the costs resulting from the extra 30-day extension (estimated at \$500K) and the confirmation that no further extension would be sought in the future.¹⁰

[44] Canada Inc. replied that it was prepared to advance a first tranche of \$200K of a DIP loan within one week of the acceptance date of their request for a SISP extension, and the balance of \$300K as needed. Canada Inc. contemplated that this proposed loan totaling \$500K was to be made on the same terms and conditions as the existing DIP loan of the Secured Lenders, and was to rank *pari passu* with them in all respects.

[45] The Monitor estimated that it was unlikely that the extension sought would allow Canada Inc. to provide a proper bidding offer at the end of the extension. After further consultation with BlackRock and the Stalking Horse Bidders and with their support, the Monitor denied the extension and informed Canada Inc. accordingly on May 12, 2022.

[46] On May 11, 2022, Canada Inc. filed the present Bid Extension Application.

6.2 Opposing arguments of the parties

[47] Canada Inc. submits that its LOI conforms with the requirements of the Bidding Procedures in that, without limitation, it meets the “Minimum Purchase Price” requirement of providing at closing net cash proceeds that are not less than the aggregate of (a) the amount of cash payable under the Stalking Horse Agreement together with the amount of obligations being credit bid thereunder, (b) the amount of expense reimbursement payable to the Stalking Horse Bidders, plus (c) a minimum overbid amount of \$1M.

[48] Canada Inc. also pleads that there is equity for the stakeholders of BlackRock, including the shareholders, based on their knowledge of the company and on recent pre-money valuations performed by third parties which ranged between USD\$175M and 350M. In order to assist in designing and financing its final bid, Canada Inc. has retained at its own costs the services of two consultants, FTI Capital Advisors Canada and ERG Securities US.

⁹ Exhibit R-6.

¹⁰ Exhibit R-7.

[49] Canada Inc.'s consultants have contacted 156 investors to solicit interest in the opportunity. To date, seven remain highly interested in the opportunity and have executed NDAs and are continuing to perform due diligence on the asset. An additional three have expressed interest and are evaluating the opportunity internally before proceeding to execute an NDA. Investors that have executed NDAs have been added to the VDR and are actively analyzing and reviewing BlackRock's materials. The Consultants have prepared a report on the status of the financing process.¹¹ For example, Canada Inc. submits a signed non-binding letter of interest signed on May 6, 2022, from a serious investment fund for a USD\$65M financing, conditional *inter alia* on a 30-day-due diligence.¹² Canada Inc. further argues that the recent events in Ukraine have improved the outlook of Project Volt and increased the value of its strategic metals.

[50] However, according to Canada Inc., based on the feedback provided to its consultants from investors and given the complexity of this transaction, the condensed timeframe of the SISP is a significant hurdle for investors to perform the necessary due diligence in order to provide a commitment to finance the its Phase 2 Qualified Bid. As such, the Consultants believe that additional time will have a material impact on the likelihood of raising the capital required.

[51] Canada Inc. argues that although it has made significant progress, it needs more time to pursue these various opportunities and finalize the business and financial terms which will form part of the its Phase 2 Qualified Bid.

[52] To that effect, Canada Inc. reminds the Court of its broad discretion under section 11 of the CCAA and points to case law¹³ that suggests that the Court would be justified to refuse an asset sale in the presence of impropriety in the sales process.

[53] The Monitor, BlackRock, Orion and IQ and BlackRock's First Nation Partners¹⁴ oppose to such extension of the Phase 2 Bid Deadline.

[54] BlackRock, the Monitor and Orion and IQ argue that such extension would run contrary to the clear rules of the Bidding Procedures and would break the integrity of the SISP, to the prejudice of all potential bidders who made their decisions based on the rules known to all. Moreover, the extension sought would maintain uncertainty for BlackRock for an additional period, with no realistic chance of obtaining a better offer. Also, the extension would increase the costs and the amounts to be advanced by the Orion and IQ as interim lenders while Canada Inc. is not ready to pay for those expenses for the requested additional period.

¹¹ Exhibit A-3.

¹² Exhibit A-4, filed under seal.

¹³ *Royal Bank v. Soundair Corp.*, 1991 CanLII 2727 (Ont. CA); *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S.C.A.); *Bank of Montreal v. Maitland* (1983), 46 C.B.R. (N.S.) 75 (N.S.S.C.).

¹⁴ Exhibit R-11.

6.3 Legal principles

[55] The CCAA primarily seeks to refinance and restructure insolvent companies rather than liquidate them.¹⁵ When selling the assets of the company, one of the objectives is thus naturally to achieve the best possible price for the assets. This usually coincides with finding the best outcome for the company's creditors.

[56] To achieve this goal, the court benefits from a wide discretionary power pursuant to section 11 of the CCAA:

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

[Emphasis added]

[57] The three baseline requirements to meet for an order to be considered "appropriate in the circumstances" are appropriateness, good faith and due diligence.

[58] In addition, the order sought must advance the policy and remedial objectives of the CCAA to qualify as "appropriate" within the meaning of section 11.¹⁶ The overarching remedial objectives pursued by the CCAA include:¹⁷

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;
2. preserving and maximizing the value of a debtor's assets;
3. ensuring fair and equitable treatment of the claims against a debtor;
4. protecting the public interest; and
5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

[59] Hence, although the objective of any sale process is obviously to obtain the best possible price from prospective purchasers, monetary considerations cannot be the only relevant factor when the Court determines if it is appropriate to deviate from a process that has been duly followed by all parties involved.

¹⁵ *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.

¹⁶ *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 21; *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 48-51.

¹⁷ *9354-9186 Québec inc v. Callidus Capital Corp*, 2020 SCC 10, par. 40.

[60] On the contrary, it is well established that sale processes are important in CCAA proceedings and that modifying same *post facto* every time there is a chance of a better financial outcome could have a negative impact on all the parties involved. Therefore, Courts have often insisted on the importance of preserving the integrity of the sales process. As this court held in *Re Boutiques San Francisco Inc.*:

[20] Dans le cadre des plans d'arrangement qu'elle autorise, le but de la LACC est, entre autres, de favoriser un processus ordonné et encadré où les paramètres choisis doivent par conséquent avoir un sens. Dans le contexte de cette loi, tout comme par exemple dans celui de la *Loi sur la faillite et l'insolvabilité*, la recherche du meilleur prix possible pour les créanciers ne peut se faire en vase clos, en ignorant la protection nécessaire de l'intégrité et de la crédibilité du processus choisi pour atteindre cet objectif.¹⁸

[61] The Bidding Procedures, which govern the SISF approved by this Court, are fundamentally important for assessing the Proposed Transaction as well as the arguments of the parties.¹⁹

6.4 Discussion

[62] The Monitor also explains that efforts have already been made for some years before the beginning of the CCAA proceedings in order to further finance Project Volt. BlackRock, with the assistance of its financial advisors at the time, have conducted a global search since 2015, but, and despite considerable time and effort, have not been able to secure the required funding.

[63] At the inception of the CCAA proceedings, the Court also modified the proposed Bidding Procedures to include a 30 day extension to the "Phase 1 Bid Deadline" based on a request from the Intervenors and their submission that such further time would suffice to ensure a fulsome and fair process. This extension has not led to the desired results.

[64] The Monitor then conducted a thorough solicitation process as part of the Phase 1 of the SISF, as mentioned previously, which culminated in a single LOI submitted by Canada Inc.:

Based on the various discussions with prospective bidders during Phase 1 of the SISF, it was apparent to the Monitor that the BRM project, which had previously been promoted extensively in the market by BRM and its financial advisors for financing purposes, was already very well known by most of the strategic and industry leaders. This situation likely explains why many potentially interested

¹⁸ *Boutiques San Francisco Inc., Re*, 2004 CanLII 480, par. 20 (QC CS). See also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 3064, par. 70 (leave to appeal dismissed, 2015 QCCA 754).

¹⁹ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 14 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

parties declined the opportunity without signing an NDA and without performing due diligence of the VDR.²⁰

[65] The lack of interest of other bidders in taking part in the Debtor's restructuring has thus been apparent since the very first stages of the SISF process. According to the Monitor, potential players who were contacted either found the opportunity too risky, or not strategic or profitable enough, or did not believe in the feasibility of the technology involved. It remains unlikely that this situation will change in the near future.

[66] Moreover, Canada Inc. was unable to secure financing of its own bid during the extended 60 days of Phase 1 of the SISF and waited all the way until that phase's deadline to execute an NDA and to enter into the process.

[67] In determining that Canada Inc.'s non-binding LOI constituted a Phase 1 Successful Bid, the Monitor relied on Canada Inc.'s reassurance that it had both the ability and the means required to pay the offered purchase price and to raise or contribute further capital resources to BlackRock's business to continue it as a going concern. The LOI went on to state that the net worth of the Bidder's representatives was, collectively, well above the said amount and that "[b]ased on their extensive experience and engagement in the industry", they were "well placed to obtain both direct and/or third party financing in an aggregate amount sufficient both to complete the Transaction and thereafter required to proceed with the Business and lead it to profitability as a going concern."²¹

[68] Canada Inc., in its Clarification Letter of March 14, 2022, refused to provide more details about its representatives' respective worth.²² Still, it is not in doubt that they have enough assets to finance its bid if needed.

[69] However, Canada Inc. wrote that it was "unable to advise with certainty to what extent [its] three principals [...] may contribute to the capital required to fund the transaction contemplated by the non-binding LOI." This issue would "clarify as [its] funding plan finalizes through [its] on-going efforts already well underway." Canada Inc. confirmed that it would "have its financing, to the extent necessary and sufficient for the purpose of the binding LOI, on or before the Phase 2 bid deadline", but added that "some or all" of the funds "may come from external sources", which was subject to further due diligence that could only be performed during Phase 2 of the SISF.

[70] These answers are evasive and, in retrospect, proved to include many loopholes. Still, the Clarification letter was considered and the Monitor nonetheless qualified Canada Inc. for Phase 2.

[71] The Monitor understood that Canada Inc.'s primary focus during Phase 2 of the SISF was to secure financing, through equity or debt, in order to submit a binding offer

²⁰ Fifth Report, par. 28.

²¹ Exhibit A-2.

²² Exhibit R-5, par. 3.

prior to the Phase 2 Bid Deadline. Indeed, the due diligence performed during that Phase was limited. Only one meeting occurred, at the request of Canada Inc.'s consultants, with BlackRock and the Monitor, to review the assumptions supporting the financial model of BlackRock. Also, all the groups that were granted access spent a relatively short amount time on the VDR reviewing the information available for this kind of project.²³

[72] At the time of the meeting on May 9, 2022, despite some cursory interest manifested by certain potential capital partners, and except for a non-binding LOI received from a third party for an amount (USD\$65M) significantly less than the one required to exceed the Stalking Horse Bid (\$100M), Canada Inc. received no other letter of intent or confirmation of interest in writing from a potential capital partner during the SISP.

[73] Critically, Canada Inc. also revealed on May 9, 2022 that none of its representatives actually intended to participate in the financing of an eventual Phase 2 Qualified Bid, should there be such a bid.

[74] The Monitor testified that had he known in due time that the shareholders had no intention to finance the bid using their own personal assets, Canada Inc. would likely not have qualified for Phase 2 of the SISP. This aspect of the LOI was described as a key consideration in the Monitor's decision at the time.

[75] In addition, the failure by Canada Inc. to confirm that it would fund all of the Debtor's costs, including professional costs, during the extended 30-day period, indicates that it is not willing to put "skin in the game" as evidence of its *bona fide* intentions. It appears that Canada Inc. is unwilling to fund the costs of a further delay notwithstanding that any successful bid would necessarily have to cover those costs in order to exceed the value of the Stalking Horse Bid.

[76] The above findings remain, in spite of the letter from VanadiumBank Inc., which Canada Inc. filed the day before the hearing.²⁴ This letter is presented as a new "financing proposal" in favor of Canada Inc. for up to \$125M in support of its bid.

[77] Actually, it appears that VanadiumBank was incorporated only a few weeks before the hearing.²⁵ Notwithstanding its name, it is not a bank. Its offer to Canada Inc. is not to lend funds out of its own pocket, but rather to arrange a loan facility after seeking and obtaining the required financing from third parties in the market.

[78] In other words, with VanadiumBank's proposal, Canada Inc. is nowhere closer to achieving its financial goals before the proposed extended Phase 2 Bid Deadline. The Court therefore gives no weight to VanadiumBank's letter.

²³ Fifth Report, par. 38-41.

²⁴ Exhibit A-11.

²⁵ Exhibit R-14.

[79] It now seems clear that, as it was unable to meet the requirements of the Initial order, Canada Inc. instead decided to launch what could be described as a parallel SISP, which was nowhere authorized and which runs contrary to the letter and spirit of the SISP as ordered by the Court.

[80] Although the Court recognizes Canada Inc. and its representatives' efforts in securing third party financing for their bid, and their belief in the potential of BlackRock's projects to attract new interest as the market evolves, it is time for the SISP to come to an end and for the CCAA proceedings to move forward.

[81] It is advantageous to the stakeholders generally that BlackRock complete the restructuring process as soon as possible in order to, in particular, end the negative narrative surrounding the company, to limit any further uncertainty and risk and facilitate the completion of the financing necessary for Project Volt, if possible.

[82] The SISP provided for a level playing field to all potential bidders. The rules were known to all parties and certain potential bidders might have decided not to participate in the SISP because of its duration (which is often the case in insolvency proceedings). Any modification of the rules after they are set and after all the players have made their choices accordingly should not be taken lightly. In the case at hand, there is no justification whatsoever to such a disruption of the fairness of the process. The overarching remedial objectives of the CCAA are better served by rejecting the Bid Extension Application.

7. RVO APPLICATION

[83] The Court's refusal to further extend the Phase 2 Deadline leaves the Stalking Horse Bid from IQ and Orion as the only Phase 2 Qualified Bid. Pursuant to the RVO Application, the Court shall now turn to the question of whether it should approve the Proposed Transaction as per the terms of his bid and, in particular, BlackRock's restructuration through a reverse vesting order (**RVO**).

7.1 Legal Principles

[84] In assessing the relevant criteria and determining whether the proposed transaction shall be approved, the Court is mindful not to modify the contractual terms that have been duly negotiated between the parties.²⁶ In this case, it takes the form of a RVO.

[85] RVOs are a fairly new way to achieve the remedial objective of the CCAA: instead of selling the assets of a debtor, a series of transactions will result in i) the purchaser becoming the sole shareholder of a debtor and ii) the unwanted liabilities be vested out

²⁶ *Mecachrome Canada Inc. (In the matter of the plan of compromise or arrangement of) c. Ernst & Young Inc.*, 2009 QCCS 6355, par. 28.

to a separate entity, thereby ensuring that the purchaser will not inherit the unwanted liabilities.²⁷

[86] Albeit new, RVOs have been confirmed by the courts as an appropriate way for a debtor to sell its business when the circumstances justify such structure.²⁸ In particular, CCAA courts have approved RVO structures in several complex mining transactions and have recognized that their benefits, which include maximizing recovery for creditors, importantly limiting delays and transaction costs, and facilitating the preservation of the insolvent business' going concern, justify the use of this innovative restructuring tool.

[87] In addition to section 11, discussed above, section 36 of the CCAA has been interpreted as providing courts with the jurisdiction and the relevant criteria to issue an RVO:

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

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

(3) [Factors to be considered] In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

²⁷ Exhibit R-2.

²⁸ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 71-79 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Quest University Canada (Re)*, 2020 BCSC 1883, par. 151-172 (leave to appeal dismissed, 2020 BCCA 364); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 24-26; *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-39, 77.

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

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

[...]

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

[...] [Emphasis added]

[88] This Court approved an RVO in the face of opposition by a creditor in *Arrangement relatif à Nemaska Lithium inc.*²⁹. It was held that section 36 should be interpreted broadly and in accordance with the policy and remedial objectives of the CCAA and the wide discretionary power vested to the supervising judge pursuant to section 11. The Court relied in part on the Supreme Court ruling in *9354-9186 Québec inc. v. Callidus Capital Corp.*³⁰ It added:

[52] La LACC donne donc au juge surveillant la flexibilité nécessaire pour rendre les ordonnances «indiquées» afin de faciliter la restructuration d'une compagnie insolvable.

[53] La nature des problèmes économiques contemporains commande que des solutions innovatrices soient envisagées et, si elles permettent que les objectifs fondamentaux de la LACC soient atteints, au bénéfice de tous, alors elles doivent être entérinées.

[...]

[71] Le Tribunal est d'avis que les termes «disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires» / «sell or otherwise dispose of assets outside the ordinary course of business» de l'article 36(1) LACC permettent un grand éventail d'actes et modes de disposition, incluant, en partie ou en totalité, par voie de «dévolution inversée», une solution innovatrice, à être analysée au cas par cas.

[72] L'article 36(1) LACC ne comporte aucune restriction à cet égard.

²⁹ 2020 QCCS 3218 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

³⁰ 2020 CSC 10.

[73] Sortir des sentiers battus n'est pas contre-indiqué, au contraire, surtout lorsque cela permet de meilleurs résultats.

[74] D'ailleurs, dans l'affaire *Callidus*, la Cour suprême mentionne ce qui suit quant au pouvoir discrétionnaire général du Tribunal prévu à l'article 11 LACC :

«[...] le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la LACC elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.»

[75] Dans la présente affaire, la solution d'une «dévolution inversée», efficace et rapide, n'affecte pas le résultat final pour les créanciers des Débitrices, au contraire, elle l'améliore.

[76] En effet, le maintien des permis, licences et autorisations existants et des contrats essentiels à l'exploitation des entreprises, et l'utilisation possible des divers attributs fiscaux disponibles, ont facilité l'obtention de concessions de la part des Offrants, et confirmées par le Contrôleur, ce qui devrait permettre qu'une distribution plus importante soit éventuellement effectuée au bénéfice des créanciers des Débitrices.

[89] The Court of Appeal refused leave in that case, while noting that some issues raised by the appeal did “appear to qualify as being significant to the practice of insolvency”:

[36] [...] This is particularly the case regarding the issue of the scope of authority of the CCAA supervising judge in the context of an order that is not strictly limited to the “sale or disposition of assets” provided for under section 36 (6) CCAA, which, according to the Applicants, results in an outcome that would normally form part of an arrangement subject to prior approval by the creditors. There is also an issue of principle raised regarding the granting of broad third party releases (that are not limited to the transaction itself), outside the confines of an arrangement and without determining their appropriateness and submitting same to the required vote of creditors.³¹

[90] In *Re Quest University Canada*, the Supreme Court of British Columbia cautioned that in the case of an RVO, “the ability of a CCAA court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the CCAA [...]”³² On the other hand, the Court added that “[t]here is no provision in the CCAA that prohibits an RVO structure. As is usually the case in CCAA matters, the court must ensure that any relief is ‘appropriate’ in the

³¹ *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488 (leave to appeal to SCC dismissed, 2021 CanLII 34999).

³² *Quest University Canada (Re)*, 2020 BCSC 1883, par. 154 (leave to appeal dismissed, 2020 BCCA 364).

circumstances and that all stakeholders are treated as fairly and reasonably 'as the circumstances permit' [...]."³³

[91] Similarly, the Ontario Superior Court of Justice relied on sections 11 and 36 of the CCAA to issue an RVO in *Clearbeach and Forbes*.³⁴

[92] An RVO structure was approved most recently by the same court in *Harte Gold Corp.*³⁵ Although the Court was unconvinced that such an order could rely entirely on section 36 of the CCAA, it concluded that its discretion under section 11 was clearly broad enough to encompass it. Furthermore, the criteria set out at paragraph 36(3) provide an analytical framework that could be applied *mutatis mutandis* to an RVO transaction:

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which finds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.³⁶

[93] It is true that a Canadian appeal court has yet to rule definitively on the legality of an RVO under the CCAA. This being said, and although the contexts might differ, the Court sees no compelling reason why it should set aside its reasoning in *Nemaska Lithium*.

[94] Even if this type of transaction was not contemplated by section 36 of the CCAA, section 11 could clearly step in as a basis for the Court's jurisdiction. The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.³⁷

³³ *Id.*, par. 157, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 14-15.

³⁴ 2021 ONSC 5564, par. 24.

³⁵ 2022 ONSC 653.

³⁶ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 36-37.

³⁷ *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 23. See also *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, par. 70.

[95] The Court agrees with the judge in *Harte Gold Corp* that paragraph 36(3), in any event, lays out a useful analytical framework for the issue at bar. These criteria, which are laid out above, should be applied in conjunction with the factors enumerated in *Royal Bank v. Soundair Corp.*:³⁸

- 95.1. “whether sufficient efforts to get the best price have been made and whether the parties acted providently”;
- 95.2. “the efficacy and integrity of the process followed”;
- 95.3. “the interests of the parties”; and
- 95.4. “whether any unfairness resulted from the process.”³⁹

[96] The Court also agrees that an RVO structure should remain the exception and not the rule, and should be approved only in the limited circumstances where it constitutes the appropriate remedy.

[97] Some authorities indeed call for caution. For instance, Professor Janis Sarra recently stressed the importance for courts to provide detailed reasons when approving RVOs.⁴⁰ Among other things, Professor Sarra reminds us that this type of order deviates significantly from the usual CCAA framework, which is meant to provide all creditors with an opportunity to be heard in the process:

[...] [T]here must be exceptional circumstances for the court to be persuaded to bypass provisions of insolvency legislation aimed at giving both secured and unsecured creditors a meaningful voice/vote in the proceedings, as they are the residual claimants to the value of the debtor’s assets during insolvency. [...]

[...]

The CCAA, particularly in its various amendments over the years, has sought to achieve an appropriate balance between various interests affected by a debtor company’s insolvency. Part I sets out the framework of the statute, well-known to practitioners and Canadian courts. It allows for a compromise or arrangement to be proposed between a debtor company and its secured and unsecured creditors, a meeting of the creditors to vote on the plan, and, if a majority in number representing two-thirds in value of the creditors, or the class of creditors, present and voting either in person or by proxy at the meeting, agree to any plan of compromise or arrangement, the plan may be sanctioned by the court and, if so sanctioned, is

³⁸ 1991 CanLII 2727 (Ont. CA); *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 34-35.

³⁹ See *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 50 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999); *Clearbeach and Forbes*, 2021 ONSC 5564, par. 25.

⁴⁰ Janis SARRA, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLII Docs 431.

binding. There are specific provisions addressing Crown claims, employees and pensioners, and treatment of equity claims, all designed to balance multiple interests in complex proceedings.

[...]

This statutory framework represents a careful balancing of interests and prejudice, and gives voice and vote to the creditors that are the residual claimants to the value of the debtor company. Many of the provisions are aimed at mitigating the imbalance in power that secured creditors have in insolvency proceedings, at least during the period of negotiations for a plan, with a view to maximizing the value of the assets, preserving going-concern value, and protection of employees and the public interest.

It makes sense, therefore, that in any application to bypass this carefully crafted statutory process, the court consider whether there are compelling and exceptional circumstances to justify this extraordinary remedy, even where the RVO is not specifically contested, as the court needs to be satisfied of the integrity of the system and the potential prejudice to creditors and other stakeholders that may not be appearing before it. Reasons are important for stakeholders to understand the benefits and prejudice that may accrue to any particular transaction.⁴¹

[98] As the Supreme Court of British Columbia held in *Quest University*:

[171] I do not consider that an RVO structure would be generally employed or approved in a CCAA restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the CCAA.⁴²

[Emphasis added]

[99] In particular, the following comments made in *Harte Gold Corp* are enlightening:

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the “norm” or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an

⁴¹ *Id.*, p. 4, 26. See ss. 4-6 of the CCAA.

⁴² *Quest University Canada (Re)*, 2020 BCSC 1883, par. 171 (leave to appeal dismissed, 2020 BCCA 364).

unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

- (a) Why is the RVO necessary in this case?
- (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
- (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
- (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[Emphasis added]

7.2 Discussion on criteria to approve an RVO

[100] The Court will now apply the criteria set out in paragraph 36(3) of the CCAA to the RVO Application, keeping in mind the other relevant factors identified by the case law, and will analyze the appropriateness of the RVO structure in particular.

[101] The process leading to the proposed sale was reasonable in the circumstances (s. 36(3)(a) of the CCAA). As detailed in the Fifth Report, BlackRock and the Monitor have conducted the SISF in accordance with the Bidding Procedures approved by this Court on January 7, 2022. The market has been adequately canvassed through a fulsome, fair and transparent process. It should be reiterated that BlackRock had already deployed a global search for financing during the years leading up to the initiation of the CCAA Proceedings, to no avail.

[102] In the present circumstances, the Court concludes that sufficient efforts have been made to get the best price for BlackRock's assets and that the parties acted providently. The record also shows the efficacy and integrity of the process followed.

[103] The Monitor approved of the process leading to the proposed sale and filed with the court a report stating that in their opinion the sale would be more beneficial to the creditors than a sale or disposition under a bankruptcy (s. 36(3)(a) and (b) of the CCAA).

The Monitor not only approved the SISP but also participated in the negotiation and development of the Bidding Procedures and had primary carriage of the process throughout. In the course of the SISP, the Monitor consulted with BlackRock.

[104] The Fifth Report concludes that the SISP was properly conducted and that the Proposed Transaction is beneficial for all the stakeholders compared to a bankruptcy scenario. The Monitor “is of the view that creditors who will suffer a shortfall following the Purchase Agreement would not obtain any greater recovery in a sale in bankruptcy.” “Furthermore, bankruptcy proceedings would: (i) [c]ause additional delays and uncertainty in the sale of [BlackRock]’s assets; (ii) [j]eopardize the going concern operations of [BlackRock]; and, (iii) [l]ikely result in employees to be unemployed.”⁴³

[105] BlackRock’s creditors were duly consulted (s. 36(3)(d) of the CCAA). The secured creditors of BlackRock are Orion and IQ who are also the Stalking Horse Bidders. Obviously, they have been consulted extensively and they consent to the RVO Application.

[106] Importantly, the Grand Council of the Crees (Eeyou Istchee) and the Cree Nation Government also expressed support for the Proposed Transaction, as outlined by their counsel in a letter sent to the Monitor on May 19, 2022:

Our clients consider that the approval of the Stalking Horse Agreement offers the most, and perhaps the only, viable prospect to bring the BlackRock Mining Project into successful commercial operation and hence to secure for the Cree Nation of Eeyou Istchee the critically important benefits of the BallyHusky Agreement.⁴⁴

[107] The other creditors are unsecured creditors who have been duly advised of the Initial Application and Order, including the Bidding Procedures. They have decided not to participate in the SISP and nothing indicates that they would oppose to the RVO Application.

[108] The effects of the proposed sale or disposition on the creditors and other interested parties are beneficial overall (s. 36(3)(e) of the CCAA). The Stalking Horse Bid is the best available alternative for BlackRock’s creditors and other interested parties and should allow for BlackRock to emerge as a rehabilitated business in a stronger position to complete the Construction Financing and move forward with Project Volt. This outcome is advantageous to BlackRock and its stakeholders, including their creditors, employees, trading partners and First Nations partners.

[109] It is true that the RVO will result in the claim of unsecured creditors being transferred to ResidualCo, an empty shell where all unassumed liabilities will be transferred. This transfer simply reflects the fact that the BlackRock’s value, as tested in

⁴³ Fifth Report, par. 57-60.

⁴⁴ Exhibit R-11.

the market through the SISP and for many years prior to the current restructuring, is not high enough to generate value for these unsecured creditors.

[110] As for the other stakeholders, they will benefit on the whole from the approval of the Proposed Transaction, as it will allow the Debtors' business to emerge in a position to move forward as a going concern. This will benefit the employees, trading partners and First Nations partners and it will have indirect socio-economic benefits in the province of Quebec.

[111] The consideration to be received for the assets is reasonable and fair, taking into account their market value (s. 36(3)(f) of the CCAA). The consideration being paid by Orion and IQ, which is in excess of \$100M, is importantly linked to the preservation the Debtor's permits (crucial to the conduct of the contemplated mining activities), certain existing contracts and its tax attributes.

[112] The reasonableness of the consideration is well established. Given the amount of the secured debt held by Orion and IQ, the consideration which they will pay exceeds i) what the market would be willing to pay to inherit intangible assets BlackRock has been able to build over time and ii) the capacity to raise on the market the financing required for Project Volt.

[113] Nobody submitted a higher bid after extensive attempts to raise financing over many years.

[114] Exceptionally, the RVO structure is appropriate in the circumstances. In his Fifth Report, the Monitor outlines the reasons why, in his opinion, the reverse vesting order structure that would be implemented would be "more appropriate and beneficial than a traditional vesting order structure and that the reverse vesting order structure is necessary, reasonable and justified in the circumstances".⁴⁵

- (i) Numerous agreements, permits, licenses, authorizations, and related amendments are part of the assets that have to be transferred as per the Purchase Agreements. It could be more complex to transfer the benefits of these assets in a traditional vesting order structure since consents, approvals or authorizations may be required. A reverse vesting order structure minimizes risks, costs or delays of having these assets transferred;
- (ii) The proposed reverse vesting order structure results in better economic results for some creditors of BRM who see their pre-filing claim being assumed and retained. Also, the reverse vesting order structure will avoid any delays or costs associated with the assignments of the assumed contracts;

⁴⁵ Fifth Report, par. 65-66.

- (iii) The contracts or obligations of the creditors and the stakeholders that are considered Excluded Assets and Excluded Obligations according to Schedule B of the Purchase Agreement will not be in a worse position than they would have been with a more traditional vesting of assets to a third party;
- (iv) Most assets of BRM are intangibles, such as agreements, permits, licenses, authorizations and related amendments, and their value depend on the capacity of the purchasers to complete the financing and achieve the project. These assets would have no or limited value if some of them were not being preserved. The reverse vesting order structure allows to avoid any potential risks around the transfer to the purchaser.

[115] The Court agrees with the Monitor's conclusions. RVO structures have been found by courts to be appropriate in situations such as the present case, where a traditional sale of assets would lead to uncertainty regarding the transfer of numerous agreements, permits, authorizations and other regulatory approvals that are required for the continuation of a company's business.⁴⁶

[116] Indeed, BlackRock operates in the highly regulated mining industry. Their business is almost entirely constituted of such intangible assets, which provide a head start of several years to the purchaser. Some of these assets cannot be assigned or are at least difficult to assign. Therefore, the capacity to restructure BlackRock depends heavily on the capacity to keep the existing legal entities in place while restructuring the share-capital of BlackRock. That is exactly what the RVO provides for.

[117] If BlackRock was forced to proceed with a traditional asset sale, it could significantly increase the costs, generate uncertainties and reduce the value its assets, to the detriment of all parties involved.

[118] Moreover, despite the Intervenor's firm belief, the SISP has unequivocally demonstrated that there is no realizable value in BlackRock's business or assets beyond the secured debt of IQ and Orion, such that there is no equity left for its unsecured creditors, let alone its shareholders.

[119] The Court adds that Shareholders have little or no say in CCAA proceedings like the present one, where the debtor company is insolvent and its shares have lost all value. This goes to their legal interest in contesting an arrangement or transaction proposed by the company.⁴⁷

[120] In any case, the shareholders and unsecured creditors of BlackRock are not in a worse position with an RVO than they would be under a traditional asset sale. Either way,

⁴⁶ See *supra*, note 28.

⁴⁷ *Proposition de Peloton Pharmaceutiques inc.*, 2017 QCCS 1165, par. 65-78; *Forest c. Raymor Industries inc.*, 2010 QCCA 578, par. 4-6; *Stelco Inc., Re*, 2006 CanLII 1773, par. 18 (Ont. SC).

they would have no economic interest because the purchase price paid would not generate any value for the unsecured creditors (and even less so for the shareholders).

[121] This is consistent with the conclusions of the Ontario Superior Court of Justice in *Harte Gold Corp.*:

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the Bankruptcy and Insolvency Act or an order made under the Companies Creditors Arrangement Act approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[...]

[64] [...] In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed,

inappropriate to require a vote of the shareholders [...]. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.⁴⁸

[Emphasis added]

[122] In particular, paragraphs 61 and 62 of the above excerpt answer the Intervenor's argument about the jurisdiction of the Court to cancel their shares under *the Canada Business Corporations Act*⁴⁹ (**CBCA**). The same logic applies with sections 173 and 191 of that statute. The power to cancel and issue shares in the context of an RVO is captured by the possibility for a court order to "change the designation of all or any of [the corporation's] shares, and add, change or remove any rights, privileges, restrictions and conditions [...] in respect of all or any of its shares, whether issued or unissued", pursuant to 191(2) and 173(1)(g) of the CBCA.

[123] It should also be noted that the Intervenor's opposition to the RVO structure in particular appears to be new. Canada Inc.'s non-binding LOI had already conceded on March 9, 2022 that its proposed bid could itself "take the form of a reverse vesting order".⁵⁰ Ultimately, it seems that the Intervenor is not objecting to the use of an RVO *per se*, but only to the extinguishment of their equity interests, which would occur irrespective of the use of an RVO structure or of a traditional vesting order.

[124] Therefore, the fact that the transaction is structured as an RVO only has benefits and does not prejudice any of the stakeholders. The Court finds that in the specific circumstances of the present case, the proposed RVO is an appropriate arrangement.

7.3 Discussion on the releases

[125] The Proposed Transaction contemplates releases for various parties, including Orion and IQ, from all claims relating to, in particular, BlackRock, its restructuring or the Proposed Transaction.

[126] While the Intervenor does not object to a release being granted to BlackRock directors or to the Monitor, they argue that Orion and IQ's actions constitute an abuse of both their rights as shareholders and of the CCAA process. Thus, the effect of the requested releases in favour of Orion and IQ would be to dismiss the Intervenor's potential claims without the benefit of hearing any evidence allowing for the determination of their potential liability.

[127] For the reasons below, the Court holds that the releases in favor of Orion and IQ will form part of the Proposed Transaction.

⁴⁸ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 59-64.

⁴⁹ R.S.C. 1985, c. C-44.

⁵⁰ Exhibit A-2.

[128] It is now commonplace for third-party releases, in favor of parties to a restructuring, their professional advisors as well as their directors, officers and others, to be approved outside of a plan in the context of a transaction.⁵¹ In fact, similar releases have been approved by this Court in recent cases involving RVO transactions, including in *Nemaska Lithium*.⁵²

[129] This being said, the courts should not grant releases blindly and systematically.

[130] In *Harte Gold Corp.*, the Court approved releases in favor of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Re Lydian International Limited*⁵³ and elsewhere⁵⁴. They are the following:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.⁵⁵

[131] In the present file, IQ's and Orion's participation was obviously instrumental to the restructuring of BlackRock's business. Considering the SISP and the opportunity given to BlackRock's stakeholders to participate in the process, it is reasonable for IQ and Orion to now start with a clean slate and not to be under the threat of potential claims as they will be leading BlackRock's efforts with Project Volt. The release will provide more certainty and finality.

[132] The release is thus reasonably connected and justified as part of the Proposed Transaction,⁵⁶ and it is to the benefit of BlackRock and its stakeholders generally as it will allow BlackRock to emerge as a solvent entity and be in the best possible position to,

⁵¹ See *Re Green Relief Inc.*, 2020 ONSC 6837, par. 23-25; *8640025 Canada Inc. (Re)*, 2021 BCSC 1826, par. 43.

⁵² *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218, par. 103-106 (leave to appeal dismissed, 2020 QCCA 1488; leave to appeal to SCC dismissed, 2021 CanLII 34999).

⁵³ 2020 ONSC 4006.

⁵⁴ *Harte Gold Corp. (Re)*, 2022 ONSC 653, par. 78-86. See also *Re Green Relief Inc.*, 2020 ONSC 6837, par. 27-28.

⁵⁵ *Re Lydian International Limited*, 2020 ONSC 4006, par. 54. See also: *Metcalfe & Mansfield Alternative Investments II Cord. (Re)*, 2008 ONCA 587;

⁵⁶ See *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, par. 70 (leave to appeal to SCC dismissed, 2008 CanLII 46997).

hopefully, secure financing for Project Volt. They are also fair and reasonable in the present circumstances.

[133] The eventual claims for which Orion and IQ should not be released, according to the Intervenor, are based on allegations of abuse related solely to Orion's and IQ's Stalking Horse Bid and their conduct during the SISP.

[134] The Court was sensitive to the shareholders' submissions initially and extended the SISP delays to ensure that the process was as fulsome and fair as possible. Still, and in spite of all the efforts made over the years, IQ and Orion remain the only entities who are ready to take over the development of BlackRock and to further invest in same.

[135] In the process leading to the Bidding Procedures Order, to the refusal of the Bid Extension Application and to the approval of the Proposed Transaction (Reverse RVO), the Court was able to appreciate the context leading up to the final outcome ordered as per the present judgment and also found the Proposed Transaction, as proposed by Orion and IQ, to be fair and reasonable. The Court sees little to no room for a finding of abuse in the events leading to the CCAA proceedings, to the SISP or to the approved transaction.

[136] To the contrary, there is no good reason to leave the door open to the Intervenor's potential claims against Orion and IQ, to BlackRock's detriment.

[137] Therefore, the release provided for in the Proposed Transaction will be granted.

FOR THESE REASONS, THE COURT:

[138] **DECIDES** in accordance with the attached orders.

MARIE-ANNE PAQUETTE, Chief Justice

Me Jean Legault
Me Jonathan Warin
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Hearing dates: May 30, 31, 2022

TAB 18

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act
-- Companies' Creditors Arrangement Act permitting inclusion of
third-party releases in plan of compromise or arrangement to be
sanctioned by court where those releases are reasonably
connected to proposed restructuring -- Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the \$32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp. (Re)* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and *Re Country Style Food Services*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over \$1 billion -- represent only a small fraction of the more than \$32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways.
[page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over \$116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately \$32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the \$32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than \$1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the \$1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

- (a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

- designed to make the notes more secure;
- (b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
 - (c) the Canadian banks provide below-cost financing for the margin funding facility; and
 - (d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

- (1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

- (a) on a proper interpretation, the CCAA does not permit such releases;
- (b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;
- (c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;
- (d) the releases are invalid under Quebec rules of public order; and because
- (e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in *Dylex Ltd. (Re)*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Quebec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; *Skydome Corp. v. Ontario*, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); *Anvil Range Mining Corp. (Re)* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in *Elan*, supra, at pp. 306-307 O.R.:

[T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper" (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

- (b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
- (c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]

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6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

- (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
- (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": *Reference re Timber Regulations*, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also *Guardian Assurance Co. (Re)*, [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; *T&N Ltd. and Others (No. 3) (Re)*, [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada (Re)*, [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] *T&N Ltd. and Others (Re)*, *supra*, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.

(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and
- (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Michaud v. Steinberg*, supra; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg*, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg* does not express a correct view of the law, and I decline to follow it.

[80] In *Pacific Coastal Airlines*, Tysoe J. made the following comment, at para. 24:

[The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. *Pacific Coastal Airlines* had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement.

(Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

[Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)

See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc. (Re)*, [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("*Stelco II*"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

In [*Stelco I*] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.
(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in *Michaud v. Steinberg*, supra. They say that it is determinative of the release issue. In *Steinberg*, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.

.

The Act offers the respondent a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.

. [page540]

The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in *Steinberg* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent *Steinberg* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] *Steinberg* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim *expressio unius*] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes it does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see *Houlden and Morawetz*, vol. 1, *supra*, at 2-144, E11A; *Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte*), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in *Royal Bank of Canada v. Larue*, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see *Ravelston Corp. Ltd. (Re)*, [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotini's Restaurant Corp. v. White Spot Ltd.*, [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor;
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;

- (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than \$32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
 Apsley Trust
 Aria Trust
 Aurora Trust
 Comet Trust
 Encore Trust
 Gemini Trust
 Ironstone Trust
 MMAI-I Trust
 Newshore Canadian Trust
 Opus Trust
 Planet Trust
 Rocket Trust
 Selkirk Funding Trust
 Silverstone Trust
 Slate Trust
 Structured Asset Trust
 Structured Investment Trust III
 Symphony Trust
 Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
 Caisse de dpt et placement du Qubec
 Canaccord Capital Corporation [page549]
 Canada Mortgage and Housing Corporation
 Canada Post Corporation
 Credit Union Central Alberta Limited
 Credit Union Central of BC
 Credit Union Central of Canada

Credit Union Central of Ontario
 Credit Union Central of Saskatchewan
 Desjardins Group
 Magna International Inc.
 National Bank of Canada/National Bank Financial
 Inc.
 NAV Canada

Northwater Capital Management Inc.
 Public Sector Pension Investment Board
 The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

- (1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee
- (2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.
- (3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merrill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG
- (4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.
- (5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)
- (6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor
- (7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec
- (8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]
- (9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)
- (10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.
- (11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank
- (12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

- (13) Usman Sheikh, for Coventree Capital Inc.
- (14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
- (15) Neil C. Saxe, for Dominion Bond Rating Service
- (16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
- (17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
- (18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law*, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), *supra*.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, *The Interpretation and Application of Statutes* (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 19

CITATION: Lydian International Limited (Re), 2020 ONSC 4006

COURT FILE NO.: CV-19-00633392-00CL

DATE: 2020-07-10

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES
CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon, Maria Konyukhova, Sanja Sopic, and Nicholas Avis*, for the Applicants

D. J. Miller and Rachel Bergino, for Alvarez & Marsal Inc.

Robert Mason and Virginie Gauthier, for Osisko Bermuda Limited

Pamela Huff and Chris Burr, for Resource Capital Fund VI L.P.

David Bish and Michael Pickersgill, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay, each in their capacity as a Shareholders of Lydian International Limited

**HEARD by ZOOM Hearing
and DECIDED:**

June 29, 2020

REASONS RELEASED:

July 10, 2020

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

- a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;
- b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and
- c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of \$43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than \$406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders (“SL Newco”), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity (“Restructured Lydian”), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan’s execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants’ restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group’s business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants’ Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional \$1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court’s approval for a plan of compromise or arrangement under the CCAA is well established:

- a) there must be strict compliance with all statutory requirements;
- b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

- c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

- a) the Plan is fair and reasonable and should be sanctioned;
- b) the releases contemplated by the Plan are appropriate;
- c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;
- d) the Stay Period should be extended;
- e) the unredacted Sellers Sanction Affidavit should be sealed; and
- f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C\$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

- a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C\$5 million threshold amount under the CCAA;
- b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

- c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and
- d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor apprised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 ([CanLII](#)), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it “does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order.”

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING’s claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group’s secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the “value has to be determined on a current basis. [...] It is inappropriate to value the assets on a speculative or (remote) possibility basis.” A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) 1078385 *Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 1078385 *Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

6(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

- a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;
- b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;
- c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and
- d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Re Canadian Airlines Corp*, 2000 ABQB 442).

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd.*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

- a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c) Whether the plan could succeed without the releases;
- d) Whether the parties being released were contributing to the plan; and
- e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd.*, 2012 ONSC 234 at paras 80-82 (CanLII)).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al.* (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule “B” art. 7 ([Monitor’s website](#)); *Rubicon Minerals Corporation et al.* (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule “A” art. 7 ([Monitor’s website](#)); and *Nortel Networks Corporation et al.* (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 ([Monitor’s website](#))).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants’ Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants’ stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, “the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable”.

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling \$1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

- a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;
- b) the Monitor is supportive of the DIP Exit Facility Amendment;
- c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and
- d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Date: July 10, 2020

Chief Justice Geoffrey B. Morawetz

SCHEDULE “A”

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors¹ ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

¹ This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the “**Waiver**”).

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank ²	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

² This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. ("DirectorCo")		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("BVI") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI)	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	Treatment	Plan Reference
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

TAB 20

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
 ARRANGEMENT OF **GREEN RELIEF INC.** (the “**Applicant**”)

BEFORE: Koehnen J.

COUNSEL: C Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell, for the Applicant
 Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson,
 Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, Joshua W. Winter for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

- [1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.
- [2] For the reasons set out below, I:
- a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.
 - b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.
 - c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

- [3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.
- [4] 265 Co. will pay \$5,000,000 for the common shares. Approximately \$1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

pay Residual Co. up to \$7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above \$5,000,000.

- [5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
 - (b) whether the Monitor approved the process leading to the proposed sale;
 - (c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
 - (d) the extent to which creditors were consulted;
 - (e) the effects of the proposed sale or distribution on the creditors and other interested parties; and
 - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
- [6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.
- [7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.
- [8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

- [9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

- [10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.
- [11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.
- [12] The Objectors argue that I should reject the release because:
- (i) It was improper to include it as a condition precedent to the Transaction.
 - (ii) I have no jurisdiction to approve the release.
 - (iii) The release fails to meet the test set out in case law concerning releases.
 - (iv) The release is too broad in scope.

(i) Release as a Condition Precedent

- [13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.
- [14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

- [15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

- [16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.
- [17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:
- 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).
- [18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to pre-filing claims
- [19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.
- [20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.
- [21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put \$3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.
- [22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

- [23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.
- [24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.
- [25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.
- [26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

- [27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:
- (a) Whether the claims to be released are rationally connected to the purpose of the plan;
 - (b) Whether the plan can succeed without the releases;
 - (c) Whether the parties being released contributed to the plan;
 - (d) Whether the releases benefit the debtors as well as the creditors generally;
 - (e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
 - (f) Whether the releases are fair, reasonable and not overly-broad.

- [28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.
- [29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.
- [30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

- [31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.
- [32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.
- [33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.
- [34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

- [35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected \$20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had \$20,000,000 available.
- [36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the \$20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.
- [37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.
- [38] At the outset of the proceeding, 265 Co. proposed to extend a \$5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.
- [39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected \$20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.
- [40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.
- [41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject \$5,000,000 of which \$1,500,000 would be for operating purposes and \$3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional \$7,000,000 for distribution to creditors. While I agree that it does not offer \$20,000,000, the reality is that \$20,000,000 was not on the table.

- [42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.
- [43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.
- [44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.
- [45] First, the Vercouteren proposal did not stop 265 Co. from making its \$5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal
- [46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth \$20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.
- [47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over \$100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

- [48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.
- [49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

- [50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.
- [51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.
- [52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.
- [53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately \$3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

- [54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed \$1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed \$220,000. Dr. Jha initially contributed \$500,000 and then increased his contribution to \$1,250,000 in June 2020.
- [55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.
- [56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.
- [57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

- [58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.
- [59] The release is found in paragraph 24 of the proposed order. Its material language provides:
- ...the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the “Released Parties”) shall be ... released ... from ...all ... claims ...of any nature or

kind whatsoever ... based in whole or in part on any act or omission, ... taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, ... provided that nothing in this paragraph shall ... release... any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

- [60] While the release appears broad at first blush, a closer reading narrows its scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, *prima facie*, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.
- [61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.
- [62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, “wrongful or oppressive conduct by directors.” Just what that means was the subject of much argument on the motion.
- [63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for “wrongful or oppressive conduct” is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.
- [64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

“However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining “oppressive conduct”. Similarly it would appear that “wrongful conduct” would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal.”

- [65] This passage would appear to support Mr. Thornton’s submission.
- [66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of “wrongful or oppressive” conduct and described it as referring to “active but not “passive torts”. In Mr. Osborne’s submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.
- [67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.
- [68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.
- [69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing “out of principle” warrants considerable restraint.

- [70] The release also carves out claims “that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order.” I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.
- [71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.
- [72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.
- [73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

- [74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.
- [75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

[76] For the reasons set out above, I

- a. approve the Transaction;
- b. approve the release;
- c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;
- d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;
- e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and
- f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

TAB 21

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: 8640025 *Canada Inc. (Re)*,
2021 BCSC 1826

Date: 20210915
Docket: S1610905
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 *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
8640025 Canada Inc. and Telephone Data Centers Inc.**

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners, 8640025
Canada Inc. and Telephone Data Centers
Inc.:

D. Le Dressay

Counsel for the Monitor, Ernst & Young:

J.R. Shewfelt

Counsel for Bond Capital Fund Limited:

R.J. Argue

Counsel for Bell Canada, Northwestel Inc.,
Bell Mobility Inc., Bell Aliant Regional
Communications Inc.:

L.C. Hiebert

Counsel for Navigata Communication Ltd.:

W.L. Roberts

Counsel for Telus Corp.:

J.R. Sandrelli

Place and Date of Hearing:

Vancouver, B.C.
September 8, 15, 2021

Place and Date of Judgment:

Vancouver, B.C.
September 15, 2021

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Introduction

[1] **THE COURT:** The Monitor seeks various orders to bring to a close this longstanding and highly litigious CCAA proceeding. By way of summary, the Monitor seeks: (a) approval to sell what it says are the remaining assets of the petitioners on terms that include a release in favour of the proposed purchaser and a prohibition against certain companies and persons bringing claims and suits against the purchaser; (b) approval of the fee accounts of the Monitor and legal counsel; and (c) discharge of most of the Monitor's current obligations.

[2] By agreement of the parties appearing on the application, I heard that part of the Monitor's application regarding the proposed asset sale first. There was insufficient time to hear submissions concerning the remaining relief sought and in light of the possibility that the proposed sale could collapse due to the lengthy delays to get to this point to seek court approval, the remainder of the relief sought on the application was adjourned to be heard another day.

[3] Accordingly, these reasons concern the proposed asset sale.

Background

[4] The relevant lengthy history to this highly contentious CCAA proceeding, which has been extant in this Court since November 2016, is set out in part in the Monitor's notice of application and in some considerable detail in the reasons of the Court of Appeal in *8640025 Canada Inc. (Re)*, 2019 BCCA 473 and of this Court indexed at 2017 BCSC 303, 2017 BCSC 1167, 2017 BCSC 1291, 2018 BCSC 1259, 2019 BCSC 8, and 2019 BCSC 1739.

[5] Insofar as the proposed asset sale is concerned, the material facts may be summarized as follows.

[6] The petitioners are two companies which were involved in the business of selling telephone services. This CCAA proceeding is what is known as a liquidating CCAA as the plan envisions the petitioners' assets to be sold in order to maximize

payment to creditors as opposed to restructuring the petitioners' business operations as going concerns.

[7] Prior to the commencement of this proceeding, the petitioners and their solvent affiliates shared business operations, senior management, and account records. They operated as a single entity, with all transactions recorded in a common ledger. In 8640025, the Court of Appeal referred to those affiliates collectively by the name of TNW Group, which includes a company known as TNW Networks Corp. Mr. Benoit Laliberte is one of the key principals involved in the TNW Group and the petitioners.

[8] Identifying the ownership of assets belonging to the petitioners was a difficult and highly contentious matter in this proceeding given the manner in which the petitioners and the TNW Group organized their affairs. To help resolve issues surrounding ownership, the Monitor was empowered, through a court order issued on April 6, 2017 ("April 6 Order"), in para. 6, to review, inventory, and otherwise investigate the affairs and assets of TNW Networks Corp. and to determine those not derived directly or indirectly from the property of the petitioners.

[9] The April 6 Order was issued on an unopposed basis and never appealed. It provided that any property the Monitor is unable to determine the origin of shall not be the property of TNW Networks Corp. In that event, the assets would, by default, be the assets of the petitioners and as such, available, *inter alia*, for sale by the Monitor as part of its obligations in this CCAA proceeding and more specifically, under various court orders issued in this proceeding. The April 6 order provided that any party may challenge the Monitor's determination by way of application within 10 business days.

[10] The Monitor's determination in respect of assets was the subject of various challenges, including appeals to this Court and the Court of Appeal (as well as an unsuccessful leave application to the Supreme Court of Canada), and was ultimately upheld: see 8640025 Canada Inc.

[11] In its reasons in *8640025 Canada Inc.*, the Court of Appeal described the disputed claims process contained in the April 6 Order (which it called the “Derivation Order”), excerpted below, and in doing so said there was a very good reason for it:

[6] *The nub of the underlying problem giving rise to all three appeals is the difficulty in disentangling assets owned by the insolvent entities subject to the CCAA proceeding, the Petitioners, from those assets owned by other entities affiliated in business with the Petitioners that were not insolvent and thus not subject to the CCAA proceeding. The appellants Telephone Corp. (“Telephone”) and the other named appellants (the “Claiming Parties”) are part of this latter group (together, the “Appellants”).*

[7] *From the Monitor’s perspective, the senior personnel involved in the Petitioners’ and Appellants’ operations did not cooperate fully in the solicitation process, as they were hoping for a successful restructuring. There was no successful restructuring proposal, and the Monitor’s primary function at issue on appeal was the identification and sale of assets belonging to the Petitioners.*

[8] *The insolvent Petitioners and their solvent affiliates shared business operations, senior management, and accounting records. As found by the chambers judge, they operated as though a single company, with all transactions recorded in a common general ledger. As has been done elsewhere in these proceedings, I will refer to the entire group of companies as the “TNW Group”. TNW Networks Corp. (“TNW Networks”) is a company that is part of the TNW Group and owns certain assets the Monitor is entitled to sell, as is discussed below.*

[9] *Key persons involved in the management, direction and operations of the various entities comprising the TNW Group, included Mr. Sandeep Panesar who was the CEO of 864 and TNW Networks; Mr. Lawry Trevor-Deutsch, former President of Telephone, and Senior Vice President of the Petitioners, as well as managing director of Investel Capital Corporation (“Investel”), the parent company of the Petitioner 864; and Mr. Benoit Laliberte who was employed as a consultant to all the companies and was instrumental in their business operations and the overall direction of the TNW Group. Mr. Laliberte is the husband of Ms. Anne-Marie Poudrier, who, together with their six children, is beneficiary of the trust that owns Investel, which trust could be considered the parent of the TNW Group. I will refer to Mr. Panesar, Mr. Trevor-Deutsch, and Mr. Laliberte together or separately, as “Senior Management” of the TNW Group.*

...

[12] *The reason the Monitor was permitted to sell some of TNW Networks’ assets was because TNW Networks had (as directed by court order) assigned to the Monitor “all of the assets of TNW [Networks] that are used in or necessary for the business of the [P]etitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by”*

TNW Networks (Appeal No. 1, para. 18). This assignment was dated March 21, 2017.

[13] *TNW Networks claimed that some of the assets it held were not subject to sale by the Monitor. Eventually terms of a court order were worked out to allow the Monitor to segregate out the TNW Networks assets that the Monitor was not authorized to sell, leaving the Monitor free to sell the Petitioners' assets and other, non-excluded TNW Networks' assets.* This was set out in a court order dated April 6, 2017, which I will refer to as the **"Derivation Order"**. Under the Derivation Order, the Monitor was to investigate "the affairs and assets" of TNW Networks and determine what property of TNW Networks it was not permitted to sell. Paragraph 6 of the Derivation Order provided (describing TNW Networks as Networks):

Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.

(Chambers Reasons No. 2, para. 9) [Emphasis added]

[14] *In short, in addition to selling the Petitioner's assets, under the Derivation Order the Monitor was permitted to sell TNW Networks' property except for TNW Networks' property that was excluded as "not derived directly or indirectly from":*

- a) property of the Petitioners;
- b) their subsidiaries (agreed to mean the Petitioners' subsidiaries); or
- c) any other entities subject to the "Applicants' security".

...

[243] The Claiming Parties also complain that the Monitor was both the party who determined the claims to ownership of assets, and the party advocating to defend the decisions reached on those claims on the appeals before the judge. They also suggest the Monitor had an inherent conflict of interest due to this and its fee arrangements.

[244] I see no merit to any complaint about the process before the Monitor and then the judge to determine claims of ownership of assets. I also see no merit to the argument that the Monitor was acting in an impossible conflict of interest. The process was designed to deal with unique problems involving

the tangled business operations of the many related parties and the insolvency context.

[245] That the Monitor was both investigator and adjudicator did not negate its role in responding to the appeal of the Monitor's Decisions in this unique situation. It was necessary for the Monitor to respond to the appeal so that there could be a fully informed appeal, particularly where there was no other respondent and where the Monitor had specialized knowledge and a lengthy history in dealing with the Appellants. These are all special factors in the context of a CCAA proceeding, but even outside of a CCAA proceeding there can be occasions when a tribunal has standing to defend the merits of a decision under review: *18320 Holdings Inc. v. Thibeau*, 2014 BCCA 494 at paras. 51–53.

[246]] It must be remembered that the Disputed Claims Process was in part negotiated by the parties and was based on terms in court orders that were not appealed. The process and the reasons for it were reviewed without negative comment by this Court in Appeal No. 2.

[247] Other complaints by the Claiming Party have to do with the fact that they bore the onus of proof.

[248] *It was clear from the Disputed Claims Process, and the structure of the Derivation Order when dealing with claims to property held by TNW Networks (customer accounts), that the onus of proof fell on a party claiming ownership of a Disputed Asset. As noted, there was very good reason for this.*

[249] *The difficulty in identifying and segregating ownership of assets had to do with the common management of the related companies, who had made little or no effort during the operations of the business to segregate assets.*

[250] *Further, as has already been emphasized, the Monitor received inconsistent advice from the Senior Management of the TNW Group as to ownership of assets, from that first received when the Petitioners were hopeful for a restructuring, in late 2016 and early 2017, which was an expansive view of the assets owned by the Petitioners, to that received when it appeared clear that the restructuring was not going to happen and the Petitioners' assets would be sold for the benefit of creditors. It was not at all unfair to put the same parties to the onus of proof when they changed their position. Also, documentary evidence of ownership would rest entirely in the hands of the TNW Group, as the Monitor had no independent access to corporate documents. On top of this, the affidavits put forward by the Appellants seemed to obscure rather than illuminate issues regarding ownership of assets.*

[251] In conclusion, I see no merit to any of the issues raised by the Claiming Parties regarding the fairness of the process of determination of claims by the Monitor.

[Bold and underlining emphasis in original; emphasis in italics added]

[12] As a consequence of leave being denied by the Court, the Monitor's determination was final.

[13] Thereafter, the Monitor effected, with court approval, sales of two tranches of the petitioners' assets to the current proposed purchaser, who as a result of a name change is now known as Navigata Communications Limited ("Navigata"). The Monitor now seeks court approval of the sale of the third and final tranche of the petitioners' assets. Those assets include hard assets, permits and licenses, and customer accounts and lists.

The Proposed Asset Sale

[14] Navigata's offer to buy those remaining assets has expired. However, it recently tendered an amended offer to purchaser to reflect events that have occurred since its first offer was made in January 2018.

[15] The new offer is different in these material respects.

[16] First, Navigata seeks a reduction in the previously agreed to purchase of price of just under \$118,000 on account of what it says, and the Monitor confirms, are funds obtained by some or all of the TNW Group through their business operations consequent on their use of assets belonging to the petitioners without the consent of the Monitor.

[17] Second, Navigata requires a release and a court order prohibiting any suits from being commenced against it. The release and proposed prohibition order are limited specifically to claims that may be brought against Navigata in respect of the proposed asset sale transaction as well as prior transactions (and vesting orders) approved by the court. The prohibition order Navigata seeks would prohibit a defined group of persons, including any of the TNW Group or any other person or entity owned or controlled by or related to Mr. Laliberte, from bringing any claims or suits against Navigata.

[18] Navigata says the release and court order are essential in light of:

- (a) the highly litigious nature of this CCAA proceeding, which Navigata says was instigated or otherwise spearheaded by the TNW Group,

Mr. Laliberte, or entities or persons controlled or directed by him, or one or more of them in combination; and

- (b) recent threats by some or all of those entities or persons to sue Navigata.

[19] Navigata wishes to purchase the assets unencumbered with what it says is the very real spectre of ongoing and costly meritless litigation.

[20] The Monitor agrees with Navigata that the terms of the proposed sale are fair and reasonable, including the proposed release and court order which the Monitor supports as warranted in the circumstances of the history of this CCAA proceeding and the threat of what is described as further meritless litigation against Navigata. Navigata. The Monitor advise that without the releases and court ordered prohibition, Navigata will not complete the transaction.

[21] The Monitor is also most concerned that if this final asset sale is further delayed, Navigata will walk away, leaving the Monitor to engage in renewed attempts to sell the petitioners' remaining assets with attendant further costs which in turn will reduce the recovery to the petitioners' secured creditors and DIP lender.

[22] The Monitor's application is supported by the various secured creditors and the DIP lender who are each taking a significant reduction in their claims to allow the proposed asset sale to proceed.

Opposition

[23] The proposed sale to Navigata is opposed by the petitioners, who are represented by separate counsel. A threshold question raised by the Monitor on this application is whether the petitioners have standing to appear with separate counsel and oppose inasmuch as they have not obtained consent from the Monitor (who has enhanced powers under court orders) or court approval, which the Monitor says the petitioners are required to do and indeed have done in the past in this proceeding. It became clear during the hearing that the petitioners' opposition to the proposed sale

is being spearheaded by Mr. Laliberte and others formerly involved with the petitioners and associated with the TNW Group.

[24] The petitioners do not contest the purchase price. Instead, they contend that the Monitor has not properly identified all of the petitioners' remaining assets and as a result is attempting to sell assets that do not belong to the petitioner. They also object to the release and order prohibiting suits.

[25] In terms of standing, the petitioners say that since they have an interest in the outcome of the sale and there is no court order in place abrogating their rights to dispute matters in court, and furthermore, as debtors who brought the proceeding and remain as parties, they have standing, and in these respects rely on *Song v. Westwood Plateau Golf & Country Club*, 2015 BCSC 1884, aff'd 2016 BCCA 110 and *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732.

Analysis and Determination

[26] I do not need to decide the standing issue since I have concluded that even if the petitioners were entitled to standing, and with the exception of the proposed prohibition from suit order, the petitioners' substantive objections to the proposed sale are without merit and that the sale, including the release, is fair and reasonable and should be approved.

Ownership

[27] I will deal first with the petitioners' complaint that the Monitor is inappropriately asking this Court to approve a sale of assets that cannot be said that the petitioners own.

[28] Relying on the proposition that no court can order the sale of assets to which the putative selling party does not own or has no right to sell (see, e.g., *Re Nortel Networks Corporation*, 2014 ONSC 4777 at para. 11, *Fright v. Fright* (1995), 18 B.C.L.R. (3d) 201 (C.A.) at para. 12), the petitioners argue that the onus is on the person proposing to sell the assets that they have the right to do so.

[29] They argue that in light of the comments of the Monitor in his 19th report, excerpted below, that the Monitor is unable to do so:

63. As a result of the lengthy and unexpected appeals process described above, (collectively, the “Appeals”), NCL and the Monitor (on behalf of the Petitioners) had been unable to confirm the full scope of the Purchased Assets that could be vested in NCL.

64. The Monitor notes that the Third Transaction (if approved) together with the First Vesting Order and the Second Vesting Order would accomplish what the Original Distributel APA set out to achieve. The Third Transaction would implement the original transaction, following a robust claim and appeal process through all levels of Court to confirm no third party assets are being sold and the Monitor is of the view that the proposed transaction is within the Court’s jurisdiction.

[Emphasis added]

[30] As previously mentioned, the petitioners’ position is that the April 6 Order is a process order that does not grant the Monitor substantive rights to sell assets it cannot say with certainty are assets of the petitioners. Nor do the court-ordered enhanced powers granted to the Monitor confer a right on the Monitor to sell assets the petitioners do not own.

[31] The petitioners were candid in expressing their concern that Navigata, who is their competitor (and also, of the TNW Group) should not obtain assets it cannot lawfully purchase in order to enhance its business to the detriment of the TNW Group and of Mr. Laliberte’s possible plan to re-engage in the telephone services business.

[32] The petitioners’ complaints are answered in part by the Monitor’s use of the word “had” in para. 63 of his 19th report (excerpted in para. 29 above), where he comments on issues in the past tense, coupled with his advice in para. 82:

82. The Monitor has confirmed that the Remaining Purchased Assets formed part of the assets listed on the schedules contained in the Revised Distributel APA [Navigata]. The Monitor notes that all litigation with respect to any and all claims by the Claiming Persons over the Remaining Purchased Assets has concluded. The Remaining Purchased Assets can be sold by the Monitor pursuant to the April 6, 2017 Order without further opposition by the Claiming Persons and the Monitor recommends that this Honourable Court approve the Third Transaction and Proposed Vesting Order sought in connection with same.

[33] Further, the petitioners have not identified any specific assets proposed to be sold as assets they do not own as owned by others.

[34] The status of assets potentially owned by the TNW Group proposed to be sold by the Monitor are confirmed as assets of the petitioners in view of the April 6 Order. There are no other parties whose claims to assets remain outstanding. Any such claims have been decided long ago.

[35] Apart from pointing to the Monitor's advice to the court, the evidence the petitioners relied on to challenge the Monitor's right to sell the proposed assets comes from an affidavit of Mr. Trevor-Deutsch, a former president of the petitioner, Telephone Corp., who was also the senior vice-president of corporate affairs of the petitioner, 8540025 Canada Inc., sworn August 31, 2021. In respect of the ownership issue, Mr. Trevor-Deutsch's evidence is sweeping in nature, and only takes issue with the trade or business names the Monitor proposes to sell. Mr. Trevor-Deutsch deposes that the petitioners are not the true owners of any of those trade or business names (the term "second option notice" in his affidavit excerpted below refers to Navigata's offer to purchase):

10. Attached as Exhibit "B" to this my affidavit is a copy of the schedule "A" to the Second Option Notice, and the first page of the second option notice, which second option notice is referred to in paragraph 43 of the nineteenth report of the monitor and is Appendix "D" to the sixteenth report of the monitor.

11. The assets referred to in that second option notice are not all assets owned by the petitioners. For example, the trade and business name "Telephone" referred to on page 3 of Schedule "A" is not property exclusively owned by any of the petitioners. To establish the ownership of most of those trade and business names would require some investigations to be made by Mr. Laliberte and myself.

12. However, I can certainly say that none of the companies that are petitioners in these proceedings or over which the Monitor has powers pursuant to court orders in these proceedings is the true owner of any of the trade names or business names referred to in the second option notice which are purported to be sold to 1027637 Canada Inc. pursuant to the Second Option Notice.

[36] Mr. Trevor-Deutsch does not set out the basis of his knowledge nor does he say who owns those assets. In his former positions with the petitioners, Mr. Trevor-

Deutsch should have knowledge or the means of obtaining such knowledge concerning ownership. The general statement in para. 12 of his affidavit is, on its own, insufficient to establish any basis to challenge the Monitor's right to sell the proposed assets.

[37] Further, knowledge of the provenance and ownership of any of the impugned assets to be sold should be within the means of knowledge of the petitioners' former employees or other officers and directors, such as Mr. Laliberte, and in light of the manner in which they organized their business affairs, persons affiliated with the TNW Group. Quite apart from the final determination made by the Monitor pursuant to the April 6 Order, no evidence has been adduced from any of those potential sources of evidence to challenge the Monitor's ability to sell the proposed assets.

[38] The petitioners' rationale to oppose the proposed sale on the basis that it may help a business competitor of the petitioners' failed business or of the petitioners' solvent affiliates, such as the TNW Group, or impede Mr. Laliberte's possible plan to return to the field in some other capacity, is not in the present circumstances a proper basis to oppose the sale.

[39] To deny the Monitor's application in these circumstances would result in pointless delay and expense and would be to the ongoing prejudice of the petitioners' secured creditors and DIP lenders.

[40] I therefore accept that the Monitor has the authority to sell the proposed assets to Navigata for the purchase price proposed in the new amended offer.

Release

[41] I turn now to the proposed release.

[42] In terms of the release, the petitioners contend it is overly broad and not rationally connected to the plan. They submit that it is not usual or appropriate to grant with a vesting order.

[43] It is not uncommon for releases to be granted in CCAA proceedings when approving sales and vesting orders. That point and the factors to be considered in deciding whether to approve a release are discussed in the oft-cited decision of the Ontario Court of Appeal in *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587:

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

...

[72] Here, then – as was the case in T&N – there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.

This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA – construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation – supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp. (Re)*, [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In *Muscletech Research and Development Inc. (Re)*, [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

[It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

...

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here – with two additional findings – because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

- (a) The parties to be released are necessary and essential to the restructuring of the debtor;
- (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;
- (c) the Plan cannot succeed without the releases;
- (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
- (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;
- (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
- (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They

simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they – as individual creditors – make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[Emphasis added]

[44] Having considered the history of this proceeding, the highly contentious issues surrounding ownership of assets, and recent information that Mr. Laliberte or persons or entities controlled by him may bring claims against Navigata, I am satisfied that the release is appropriate in the circumstances in order to effect the sale of the petitioners' remaining assets. I agree with the Monitor that Navigata's concern over buying assets coupled with the very real prospect of litigation in respect of the sale is well founded. Navigata's concerns are also underscored by what appears to be the impetus for the opposition to the Monitor's application, i.e., to prevent a competitor from enhancing its business through the acquisition of the

petitioners' assets. The proposed release, limited in scope to the instant and prior court-approved transactions and vesting orders is, I find, necessary and essential to further this liquidating CCAA and rationally connected to the purpose of the plan to liquidate the petitioners' remaining assets (which will benefit all remaining creditors entitled to recovery). I am satisfied that the proposed sale and final implementation of the liquidation plan will not succeed without it and satisfied that the release language is fair and reasonable in the circumstances.

Prohibition of Suits without Leave

[45] The proposed prohibition order sought by the Monitor is contained in para. 11 of the proposed draft order, and reads:

11. The Claiming Parties are hereby forever barred and prohibited from taking any actions, without prior leave of this Court, against the Purchaser or against or in respect of the Required Purchased Assets or the Optional Purchased Assets (including the Schedule A Assets (as defined in the Option Notice) and the Remaining Assets) purchased by the Purchaser pursuant to the APA, the Approval and Vesting Order granted on September 15, 2017, the Option Notice, the Subsequent Approval and Vesting Order granted on December 14, 2017, the Restated Second Option Notice, and this Order.

[46] "Claiming parties" are defined in para. 10 of the proposed order as follows:

10. The Purchaser is hereby granted a full and final release from and against any and all Claims by TNW Networks Corp., Cloud-Phone Inc., ChoiceTel Networks Ltd., Titan Communications Ltd., 8583498 Canada Ltd., 9151-4877 Quebec Inc. dba Dialek Telecom, Orion Communications Inc., New York Telecommunication Exchange Inc., United American Corp. (US Florida), and Coastline Broadcasting Ltd. and any other person or entity owned or controlled by, or related to Benoit Laliberte and their respective predecessors, successors and assigns (collectively, the "Claiming Parties"), or any Claims made by the Claiming Parties against or in respect of the Required Purchased Assets or the Optional Purchased Assets (including the Schedule A Assets (as defined in the Option Notice) and the Remaining Assets) purchased by the Purchaser pursuant to the APA, the Approval and Vesting Order granted on September 15, 2017, the Option Notice, the Subsequent Approval and Vesting Order granted on December 14, 2017, the Restated Second Option Notice, and this Order.

[47] The Monitor and Navigata say the proposed prohibition order is appropriate in the circumstances of this case in light of what they characterize as the past, extensive, meritless steps taken by Mr. Laliberte and others affiliated with the

petitioners and the TNW Group. They drew to my attention that such an order was granted by Justice Campbell in *Metcalfe*. Further, relying on *Yang v. Shi*, 2020 BCSC 1857, they submit that granting such an order in this case comports with the court's jurisdiction to prevent abuses of the court's process.

[48] The petitioners submit that the court lacks jurisdiction to restrict a person's right to bring a suit. It is one thing, they argue, to approve a release, but quite another to prevent a party from access to this Court without first seeking leave in the absence of a frivolous and vexatious order obtained following an application to this Court. Granting such an order at this juncture would be akin, they argue, to deciding a frivolous and vexatious application in the absence of such application and a proper record. The petitioners contend that Navigata can hold up its release to have any suit brought against Navigata covered by the release dismissed and seek costs.

[49] Dealing first with *Metcalfe*, it is not clear from the reasons of the Court of Appeal and of Justice Campbell in the court below (indexed at 2008 CarswellOnt 3523, [2008] O.J. No. 2265) and from the form of order issued by Campbell J. (which counsel have provided to me), the basis on which Campbell J. ordered the broad form of prohibition orders and whether they were made unopposed or in light of evidence concerning potential frivolous and vexatious suits.

[50] In *Yang*, Justice Norell observed at paras. 81-87, that the Court has statutory jurisdiction under s. 18 of the *Supreme Court Act*, R.S.B.C. 1996, c. 443 as well as inherent jurisdiction to prevent the habitual or vexatious abuse of court processes.

[51] In her reasons, Norell J. said "habitual" encompasses both quantitative and qualitative features:

[83] "Habitual" in s. 18 does not refer only to the number of different proceedings a party commences, but also to the nature of the litigant's conduct within a particular action itself: *Semenoff Estate v. Semenoff*, 2017 BCCA 17 at para. 34. The term "legal proceedings" in s. 18 includes interlocutory applications that raise a new matter or cause: *Pearlman v. Vancouver Police Department*, 2012 BCSC 1179 [*Pearlman*] at para. 25.

[52] Vexatious proceedings are those that ought not to have been brought, such as those brought for an improper purpose such as harassment or oppression of another party through multifarious proceedings, where it is obvious that the action cannot proceed, no reasonable person can expect to obtain relief, or where the issue has been determined by a court of competent jurisdiction. In determining whether a proceeding is vexatious, the court must look at the entire history of the matter and not just whether there was originally a good cause of action: *Yang*, para. 84.

[53] I do not think it appropriate to grant the order sought in the broad terms sought by the Monitor and Navigata. I agree with the petitioners that an order barring Claiming Parties from bringing any action or suit against in respect of the transactions is tantamount to a frivolous and vexatious order without the requisite application materials. Moreover, in light of the petitioners' submissions concerning their prior successes in the Court of Appeal in this action, I am not in a position at this juncture, based on the record before me, to make a finding that the Claiming Parties should be barred generally from bringing suits without leave due to past conduct.

[54] That said, I am prepared to issue an order more limited in scope, one that prohibits the Claiming Parties, without first seeking leave, from bringing suits to challenge any of the terms and integrity of the proposed transaction as well as the prior sales transactions and vesting orders (including the Monitor's right to sell the assets and the price paid). Such an order is rationally connected to the plan for this liquidating CCAA, accords with the highly contentious and protracted history of disputes in this proceeding concerning ownership of assets and prior decisions of this Court and the Court of Appeal concerning the right of the Monitor to sell assets, and the nature and scope of the release. It also avoids further, costly litigation at the expense of the remaining creditors. I have to leave it up to the Monitor and Navigata to sort out whether a prohibition order in those terms is acceptable and if it is, then I would approve a form of order with that more limited language.

Disposition

[55] Accordingly, I approve of the proposed sale to Navigata, including the release. I would also approve a prohibition from suits order proposed by the Monitor so long as the scope of the order is in respect of the terms and integrity of this and prior asset sales transactions and vesting orders granted in this proceeding.

“Walker J.”

TAB 22



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 September 1, 2025

À jour au 1 septembre 2025

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

income trust means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event; (*fiducie de revenu*)

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

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

locality of a debtor means the principal place

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
- (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

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

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

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

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

- a) soit du prononcé de l'ordonnance de faillite la visant;
- b) soit du dépôt d'une cession de biens la visant;
- c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

- a) le dépôt d'une cession de biens la visant;
- b) le dépôt d'une proposition la visant;
- c) le dépôt d'un avis d'intention par elle;
- d) le dépôt de la première requête en faillite :
 - (i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),
 - (ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;
- e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;
- f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

TAB 23

COURT FILE NO.: 04-CL-5306

DATE: 20040322

2004 CanLII 24933 (ON SC)

**SUPERIOR COURT OF JUSTICE – ONTARIO
(Commercial List)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER
APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT
ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage and Geoff R. Hall*, for the Applicants
David Jacobs and Michael McCreary, for Locals 1005, 5328 and 8782 of the
United Steel Workers of America
Ken Rosenberg, Lily Harmer and Rob Centa, for United Steelworkers of America
Bob Thornton and Kyla Mahar, for Ernst & Young Inc., Monitor of the
Applicants
Kevin J. Zych, for the Informal Committee of Stelco Bondholders
David R. Byers, for CIT
Kevin McElcheran, for GE
Murray Gold and Andrew Hatnay, for Retired Salaried Beneficiaries
Lewis Gottheil, for CAW Canada and its Local 523
Virginie Gauthier, for Fleet
H. Whiteley, for CIBC
Gail Rubenstein, for FSCO
Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

"debtor company" means any company that:

(a) is bankrupt or insolvent;

(b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

(c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or

(d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least \$5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of \$5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* ...

To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)...

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

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

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

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

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 at p. 580:

Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:

- (a) identification of the debtor's stakeholders and their interests;
- (b) arranging for a process of meaningful communication;
- (c) dealing with immediate relationship issues arising from a CCAA filing;
- (d) sharing information about the issues giving rise to the debtor's need to restructure;

- (e) developing restructuring alternatives; and
- (f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to pre-filing liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

With respect to the Business Plan, the average spot market sales price per ton was \$514, and the average contract business sales price per ton was \$599. The Forecast reflects an average spot market sales price per ton of \$575, and average contract business sales price per ton of \$611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that \$145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of \$350 million had increased from \$241 million on November 30, 2003 to \$293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of \$75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of \$80 million now to a projected loss of \$192 million and cash has gone from a positive \$209 million to a negative \$114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.

37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing \$74 million investment. In stating his opinion MacGirr defined solvency as:

- (a) the ability to meet liabilities as they fall due; and
- (b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run...eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the \$313 - \$363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

33...They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.

25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

"11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and its text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

S. 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 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.

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor* (No. 64 of 1992), [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King*, *supra* p. 81; *Salvati*, *supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

Mr. MacAdam argues also that the \$4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital*, *supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.

There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:

A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.

Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed*, Spencer J. at pp. 162-3 stated:

In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. ...

The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."

71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over \$600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as \$804.2 million. From that, he deducted the loss for December 2003 – January 2004 of \$17 million to arrive at an equity position of \$787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) \$294 million of future income tax recourse which would need taxable income in the future to realize; (b) \$57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the capitalized deferred debt issue expense of \$3.2 million which is being written off over time and therefore, truly is a "nothing". This totals \$354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be \$433 million.

[66] On a windup basis, there would be a pension deficiency of \$1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of \$656 million. If the \$1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of \$198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as \$909.3 million but only \$684 million has been accrued and booked on the financial statements so that there has to be an increased provision of \$225.3 million. These off balance sheet adjustments total \$1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of (\$433 million minus \$1080 million) or *negative* \$647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the \$773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that \$773 million. Lastly, the Union indicated that there should be a \$155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

TAB 24

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

SUPERIOR COURT

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 23, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:**ABITIBIBOWATER INC.**

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

And

ERNST & YOUNG INC.

Monitor

**CORRECTED JUDGMENT
 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
 AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
 OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
 FOR THE SENIOR SECURED NOTES (#312)**

[1] **WHEREAS** the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the

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PAGE: 2

ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

[2] **WHEREAS** the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

[3] **WHEREAS** a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- a) a first draw of \$130 million to be advanced at closing;
- b) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- c) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and

manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC

DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this

purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

[22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[23] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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Date of hearing: November 23, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"
18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

AbitibiBowater inc. (Arrangement relatif à)

2009 QCCS 6461

SUPERIOR COURT

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **NOVEMBER 16, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.

And

ABITIBI-CONSOLIDATED INC.

And

BOWATER CANADIAN HOLDINGS INC.

And

The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

And

ERNST & YOUNG INC.

Monitor

JUDGMENT
ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING
AND FOR DISTRIBUTION OF CERTAIN PROCEEDS
OF THE MPCo SALE TRANSACTION TO THE TRUSTEE
FOR THE SENIOR SECURED NOTES (#312)

INTRODUCTION

[1] In the context of their CCAA¹ restructuring, the Abitibi Petitioners² present a Motion³ for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("**MPCo**") sale transaction to the Senior Secured Noteholders ("**SSNs**").

[2] More particularly, the Abitibi Petitioners seek:

- 1) Orders authorizing Abitibi Consolidated Inc. ("**ACI**") and Abitibi Consolidated Company of Canada Inc. ("**ACCC**") to enter into a Loan Agreement (the "**ULC DIP Agreement**") with 3239432 Nova Scotia Company ("**ULC**"), as lender, providing for a CDN\$230 million super-priority secured debtor in possession credit facility (the "**ULC DIP Facility**").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN\$282.3 million (the "**ULC Reserve**"), with terms that will be substantially in the form of the term sheet (the "**ULC DIP Term Sheet**") attached to the ULC DIP Motion;

- 2) Orders authorizing the distribution to the SSNs of up to CDN\$200 million upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

- 3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "**ACI DIP Charge**") in respect of the ACI DIP Facility by an amount of CDN\$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

¹ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

² In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

³ *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "**Term Lenders**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "**Lien Holders**") arising under paragraph 61.10 of the Second Amended Initial Order.

[3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

[4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the "**Bondholders**") opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

[5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN\$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

[6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

[7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

[8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec ("**HQ**") agreed to pay ACCC CDN\$615 million (the "**Purchase Price**") for ACCC's 60% interest in MPCo.

[9] Of this amount, it is expected that (i) CDN\$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN\$31 million will be held by HQ for two years to secure various indemnifications (the "**HQ Holdback**"); (iii) certain inter-party accounts will be settled; (iv) the CDN\$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

[10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been

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contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable⁴.

[11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

[12] To that end, the SSNs' claim of US\$477,545,769.53 (US\$413 million in principal and US\$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

[13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

- a) Approved the terms and conditions of the Implementation Agreement;
- b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
- c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **"MPCo Share Proceeds"**);
- d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
- e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **"MPCo Noteholder Charge"**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
- f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the **"ULC Reserve Charge"**); and
- g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

[14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension

⁴ See Monitor's 19th Report dated October 27, 2009.

from Investissement Quebec (“**IQ**”) to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

[15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN\$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN\$173.9 million.

THE ULC DIP FACILITY

[16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN\$282.3 million.

[17] This amount may be used for a limited number of purposes (the “**Permitted Investments**”) that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

[18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN\$230 million from the ULC Reserve as a Permitted Investment.

[19] According to the Monitor⁵, the significant terms of the ULC DIP Term Sheet are as follows:

- i) **Manner of Borrowing** – Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN\$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN\$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN\$50 million in increments of up to CDN\$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN\$50 million shall become available upon further order of the Court.
- ii) **Interest Payments** – No interest will be payable on the ULC DIP Facility;
- iii) **Fees** – No fees are payable in respect of the ULC DIP Facility;
- iv) **Expenses** – The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;
- v) **Reporting** – Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

⁵ See Monitor's 19th Report dated October 27, 2009.

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- vi) Use of Proceeds** – The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the “**Budget**”);
- vii) Events of Default** – The events of default include the following:
- (a) Substantial non-compliance with the Budget;
 - (b) Termination of the CCAA Stay of Proceedings;
 - (c) Failure to file a CCAA Plan with the Court by September 30, 2010; and
 - (d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;
- viii) Rights of Alcoa** – Alcoa will receive all reporting noted above and notices of events of default. Alcoa’s consent is required for any amendments or waivers;
- ix) Rights of Senior Secured Noteholders** – The Senior Secured Noteholders’ rights consist of:
- (a) Receiving all reporting noted above and any notice of an Event of Default;
 - (b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;
 - (c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;
 - (d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa’s sole discretion; and
 - (e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;
- x) Security** – Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

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[20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN\$167 million.

THE QUESTIONS AT ISSUE

[21] In light of this background, the Court must answer the following questions:

- 1) Should the ULC DIP Facility of CDN\$230 million be approved?
- 2) Should the proposed distribution of CDN\$200 million to the SSNs be authorized?
- 3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

[22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN\$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

[23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

[24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US\$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US\$100 million loan to the Abitibi Petitioners by Bank of Montreal ("**BMO**"), guaranteed by IQ.

[25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

[26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

[27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

[28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

[29] On the one hand, as highlighted notably by the Monitor⁶, the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

- a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);
- b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);
- c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US\$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US\$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);
- d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;
- e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and
- f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

[30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

⁶ See Monitor's 19th Report dated October 27, 2009.

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[31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

- a) Only about CDN\$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN\$335 million of liquidity (Monitor's 19th Report at paragraph 68);
- b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US\$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US\$200 million;
- c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;
- d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and
- e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US\$100 million.

[32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

[33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

[34] Finally, the provisions of section 11.2 of the amended CCAA, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

[35] Pursuant to subsection 11.2(4) of the amended CCAA, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

- a) The period during which the company is expected to be subject to CCAA proceedings;
- b) How the company's business and financial affairs are to be managed during the proceedings;

- c) Whether the company's management has the confidence of its major creditors;
- d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- e) The nature and value of the company's property;
- f) Whether any creditor would be materially prejudiced as a result of the security or charge; and
- g) The Monitor's report.

[36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the CCAA.

[37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

[38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

[39] Second, even if the ULC DIP Facility of CDN\$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

[40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN\$130 million. Subsequent additional draws up to CDN\$50 million will be in maximum increments of CDN\$25 million and subject to prior notice. The final CDN\$50 million will only be available with the Court's approval.

[41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

- a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
- b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

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- c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and
- d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

[42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

- a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;
- b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;
- c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;
- d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and
- e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

[43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

[44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

[45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

[46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

[47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

[48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

[49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

[50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN\$200 million.

[51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

[52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN\$27.4 million per year in accruing interest costs on the CDN\$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

[53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

[54] The Bondholders oppose the CDN\$200 million distribution to the SSNs.

[55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the CCAA process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

[56] The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor

group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

[57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

[58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

[60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

[61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN\$230 million ULC DIP Facility, they still contest the CDN\$200 million proposed distribution that is directly linked to the latter.

[62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

[63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

[64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

[65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better

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arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

[66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

[67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN\$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN\$230M for the ULC DIP Facility funding.

[68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

[69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN\$173.9 million. Accordingly, out of a CDN\$200 million distribution to the SSNs, only CDN\$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN\$200 million at issue.

[70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN\$200 million to the SSNs will create at the same time interest savings of approximately CDN\$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

[71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada⁷.

[72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

⁷ See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

[73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

[74] In *Windsor Machine & Stamping Ltd. (Re)*⁸, Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN\$27 million per year in interest savings; and
- d) Even taking into consideration the CDN\$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

[76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the CCAA. For some, it may only be a small step. However, it is a definite step in the right direction.

[77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

[78] This benefits a large community of interests that goes beyond the sole SSNs.

[79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the CCAA ultimate goals.

⁸ *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

[80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

[81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

[82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

[83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in CCAA proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

[84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this CCAA process to continue to move forward efficiently.

[85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

[86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ULC DIP Financing

[87] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "**ULC DIP Agreement**") among ACI, as borrower, and 3239432 Nova

Scotia Company, an unlimited liability company ("**ULC**"), as lender (the "**ULC DIP Lender**"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **\$230** million.

[88] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the "**ULC DIP**") will be subject to the following draw conditions:

- d) a first draw of \$130 million to be advanced at closing;
- e) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- f) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

[89] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "**Draft ULC DIP Agreement**") to the Monitor and to any party listed on the Service List which requests a copy of same (an "**Interested Party**") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

[90] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

[91] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the

approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "**ULC DIP Documents**"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

[92] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

[93] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

[94] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

[95] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

[96] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "**ULC DIP Expenses**") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

[97] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

[98] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

- c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and
- d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

[99] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

[100] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[101] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior

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Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

[102] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

[103] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

"**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **\$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate

of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

[104] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

[105] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

[106] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

[107] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First

Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[108] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[109] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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Date of hearing: November 9, 2009

SCHEDULE "A"
ABITIBI PETITIONERS

21. ABITIBI-CONSOLIDATED INC.
22. ABITIBI-CONSOLIDATED COMPANY OF CANADA
23. 3224112 NOVA SCOTIA LIMITED
24. MARKETING DONOHUE INC.
25. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
26. 3834328 CANADA INC.
27. 6169678 CANADA INC.
28. 4042140 CANADA INC.
29. DONOHUE RECYCLING INC.
30. 1508756 ONTARIO INC.
31. 3217925 NOVA SCOTIA COMPANY
32. LA TUQUE FOREST PRODUCTS INC.
33. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
34. SAGUENAY FOREST PRODUCTS INC.
35. TERRA NOVA EXPLORATIONS LTD.
36. THE JONQUIERE PULP COMPANY
37. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
38. SCRAMBLE MINING LTD.
39. 9150-3383 QUÉBEC INC.
40. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

20. BOWATER CANADIAN HOLDINGS INC.
21. BOWATER CANADA FINANCE CORPORATION
22. BOWATER CANADIAN LIMITED
23. 3231378 NOVA SCOTIA COMPANY
24. ABITIBIBOWATER CANADA INC.
25. BOWATER CANADA TREASURY CORPORATION
26. BOWATER CANADIAN FOREST PRODUCTS INC.
27. BOWATER SHELBURNE CORPORATION
28. BOWATER LAHAVE CORPORATION
29. ST-MAURICE RIVER DRIVE COMPANY LIMITED
30. BOWATER TREATED WOOD INC.
31. CANEXEL HARDBOARD INC.
32. 9068-9050 QUÉBEC INC.
33. ALLIANCE FOREST PRODUCTS (2001) INC.
34. BOWATER BELLEDUNE SAWMILL INC.
35. BOWATER MARITIMES INC.
36. BOWATER MITIS INC.
37. BOWATER GUÉRETTE INC.
38. BOWATER COUTURIER INC.

SCHEDULE "C"
18.6 CCAA PETITIONERS

17. ABITIBIBOWATER INC.
18. ABITIBIBOWATER US HOLDING 1 CORP.
19. BOWATER VENTURES INC.
20. BOWATER INCORPORATED
21. BOWATER NUWAY INC.
22. BOWATER NUWAY MID-STATES INC.
23. CATAWBA PROPERTY HOLDINGS LLC
24. BOWATER FINANCE COMPANY INC.
25. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
26. BOWATER AMERICA INC.
27. LAKE SUPERIOR FOREST PRODUCTS INC.
28. BOWATER NEWSPRINT SOUTH LLC
29. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
30. BOWATER FINANCE II, LLC
31. BOWATER ALABAMA LLC
32. COOSA PINES GOLF CLUB HOLDINGS LLC

TAB 25

CITATION: First Source Financial Management v. Chacon Strawberry Fields Inc., 2024
ONSC 7229

COURT FILE NO.: CV-24-00717742-00CL

DATE: 20241223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: FIRST SOURCE FINANCIAL MANAGEMENT INC.

Applicant

AND:

CHACON STRAWBERRY FIELDS INC. and SURINDER KAUR CHAHAL

Respondents

BEFORE: Justice Jana Steele

COUNSEL: *Steven L. Graff and Adrienne Ho*, for the Receiver, The Fuller Landau Group Inc.

Wolfgang Kaufmann and Tajinder Kaur Sivia, for the Respondents

Ryan Shah, for the Applicant, First Source Financial Management Inc.

Jitseh Bhalla, for the Second Lender, 1794523 Ontario Inc.

Arnab Bose, for the third-party, Ramesh Ahluwalia

HEARD: December 20, 2024

ENDORSEMENT

Overview

[1] This is a motion brought by The Fuller Landau Group Inc., the Receiver, for the approval of a sale process and transaction, an approval and vesting order, and an ancillary order approving the Receiver's report, fees and disbursements, and a distribution to the first secured lender, among other things.

[2] The contentious issues before the court relate to whether last ditch attempts to alter the sale process by an unsuccessful bidder, Ramesh Ahluwalia, and by the respondents should be permitted.

[3] The respondents seek access to certain sealed confidential documents and an adjournment of three weeks. The respondents say they want the time to secure financing.

[4] Mr. Ahluwalia asks that his late offer be considered when the court determines whether to approve the agreement of purchase and sale with the Purchaser.

[5] For the reasons set out below the Receiver's motion is granted.

Background

[6] The application to appoint the Receiver was filed by First Source Financial Management Inc. ("First Source") on or about April 3, 2024. However, due to a forbearance agreement that was reached, the Receiver was not appointed until on or about July 19, 2024. At that time, the Receiver was appointed as receiver and manager of the lands and premises municipally known as 12550, 12560 and 12570 Kennedy Road, Caledon Ontario, (the "Real Property") owned by Chacon Strawberry Fields Inc. (the "Debtor").

[7] The Debtor is a company incorporated pursuant to the laws of Ontario.

[8] The Debtor owns and operates a mixed-use retail plaza called "Strawberry Fields Plaza," which is situated on the Real Property, a 2.32-acre piece of land. The plaza is fully leased to 15 tenants.

[9] Upon being appointed and determining the nature of the property and other preliminary steps, the Receiver undertook a process to engage a real estate broker to market and sell the Real Property. The Receiver met with five real estate brokerages, each of which were asked to provide a marketing proposal for the Real Property. All five brokerages submitted marketing proposals. The Receiver selected Lennard Commercial Realty, Brokerage ("Lennard") based on its specific expertise with properties similar to the Real Property and prior successful experience with sales in receiverships.

[10] The Receiver entered into the listing agreement with Lennard on or about September 17, 2024.

[11] Lennard listed the property on September 23, 2024. Lennard took numerous other marketing steps, resulting in 127 parties executing non-disclosure agreements to access the data room.

[12] The initial bid deadline was set at November 6, 2024, at 3 p.m. Eleven offers were submitted by the deadline and three other offers were submitted after the deadline, including Mr. Ahluwalia's bid. The top six bidders (all of which had submitted their bids by the deadline) were invited to submit another bid – Mr. Ahluwalia was not asked to re-submit because he was not among the top six bidders.

[13] The successful bidder (the "Purchaser") submitted its bid by the initial bid deadline and was among the top six asked to re-submit a bid.

[14] The second bid deadline was set at November 12, 2024, at 3 pm. Five of the six bidders who were invited to re-submit, including the Purchaser, did so in accordance with the deadline. Two other bidders who were not invited to re-submit, including Mr. Ahluwalia, made another bid.

[15] The Purchaser's bid was accepted by the Receiver on November 13, 2024. The Purchaser's bid was the highest bid delivered by the second bid deadline. The Purchaser paid the required deposit to the Receiver.

[16] On November 14, 2024, two days after the second bid deadline, and after the Receiver had accepted the Purchaser's bid, Mr. Ahluwalia made another bid.

[17] Among other things, the Receiver is asking the court to approve the transaction with the Purchaser (the "Sale Transaction"). The Sale Transaction is targeted to close on January 13, 2025.

[18] The applicant, First Source, is the first ranking secured creditor on the Real Property.

Analysis

Should the Court adjourn the proceedings to January 9, 2025, as requested by the respondents?

[19] The respondents ask the court to adjourn the Receiver's motion to January 9, 2025 to give the respondents the opportunity to redeem. Tied in with this request, is the respondents' request that the Receiver be required to provide the respondents with access to certain sealed documents, including the sale price the Purchaser is paying pursuant to the Sale Transaction, the adjustments to the sale price, and a draft payout statement to show what each creditor is expected to receive (the "Transaction Information").

[20] The Court of Appeal in *Rose-Isli Corp. v. Smith*, 2023 ONCA 548, at para. 9, affirmed that the motions judge had not erred in applying the following principles to guide her consideration of whether the debtor should be granted leave to redeem:

- a. In considering a request by an encumbrancer to redeem a mortgage on property in receivership, a court should consider the impact that allowing the encumbrancer to exercise its right of redemption would have on the integrity of a court-approved sales process;
- b. Usually, if a court-approved sales process has been carried out in a manner consistent with the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), a court should not permit a latter attempt to redeem to interfere with the completion of the sales process. In our view, the reason the *Soundair* principles apply to circumstances where an encumbrancer seeks to redeem a mortgage is that once the court's process has been invoked to supervise the sale of assets under receivership, the process must take into consideration all affected economic interests in the properties in question, not just those of one creditor; and
- c. In dealing with the matter, a court should engage in a balancing analysis of the right to redeem against the impact on the integrity of the court-approved receivership process.

[21] Unlike *Rose-Isli*, in the instant case the sales process was not pre-approved by the court. The Receiver asks the court on this motion to approve the sales process that it undertook. As set out below, I am satisfied that the *Soundair* principles have been satisfied and the sales process should be approved.

[22] The respondents' evidence is that they have obtained a financing offer from Gurpreet Kainth of K.P. Financial Group for \$23.5 million (the "Financing Offer"). Further, the respondents state that their redemption plan, assuming the financing is approved, is to pay the following:

- a. First Source will be paid in full,
- b. The second mortgagee will receive 90% of the amount owing,
- c. All HST, realty taxes, Receiver's costs and real estate break fees will be satisfied, and
- d. Subsequent mortgagees will be compensated, with specific amounts allocated to obtain necessary postponements.

[23] Essentially the respondents are asking the court for more time to put together a proposal that they say will be better than the Sale Transaction. The respondents are not saying that they have "cash in hand" and can redeem the outstanding mortgages on the property. The respondents seek the confidential Transaction Information so they can ensure that their proposal is better than the deal reached pursuant to the Sale Transaction.

[24] The Receiver objects to any adjournment. As the Receiver points out an adjournment will result in a delay and will not change the outcome. Setting aside whether the Financing Offer may come to fruition, the proposed \$23.5 million in financing is not enough for the Debtor to redeem the outstanding mortgages on the property. The Receiver states that the Debtor would need more than \$32.8 million in financing to pay out the mortgagees in full.

[25] The jurisprudence provides for a balancing act that the court must engage in when faced with a debtor who wants to redeem. After a receiver has gone through an exhaustive bidding process, including the costs associated therewith, to find a purchaser, the court may still permit a last-minute redemption where the debtor comes with a cheque in hand: *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONSC 4000 at para. 7-9. Further, in the exceptional circumstances where the court may permit a last-minute redemption, the cheque in hand must be sufficient to cover all the outstanding obligations: *Vector Financial Services v. 33 Hawarden Crescent*, 2024 ONSC 1635, at para. 97.

[26] There is no cheque in hand in the instant case.

[27] Further, a short adjournment would not alter the situation such that the debtors would have sufficient funds to redeem the mortgages. As noted above, the Financing Offer, even if it comes to fruition, would not provide sufficient funds for the debtor to redeem all the outstanding mortgages on the Real Property. Instead, the debtors want to obtain information and financing so that they can make an offer above the sale price in the Sale Transaction. As noted by the Receiver, this is one of the reasons the purchase price is kept confidential in a situation like this until the transaction closes. Otherwise, the debtor may use the information to try to obtain financing just to beat the purchase price and attempt to negotiate with subsequent mortgagees. This would thwart the entire process.

[28] As noted by the court in *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930, 55 C.B.R. (5th) 271, at para. 22:

[...] Ms. Singh does not have an automatic right to redeem. A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

[29] The request for an adjournment is denied.

Should the Court approve the Sale Agreement and the Sale Transaction with the Purchaser?

[30] The Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727, 4 O.R. (3d) 1 set out the factors for the court to consider when determining whether a proposed sale should be approved:

- a. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- b. The efficacy and integrity of the process by which offers were obtained;
- c. Whether there has been unfairness in the working out of the process; and,
- d. The interest of all parties.

[31] I am satisfied that the *Soundair* factors have been met.

[32] The Receiver first sought proposals for the brokerage firm to market the property. After receiving and considering five marketing proposals, the Receiver selected Lennard, based on its expertise and experience. The activities taken to market the Real Property included listing the property on MLS, sending weekly eblasts with relevant details to prospective purchasers and agents, featuring the Real Property on the Lennard Commercial website and LinkedIn, and advertising the Real Property on three occasions in the *Globe & Mail's* Report on Business section. As evidenced by the fact that 127 parties executed NDAs and were granted access to the data room, the Real Property received wide market exposure. As noted above, 14 bidders submitted offers on the first round and seven bidders submitted offers on the second round. The Purchaser's offer was the highest and best offer received in the bidding process and the agreement of purchase and sale does not contain any material conditions. The Real Property is being bought by the Purchaser on an "as is where is" basis. I further note that the Sale Transaction has the support of the Debtor's first ranking secured creditor.

[33] Mr. Ahluwalia asks the court to consider his November 14, 2024 offer when determining whether to approve the sale process and the proposed Sale Transaction. As noted above, Mr. Ahluwalia missed the first bid deadline and submitted a bid significantly below the top six bidders who were asked to re-submit. Mr. Ahluwalia submitted a bid in the second round of bidding in any event, which the Receiver did consider. However, there were at least three parties who had higher bids than Mr. Ahluwalia in the second round. Accordingly, the Receiver accepted the

Purchaser's offer. Mr. Ahluwalia submitted his November 14, 2024 offer after the Receiver had accepted the Purchaser's offer.

[34] A disappointed bidder does not generally have standing to challenge a motion to approve a sale to another bidder: *Re Consumer Packaging Inc.*, 2001 CanLII 6708, at para. 7.

[35] In any event, considering Mr. Ahluwalia's bid after the bid deadline passed and the Purchaser's offer was accepted would thwart the integrity of the sales process. If a party could swoop in at the last minute and submit a bully bid, after a fair and thorough sales process has been run and the highest and best offer accepted, complete uncertainty would be created.

[36] As noted by the Receiver, courts will generally defer to a court-appointed receiver's expertise in reviewing a sale and will not second-guess their recommendation absent exceptional circumstances: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15.

[37] I am satisfied that the sale agreement and Sale Transaction with the Purchaser should be approved.

Should the Approval and Vesting Order be granted?

[38] The Receiver seeks an approval and vesting order in respect of the Real Property sale to the Purchaser.

[39] Under section 100 of the *Courts of Justice Act* the court has the power to grant approval and vesting orders:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[40] The proposed vesting order will extinguish the registered charges on the Real Property listed out in paragraphs 30 and 31 of the Receiver's factum.

[41] Vesting orders are routinely granted by this court: *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 106.

[42] I agree with the Receiver's submission that it is appropriate for the court to grant the requested AVO, granting the Real Property to the Purchaser free and clear of the claims and encumbrances set out at paras. 30 and 31 of the Receiver's factum (other than Permitted Encumbrances). The applicant, First Source, is supportive of the transaction being put forward. Further, as set out above, the sale was conducted in a manner that meets the *Soundair* principles.

Should the Interim Distribution be approved?

[43] The Receiver seeks court approval to distribute \$16 million to First Source following the completion of the Transaction. The Receiver seeks authorization to make further payments to First Source from available funds up to the amount of First Source's debt, once the Receiver has determined the amounts due in respect of certain priority claims.

[44] The court routinely grants orders authorizing interim distributions in insolvency proceedings: e.g., *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472, at paras. 8 and 12.

[45] In determining whether it is appropriate to authorize an interim distribution the court may consider: (a) whether the proposed recipient's security is valid and enforceable; (b) whether the amounts that are owed to the proposed recipient exceed the proposed interim distribution amount; and (c) whether the proposed interim distribution would result in interest savings: *Re Abitibowater Inc.*, 2009 QCCS 6461 at para. 75.

[46] In the instant case, First Source has a valid and enforceable security interest in respect of the collateral covered by its security. Counsel to the Receiver provided the Receiver with a security opinion, subject to the usual qualifications, assumptions and disclaimers, which opinion confirms the validity of the charge granted in favour of First Source on the Real Property. The amount of First Source's indebtedness as at October 1, 2024 was \$17,752,258.56. The proposed distribution of \$16 million is less than the amount outstanding on the loan. By repaying a portion of the loan, there will be interest savings.

[47] I am satisfied that the proposed interim distribution should be approved.

Should the Court grant the Sealing Order?

[48] The Receiver seeks a sealing order with respect to the Confidential Appendices of the Third Report. The Confidential Appendices contain information regarding the purchase price for the transaction and information regarding the sales process, including other offers submitted.

[49] Subsection 137(2) of the *Courts of Justice Act* provides that the Court may order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record.

[50] For the court to grant a sealing order, the party requesting the order must establish that:

- a. Court openness poses a serious risk to an important public interest;
- b. The order sought is necessary to prevent this serious risk to the interest because reasonably alternative measures will not prevent this risk; and
- c. As a matter of proportionality, the benefits of the sealing order outweigh its negative effects:

Sherman Estate v. Donovan, 2021 SCC 25, at para. 38.

[51] The requested sealing order is limited in scope. The proposed sealing order balances the open court principle and legitimate commercial requirements for confidentiality in the circumstances. In my view, the benefits of the requested sealing order outweigh the negative impact on the "open court" principle. The Confidential Appendices contain commercially sensitive information that could have a detrimental impact on a future sales process, should one be required if the transaction does not close. No stakeholder will be materially prejudiced by the

sealing order, which applies to only a limited amount of information. As noted by the Receiver, there is not a reasonable alternative to a sealing order.

[52] I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53, requirements, as modified in *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38.

[53] I am satisfied that the Confidential Appendices should be sealed pending further order of this court.

Should the Court grant the other relief sought by the Receiver?

[54] There was no opposition to the other relief sought by the Receiver, specifically, the approval of the Second Report, Third Report, and Supplemental Third Report, and the approval of the fees and disbursements of the Receiver and its counsel.

[55] As noted in *Re Target Canada Co.*, 2015 ONSC 7574, at para. 2, court appointed officers routinely seek court approval of their reports and activities, which relief is routinely granted where there is no opposition. The court in *Target* also recognized, at para. 22, that there are “good policy and practical reasons” for the court to provide such approval. While *Target* was a case involving court approval of Monitor’s reports and activities under a *Companies’ Creditors Arrangement Act* proceeding, subsequent cases have confirmed that the considerations apply equally to the reports and activities of a receiver: *Re Hangfeng Evergreen Inc.*, 2017 ONSC 7161 at para. 15.

[56] I am satisfied that the activities of the Receiver set out in the Second Report, Third Report, and Supplemental Third Report were necessary and undertaken in good faith in accordance with the order appointing the Receiver and should be approved.

[57] Having reviewed the fee affidavits and considered the non-exhaustive factors in *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851, at para. 33, I am satisfied that the fees and disbursements of the Receiver and its counsel for the applicable billing period are fair and reasonable and should be approved.

[58] Orders attached.

J. Steele J.

TAB 26

Court of Queen's Bench of Alberta

Citation: Re SemCanada Crude Company (Companies' Creditors Arrangement Act), 2009 ABQB 90

Date: 20080211
Docket: 0801 08510
Registry: Calgary

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

And in the Matter of a Plan of Compromise or Arrangement of SemCanada Crude Company, SemCAMS ULC, SemCanada Energy Company, A.E. Sharp Ltd., CEG Energy Options, Inc., 3191278 Nova Scotia Company and 1380331 Alberta ULC

Applicants

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

Introduction

[1] Three of this group of CCAA debtors have applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States.

Background to Application

[2] SemCanada Energy Company ("SemCanada Energy") and its subsidiaries A.E. Sharp Ltd. ("AES") and CEG Energy Options, Inc. ("CEG") are three of a group of seven companies referred to as the SemCanada Group that obtained protection from their creditors pursuant to an Order granted under the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36, as amended, on July 30, 2008. Prior to the initial order, SemCanada Energy, AES and CEG had

commenced proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, on July 24, 2008 and those proceedings were then converted to proceedings under the CCAA.

[3] On July 22, 2008, SemGroup L.P. and its direct and indirect subsidiaries in the United States (the “U.S. Debtors”) filed voluntary petitions to restructure under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the District of Delaware.

[4] According to the second report of the Monitor, the financial problems of the SemGroup arose from a failed trading strategy and the volatility of petroleum products prices, leading to material margin calls related to large futures and options positions on the NYMEX and OTC markets, resulting in a severe liquidity crisis. SemGroup’s credit facilities were insufficient to accommodate its capital needs, and the corporate group sought protection under Chapter 11 and the CCAA.

[5] The SemCanada Group are indirect wholly-owned subsidiaries of SemGroup LP. The SemCanada Group is comprised of three separate businesses:

- (a) SemCanada Crude Company (“SemCanada Crude”), a crude oil marketing and blending operation;
- (b) SemEnergy Group, whose business is gas marketing, including the purchase and sale of gas to certain of its four subsidiaries as well as to SemCAMS ULC; (“SemCAMS”); and
- (c) SemCAMS, whose business consists of ownership interests in large gas processing facilities located in Alberta, as well as agreements to operate these facilities.

[6] SemCrude, L.P. as U.S. borrower and a predecessor company of SemCAMS as Canadian borrower, certain U.S. SemGroup corporations and Bank of America as administrative agent for a syndicate of lenders (the “Lenders”) entered into a credit agreement in 2005 (the “Credit Agreement”). The Credit Agreement provides four different credit facilities. There are no advances outstanding with respect to the Canadian term loan facility, but in excess of U.S. \$2.5 billion is owing under the U.S. term loan facility, the working capital loan facility and the revolver loan.

[7] Five of the SemCanada Group of companies, including SemCanada, have provided a guarantee of all obligations under the Credit Agreement to the Lenders, who rank as senior secured lenders, and to a US \$600 million bond indenture issued by SemGroup. The amount owing under these instruments is in excess of US \$3.3 billion. The guarantee is secured by a security and pledge agreement (the “Security Agreement”) signed by five members of the SemCanada Group.

[8] While it is intended to present a plan of arrangement or compromise with respect to at least one of the other two businesses, the SemEnergy Group is in self liquidation and has no significant ongoing operations. As a result of liquidation proceedings and the collection of

outstanding accounts receivable, SemCanada Energy, AES and CEG now hold \$113 million in cash.

[9] The SemEnergy Group proposes to make an interim distribution payment to the Lenders of \$90 million. The remainder of the \$113 million would be held back to satisfy claims that may rank in priority to that of the Lenders, costs and fees related to the CCAA proceedings and the employee retention plan, potential claims under the Directors' Charge and a general contingency reserve. Since the time of the first application, the Lenders have requested that the outstanding and continuing fees of their Canadian advisors be paid by the SemEnergy Group. The current outstanding fees amount to approximately \$1.8 million. It is common ground that if such interim payment is allowed, there will be nothing left from the \$113 million to be distributed to unsecured creditors, subject to certain recovery measures in the United States proceedings that will be referred to later in this decision.

[10] A number of unsecured creditors objected to the application, and it was adjourned to allow the unsecured creditors access to the security opinion of the Monitor's counsel, cross-examination on affidavits and the preparation of a report from the Monitor on the status of the restructuring efforts of the U.S. Debtors to date.

[11] The unsecured creditors of the SemCanada Group that object to the application have raised a number of issues. They can be summarized as follows:

- (a) the obligations of the SemCanada Group under the guarantee to the Lenders may be voidable as fraudulent preferences or fraudulent conveyances. The Court has insufficient evidence on that issue to grant the order sought, and the SemCanada Group should be compelled to provide further financial information and to answer specific questions on the issue during cross-examination on the affidavits;
- (b) the amounts that the SemCanada Group are obligated to pay under the guarantee are expressly limited by the terms of the guarantee itself;
- (c) the interim distribution may unfairly prejudice Canadian unsecured creditors and bestow an unwarranted benefit on unsecured creditors in the United States proceedings; and
- (d) there is no urgency and a delay may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings.

Analysis

(a) *The Fraudulent Preferences Issue*

[12] The opinion obtained by the Monitor from counsel on the validity of the Lenders' security does not address any issue of fraudulent preference. It would not be normal practice in this kind of proceeding for the Monitor's counsel to address the possibility of fraudulent preference unless the Monitor is alerted to some evidence that this may be an issue. The Monitor has not identified any such concern in this case. Thus, in the normal course, it would be up to

creditors, if they believe circumstances exist, to bring appropriate proceedings to attack the guarantee and Security Agreement. The SemCanada Group points out that the unsecured creditors have not brought any action (which might leave them open to sanctions of costs if unsuccessful) and submit that they are attempting to use the proceeding as a fishing expedition to delay and obfuscate the application. The applicants and the Lenders submit that the analysis of the possibility of fraudulent preference submitted by the unsecured creditors is flawed at any rate and lacking in merit.

[13] There is, however, a complication in the argument as to who has the onus to address the possibility of fraudulent preferences. The unsecured creditors point out that the draft order proposed by the applicants for the interim distribution seeks a declaration that the Lenders' security (as embodied in the guarantee and the Security Agreement, which was executed by all five major companies in the SemCanada Group) constitutes a valid and enforceable obligation of the SemEnergy Group and that the payment of the interim distribution will not be void or voidable at the instance of creditors and does not constitute an unjust preference, fraudulent conveyance or reviewable transaction. Pursuant to the proposed order, this declaration would be binding on any trustee in bankruptcy or receiver that may be appointed in respect of the debtors. Thus, the unsecured creditors argue, the issue of fraudulent preferences is relevant and the SemCanada Group should be obligated to file more complete affidavits providing financial statements at relevant periods at and around the time the loan documents and guarantee were entered into and to answer cross-examination questions on the value of the assets of the SemEnergy Group at such times.

[14] The declaratory language at issue is common to this type of order, and the SemEnergy Group and the Lenders submit that it applies only to the interim distribution, not the underlying guarantee and Security Agreement that precedes it. They also submit that, at any rate, language can be crafted to ensure that the declaration is not given effect beyond a limited purpose. While it could be argued that declaratory relief relating to the interim distribution could be construed as extending to the underlying guarantee obligations, I accept that the language of the proposed order was not intended to protect the guarantee and the Security Agreement from the possibility of attack as a fraudulent preference, conveyance or reviewable transaction.

[15] It is not inappropriate for the applicants to ask for a declaration that the interim distribution is not a fraudulent preference or conveyance and such a declaration would arise from the Court's review of the relief sought as a part of CCAA process. Given the limited nature of what is being sought and the purpose of the proceedings, the creditors are not entitled to a full review of the possibility of historical fraudulent preferences or fulsome financial information from the CCAA debtors arising from this application standing alone. This does not preclude the unsecured creditors from applying to lift the stay to bring an independent action if they believe that it is justified by evidence.

[16] The applicants and the Lenders raised a number of arguments about the weakness of any allegations of fraudulent preference, the passing of limitation periods and the absence of any

intent that could form the basis for such an action. It is not necessary to address these submissions at this point in time.

[17] I therefore decline to require the CCAA debtors to file further financial information on this application or to answer the questions or provide the undertakings previously refused.

(b) The Guarantee is Limited - Section 2(f) of the Guarantee

[18] The guarantee signed by SemEnergy and the other guarantors includes the following provision:

2(f) The liability of each Guarantor hereunder shall be limited to the maximum amount of liability that can be incurred without rendering this Guaranty, as it relates to such Guarantor, voidable under applicable Law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount.

[19] It appears from academic commentary that this clause was designed to address an issue that exists under United States corporate law relating to the inability of a corporation to grant a guarantee if it causes the guarantor to become insolvent: *Corporate Guarantees As a Form of Financial Assistance: The Banker's View*, S.D.N. Belcher and Peter J. Lewarne, (1990) 5 B.F.L.R. at 1. While certain insolvency tests under corporate legislation historically limited Canadian corporations in granting guarantees, they have now been repealed, and the same issue does not exist under Canadian law.

[20] Thus, while this clause may have effect when construed under U.S. law to limit the guarantee to an amount that would not render the guarantors insolvent at relevant periods of time, there are no corresponding obligations under the laws of Alberta (the governing law of the guarantee) or the corporate statutes of Nova Scotia, Alberta and Saskatchewan that govern SemEnergy, AES and CEG, respectively, that would limit the amount of the guarantee arising from the potential of insolvency when the guarantee was granted, or to the asset value of the guarantor, net of unsecured indebtedness, as suggested by the unsecured creditors. The "next asset value" limitation argued by the unsecured creditors appears to arise from either the wording of Section 6(c) of the guarantee (set out later in these reasons) or a representation as to solvency given by the SemGroup companies to the banking syndicate in the Credit Agreement for the indebtedness that underlies the guarantee.

[21] The wording of Section 6(c) relating to the concept of "net worth" is restricted to the subsection and plainly refers only to the calculation of a limited right of subrogation.

[22] While the breach of the representation in the Credit Agreement may form the basis for an action by the banking syndicate under the Credit Agreement if it is established to be incorrect, there is no evidence incorporating this representation into Section 2(f) of the guarantee, or that would warrant it being read into the section or otherwise modifying the section's plain meaning.

[23] While Section 2(f) may take effect in addition to the standard statutory remedies if the guarantee is determined to be a fraudulent conveyance or fraudulent transfer under applicable Canadian insolvency law, that argument refers back to the issue of fraudulent preferences in the more generally understood “all or nothing” sense, and the current lack of any persuasive evidence that would indicate a fraudulent preference. Thus, Section 2(f) of the guarantee does not, as submitted by the unsecured creditors, limit the liability of each individual guarantor to its net asset value on certain relevant dates, either by its plain language, the operation of any ambiguity or cross-reference to another agreement or a reference to applicable Canadian law, and there is no reason arising from this provision of the guarantee to require further financial information from the applicants.

(c) Potential Prejudice to Canadian Unsecured Creditors

[24] The unsecured creditors submit that the payment of the interim distribution may give rise to the development of inequities among the unsecured creditors of the SemCanada Group and the U.S. Debtors. They note that, according to material filed with the application for the initial order, all the CCAA applicants were solvent but for their secured guarantee obligations. The declaration filed at the commencement of Chapter 11 proceeding in the United States disclosed that the consolidated assets of the SemGroup as of May 31, 2008 totalled approximately \$6.14 billion. It appears that subsequent events have reduced the value of the SemGroup’s assets by approximately \$2 billion and it must be noted that the value declared is book value. However, given that secured and senior debt totals approximately \$3.3 billion, it does not appear that there are insufficient assets in the U.S. estate to fully pay the Lenders.

[25] There have been no distributions made to the Lenders in the United States since the commencement of the U.S. proceedings. The unsecured creditors submit that, if the interim distribution is authorized, an inequitable situation arises whereby the SemEnergy Group of debtor companies will have applied all of their assets to the secured debt, leaving their unsecured creditors without the possibility of recovery, while other debtor companies, including in the U.S. proceedings, will have their burdens reduced, making it possible that U.S. unsecured debtors will benefit disproportionately.

[26] The applicants and the Lenders point out, firstly, that the guarantee is an unconditional guarantee and that the Lenders are not required to exhaust their remedies against any other party before invoking its provisions against the applicants. That is clear from the language of the guarantee and the law. However, the contractual rights of the Lenders, in common with the contractual rights of many stakeholders, have been stayed by the CCAA proceedings. The rights of a secured creditor are not awarded a unique status under the CCAA: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) at page 92. It is not uncommon for contractual rights to be affected by CCAA proceedings and it is important to note that what is being proposed by the applicants is a deviation from the normal course of such proceedings, which are designed to prevent manoeuvring for position among creditors while a reorganization is attempted.

[27] While orders allowing interim distributions to creditors for one reason or another are not without precedent, at the least, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity.

[28] The applicants and the Lenders point out that the Lenders have established the indebtedness of the SemEnergy Group and that their security is valid and ranks first in priority. While the Lenders have not made a formal demand of payment or filed a notice of intention, they are only precluded from doing so by the stay provisions of the initial order. The SemEnergy Group has been liquidated, and, they submit, these companies were only included in the CCAA proceedings for administrative convenience. The unsecured creditors counter that the SemEnergy Group sought the protection of the CCAA in July of 2008 purportedly to “reorganize and/or liquidate”, that the CCAA applicants argued that adding the SemEnergy Group to the CCAA proceedings made sense given the inter-relationship of the SemCanada Group’s businesses, and that, having chosen to use the CCAA process, the SemEnergy Group should be compelled to live with its choice.

[29] I agree that I cannot ignore the fact that this is a CCAA proceeding and not a receivership merely because it is more convenient for the applicants and the Lenders at this point to characterize the proceedings in those terms. While the SemEnergy Group standing alone may have liquidated with no current intention of formulating a reorganization plan, the whole of the SemGroup is under the protection of the CCAA in Canada and Chapter 11 in the United States. This is not only for the convenience of the debtors and the Lenders, but to allow the corporate group time to accomplish the goals of such legislation in terms of attempting to reorganize its business, maximizing the value of its estate for the benefit of all stakeholders, and ensuring fairness of treatment. I am not only permitted but required in my supervisory role under the CCAA to consider the implications of the corporate group’s cross-border reorganization efforts as a whole.

[30] The applicants argue that if the application does not succeed, the Lenders will apply to appoint a receiver. The Lenders in fact invite the Court to convert the proceedings to a receivership on its own motion. That application is not before me and not likely to be unopposed in any event.

[31] The applicants and the Lenders submit that the interim distribution would not prejudice the SemEnergy’s Group’s other creditors because SemCanada Energy has rights of indemnification and subrogation from the other members of the corporate group.

[32] Sections 6(a) and 6(c) of the guarantee, however, read as follows:

Section 6. Limited Subrogation

- (a) Until all of the Obligations have been paid and performed in full, no Guarantor shall have any right to exercise any right of subrogation, reimbursement, indemnity, exoneration, contribution or any other claim which it may now or hereafter have against or to any Obligor or any Security in connection with this Guaranty (including any right of subrogation under any law, as amended), and each Guarantor hereby waives any rights to enforce any remedy which such Guarantor may have against either Borrower or any other Obligor and any right to participate in any Security until such time. ...
- (c) Upon full and final payment of the Obligations, each guarantor of the Obligations which has made payments upon the Obligations shall be entitled to contribution from each other guarantor of the Obligations, to the end that all such payments upon the Obligations shall be shared among all such guarantors in proportion to their respective net worth, provided that the contribution obligations of each Guarantor shall be limited to the maximum amount that it can pay at such time without rendering its contribution obligations voidable under applicable Law relating to fraudulent conveyances or fraudulent transfers. As used in this subsection, the "Net Worth" of each guarantor means, at any time, the remainder of (i) the fair value of such guarantor's assets (other than such right of contribution), minus (ii) the fair value of such guarantor's liabilities (other than its liabilities under its guaranty of the Obligations).

[33] It appears, therefore, that the SemEnergy Group's right of subrogation and indemnity may not be enforceable against other borrowers or guarantors unless and until all the indebtedness to the Lenders is paid in full. It also appears that the right to contribution from other members of the SemGroup may be limited under U.S. law to amounts that would not result in the insolvency of such an entity in proportion to such entity's net worth. At this stage of proceedings, both in Canada and in the United States, it is not possible to say with certainty that the reorganization of the corporate group will result in the payment of indebtedness to the Lenders in full or in such a fashion that the limitation upon subrogation is not triggered. It is possible, for example, that a reorganization may compromise the claims of the Lenders or may have them continue the loans on revised terms to a reorganized corporate group. The SemEnergy Group's right of subrogation and indemnity could prove to be a hollow or inadequate remedy.

[34] The unsecured creditors submit that the language of the guarantee prevents the SemEnergy Group from filing a claim for subrogation in the U.S. proceedings. The applicants submit that, if payment under the guarantee is authorized, they would file a claim and the Lenders agree that, in their view, such a filing would not be a breach of Section 6 of the guarantee. What is not clear is whether the U.S. debtors would also agree. Even if they did, the filing of a claim does not eliminate the contractual limits on subrogation.

[35] The Lenders submit that making the payment and subsequently filing a claim in the U.S. proceedings may ultimately be beneficial to the SemEnergy Group's other creditors, as it allows the timely filing of a claim. The unsecured creditors do not appear to agree.

[36] The Lenders submit that there is no good reason to delay the rights of the Lenders to collect on the guarantee, and that to refuse the application would be to improve the position of the unsecured creditors to the detriment of the secured creditor. I am satisfied that an interim distribution to the Lenders gives rise to the possibility that unsecured creditors may be prejudiced and that such potential for prejudice outweighs the benefits of an early payment on the guarantee to the Lenders. To suggest, as the Lenders do, that if the right to subrogation is contractually barred or is compromised by a plan of arrangement in the United States, the unsecured creditors are where they would be if the Lenders had exercised their contractual rights in any event is to treat the Canadian CCAA proceedings as a mere administrative convenience.

[37] The unsecured creditors made certain representations regarding a claim by NGX Financial Inc. Given the decision I have reached, it is not necessary that I address this issue at this time.

(d) *The Lack of Urgency and Benefit of Delay*

[38] The unsecured creditors submit that the applicants have shown no urgency to this application, and the only evidence before this court to justify the application is the statement of the Chief Executive Officer of the SemEnergy Group that, given the status of the group and the significant proceeds in their bank accounts, an interim distribution is appropriate. The Monitor, in commenting that the interim distribution is appropriate, repeats these reasons and notes that the claims bar date has passed and that it has received its security opinion from counsel. While the Monitor's recommendations are entitled to great deference, the Monitor has not delved into or addressed the issues of potential prejudice raised by the unsecured creditors in its analysis of the issue.

[39] The unsecured creditors submit that even a short delay in the distribution of funds may provide more clarity with respect to the situation in the U.S. Chapter 11 proceedings. They refer to media reports that indicate that a third party may be purposing a plan of arrangement or reorganization to the U.S. Debtors in the near future, and the Monitor reports that it understands that business plans and confidential information memorandums have been prepared for some of the significant U.S. Debtors and the SemGroup's intention is to either seek a sale of certain operating units or companies or restructure under the ownership of Semgroup. The Monitor advises, however, that it is premature and unrealistic to estimate the timing for the conclusion of the U.S. proceedings.

[40] It is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of Chapter 11 proceedings in the United States. The Canadian CCAA proceedings may advance at a different pace if the Court is satisfied by evidence before it that it is appropriate to do so. In the case of this application, however, it is prudent to delay an interim distribution until there is sufficient information to better evaluate the potential of prejudice to Canadian creditors.

Conclusion

[41] I find the application to be premature, and adjourn it sine die with leave to the applicants and the Lenders to reapply with more current information if it becomes apparent that the potential prejudice identified to the unsecured creditors is unlikely to materialize, can be avoided by other measures or that the balance of prejudice and benefit has shifted.

Heard on the 19th day of January, 2009.

Dated at the City of Calgary, Alberta this 11th day of February, 2009.

B.E. Romaine
J.C.Q.B.A.

Appearances:

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Chris Simard
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Sabre Energy Partnership (by its Managing Partner Sabre Energy Ltd.), 1316751 Alberta
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Crew Energy Inc., Trilogy Energy LP

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Travis Lysak
Fraser Milner Gasgrain LLP
for Nexen Marketing and Keyera Energy Partnership

William E.J. Skelly
Heenan Blaikie LLP
for Fractal Systems Inc. Bellamont Exploration Ltd., Enersul Limited Partnership and
Dynamysk Automation Ltd.

TAB 27

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?

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édiction de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the CCAA established above, because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a CCAA or BIA provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the CCAA and in s. 67(3) of the BIA in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the BIA or the CCAA, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagee précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la LTA, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la LACC ou de la LFI confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la LTA, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la LACC et au par. 67(3) de la LFI en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la LTA. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la LFI ou la LACC, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édiction du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édiction du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.

Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. (“LeRoy Trucking”) commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax (“GST”) collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discrétionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d’avis d’accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L’entreprise a vendu certains éléments d’actif excédentaires, comme l’y autorisait l’ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s’applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s’applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s’appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l’époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l’emportait sur la *LACC*, la Couronne jouissant ainsi d’un droit prioritaire à l’égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu’elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l’objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu’il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the CCAA proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the BIA. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the BIA (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la LACC, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 \$ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la LFI. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la LFI (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la LACC n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the CCAA.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the CCAA and give priority to the Crown's *ETA* deemed trust during CCAA proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la LACC, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la LTA, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la LTA à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la LACC.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

- (1) Le paragraphe 222(3) de la LTA l'emporte-t-il sur le par. 18.3(1) de la LACC et donne-t-il priorité à la fiducie réputée qui est établie par la LTA en faveur de la Couronne pendant des procédures régies par la LACC, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la LACC en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvable ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The “flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions” (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, “the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world” (R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 *GST Deemed Trust Under the CCAA*

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during CCAA reorganization despite language in the CCAA that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the CCAA purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the CCAA to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 *Fiducie réputée se rapportant à la TPS dans le cadre de la LACC*

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the CCAA was binding at all upon the Crown. Amendments to the CCAA in 1997 confirmed that it did indeed bind the Crown (see CCAA, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, “Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy” (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance (“EI”) and Canada Pension Plan (“CPP”) premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d’une priorité en cas d’insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l’insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l’objet d’aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu’elle l’était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l’État en cas d’insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l’État ne bénéficie d’aucune priorité, alors qu’aux États-Unis et en France il jouit au contraire d’une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d’une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l’impôt sur le revenu et des cotisations à l’assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s’applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n’a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as “source deductions”.

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 (“*PPSA*”). As then worded, an *ITA* deemed trust over the debtor’s property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the “*Sparrow Electric* amendment”).

également les biens détenus par un créancier garanti qui, si ce n’était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l’égard des retenues à la source relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC (voir par. 227(4) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J’emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d’un litige portant sur la priorité de rang entre, d’une part, une fiducie réputée établie en vertu de la *LIR* à l’égard des retenues à la source, et, d’autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l’Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D’après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l’égard des biens du débiteur pour une valeur égale à la somme due au titre de l’impôt sur le revenu — commençait à s’appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l’emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n’existait pas de biens susceptibles d’être visés par la fiducie réputée de la *LIR* lorsqu’elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu’elle est réputée s’appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l’arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

. . . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés . . .

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

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

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

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

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

. . . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

. . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be “identical” (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 (“*C.C.Q.*”), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l’égard de la TPS dans le cadre de la *LACC*. Dans l’arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d’appel de l’Ontario a invoqué la doctrine de l’abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d’appel de l’Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu’en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

[TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d’appel de l’Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s’estimait donc tenue de suivre l’arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu’une disposition d’une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d’abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrerait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édicton visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at “ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer” (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament’s express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l’effet de l’arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l’on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L’anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d’un projet de loi d’exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n’indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l’égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l’assurance-emploi et au Régime de pensions du Canada qu’un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l’employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l’égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l’égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from “identical” to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament’s overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament’s intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l’historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d’être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l’historique législatif. On ne peut donc pas dire que l’arrêt *Doré* commande l’application automatique d’une règle d’abrogation implicite.

[53] Un bon indice de l’intention générale du législateur peut être tiré du fait qu’il n’a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D’ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l’art. 18.3 a, comme nous l’avons vu plus tôt, été reprise sous une formulation différente à l’art. 37. Par conséquent, dans la mesure où l’interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d’abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l’engagement de procédures fondées sur la *LACC*, c’est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c’est dans la *LACC* qu’est exprimée l’intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d’accord avec ma collègue la juge Abella pour dire que l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, permet d’interpréter les modifications de 2005 comme n’ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l’objet d’un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l’approche de la *LFI* et celle de la *LACC* à l’égard de l’insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by CCAA s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in CCAA proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the CCAA's override provision. Viewed in its entire context, the conflict between the *ETA* and the CCAA is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that CCAA s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the CCAA as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a CCAA reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the CCAA helps in understanding how the CCAA grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as “the hothouse of real-time litigation” has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the CCAA’s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématisée » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[63] Judicial innovation during CCAA proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during CCAA proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[62] L'utilisation la plus créative des pouvoirs conférés par la LACC est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La LACC a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la LACC, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la LACC n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la LACC? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la LACC et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la LACC, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the CCAA empowered a court “where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d’appel ont déconseillé aux tribunaux d’invoquer leur compétence inhérente, concluant qu’il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu’interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d’accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d’abord à une interprétation des dispositions de la LACC avant d’invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d’une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu’on lui donne l’interprétation téléologique et large qui s’impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L’examen des parties pertinentes de la LACC et de l’évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l’interprétation législative. D’ailleurs, à cet égard, il faut souligner d’une façon particulière que le texte de loi dont il est question en l’espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu’une demande [était] faite sous le régime de la présente loi à l’égard d’une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown’s enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établissait une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [...] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [L]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferable from the court's order of April 29, 2008 sufficient to support an express trust.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of CCAA s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the CCAA and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the BIA was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the CCAA restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [CCAA proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la LACC dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la LACC et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la LFI était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la LACC exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la LACC] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 \$ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA").

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the CCAA and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a CCAA or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l’absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l’insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d’un montant qu’une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d’une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the CCAA:

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la LACC :

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

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[101] The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(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.

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

(3) 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* . . .

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's *ITA* deemed trust under *both* the CCAA and the *BIA* regimes.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC* *que* sous celui de la *LFI*.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 (“*EIA*”), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament’s intent to enforce the Crown’s deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament’s intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l’on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l’article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu’elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l’avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d’insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu’il prétende maintenir cette fiducie en vigueur malgré les dispositions à l’effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l’existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j’ai mentionnés fait donc défaut, ce qui témoigne de l’intention du législateur de laisser la fiducie réputée devenir caduque au moment de l’introduction de la procédure d’insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la personne, jusqu’à ce qu’il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or “building blocks”, for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it “inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception” (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la LFI. L'article 222 de la LTA ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la LFI dans la LTA.*

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 \$ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“ETA”), and specifically s. 222(3), gives priority during *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), proceedings to the Crown’s deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court’s discretion under s. 11 of the CCAA is circumscribed accordingly.

[115] Section 11¹ of the CCAA stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court’s discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

¹ Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n’a pas encore été versée au receveur général du Canada — ne fasse l’objet d’aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l’art. 222 de la *Loi sur la taxe d’accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d’une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l’égard de la TPS non versée. À l’instar du juge Tysoe de la Cour d’appel, j’estime que tel est le cas. Il s’ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l’art. 11 de la *LACC* est circonscrit en conséquence.

[115] L’article 11¹ de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu’une demande est faite sous le régime de la présente loi à l’égard d’une compagnie, le tribunal, sur demande d’un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l’ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l’art. 11, il est nécessaire de trancher d’abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l’espèce, prévoit ce qui suit :

¹ L’article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

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

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) ... [P]ar dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (para. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with “any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)”, s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.’s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d’interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c’est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s’applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d’application du par. 222(3) et en déclarant de façon non équivoque qu’il s’applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d’appel MacPherson dans l’arrêt *Ottawa Senators* :

[TRADUCTION] L’intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) », c’est le par. 222(3) qui l’emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l’emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l’insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L’opinion du juge d’appel MacPherson suivant laquelle le fait que la *LACC* n’ait pas été soustraite à l’application de la *LTA* témoigne d’une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l’édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n’a pas été modifié.

[120] L’absence de modification du par. 18.3(1) vaut d’être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

[123] Nor do I see any “policy” justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the CCAA and ETA described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the BIA as an exception when enacting the current version of s. 222(3) of the ETA without considering the CCAA as a possible second exception. I also make the observation that the 1992 set of amendments to the BIA enabled proposals to be binding on secured creditors and, while there is more flexibility under the CCAA, it is possible for an insolvent company to attempt to restructure under the auspices of the BIA. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is “later in time” prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d’inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l’application du par. 18.3(1) de la LACC.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d’aller à l’encontre, par voie d’interprétation législative, de l’intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l’a fait le juge d’appel Tysoe les raisons pour lesquelles l’argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l’espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

[TRADUCTION] Je ne conteste pas qu’il existe des raisons de politique générale valables qui justifient d’inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n’a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu’il a adopté les modifications susmentionnées à la LACC et à la LTA. Comme le juge MacPherson le fait observer au par. 43 de l’arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu’il a adopté la version actuelle du par. 222(3) de la LTA, ait désigné expressément la LFI comme une exception sans envisager que la LACC puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la LFI ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la LACC, il est possible pour une compagnie insolvable de se restructurer sous le régime de la LFI. [par. 37]

[124] Bien que je sois d’avis que la clarté des termes employés au par. 222(3) tranche la question, j’estime également que cette conclusion est même renforcée par l’application d’autres principes d’interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l’emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

[125] The “later in time” principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that “[a] more recent, general provision will not be construed as affecting an earlier, special provision” (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be “overruled” by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu’il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3^e éd. 2000), p. 358).

[126] L’exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n’est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu’il a employés, a exprimé l’intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d’interprétation visent principalement à faciliter la détermination de l’intention du législateur, comme l’a confirmé le juge d’appel MacPherson dans l’arrêt *Ottawa Senators*, au par. 42 :

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [...] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCAA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44f) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 The amendments did not come into force until September 18, 2009.

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

“new law” unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

. . .

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an “enactment” as “an Act or regulation or any portion of an Act or regulation”.

[130] Section 37(1) of the current CCAA is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

[131] The application of s. 44(f) of the *Interpretation Act* simply confirms the government’s clearly expressed intent, found in Industry Canada’s clause-by-clause review of Bill C-55, where s. 37(1) was identified as “a technical amendment to re-order the provisions of this Act”. During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l’al. 44f)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n’est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l’art. 2 de la *Loi d’interprétation* : « Tout ou partie d’une loi ou d’un règlement. »

[130] Le paragraphe 37(1) de la LACC actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

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

[131] L’application de l’al. 44f) de la *Loi d’interprétation* vient tout simplement confirmer l’intention clairement exprimée par le législateur, qu’a indiquée Industrie Canada dans l’analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d’ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the CCAA proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . .

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

. . . .

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

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

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

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

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium,

(iv) au moment de tout défaut d’exécution de la transaction ou de l’arrangement,

(v) au moment de l’exécution intégrale de la transaction ou de l’arrangement;

b) la suspension de l’exercice par Sa Majesté du chef d’une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l’égard d’une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L’ordonnance cesse d’être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n’ont pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

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

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

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

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

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

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

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

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

. . .

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

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

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

. . .

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

. . .

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a)(i)* à *(v)* qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

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

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

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

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des sommes réputées détenues en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, si, dans ce dernier cas, se réalise l’une des conditions suivantes :

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

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

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

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

. . .

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

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

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

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

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

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

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

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

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

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

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

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

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

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

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

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers’ compensation, in this section and in section 87 called a “workers’ compensation body”, rank as unsecured claims.

. . .

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

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

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

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

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

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

86. (1) [Réclamations de la Couronne] Dans le cadre d’une faillite ou d’une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d’une province ou d’un organisme compétent au titre d’une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

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

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.