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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENTS ACT*, RSC c C-36, AS AMENDED AND IN THE MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF SUGARBUD CRAFT GROWER CORP., TRICHOME HOLDINGS CORP., AND 1800905 ALBERTA LTD.
APPLICANTS	**SUGARBUD CRAFT GROWER CORP., TRICHOME HOLDINGS CORP., and 1800905 ALBERTA LTD.**
DOCUMENT	**BRIEF OF LAW OF THE INTERIM LENDER, CONNECT FIRST CREDIT UNION LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DENTONS CANADA LLP** Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8 **Attention: Afshan Naveed** Ph. (403) 268-7015 Fx. (403) 268-3100 File No.: 571709-75

BRIEF OF THE INTERIM LENDER, CONNECT FIRST CREDIT UNION LTD.
Submissions on the Interim Financing Charge and Good Faith

Table of Contents

I. INTRODUCTION

1. This Brief of Law and Argument is submitted on behalf of Connect First Credit Union Ltd. ("**CFCU**") in reply to the Brief of Law submitted by the Attorney General of Canada, acting for His Majesty the King in right of Canada, represented by the Minister of National Revenue (the "**Minister**"), herself represented by the Canada Revenue Agency ("**CRA**") filed by the Department of Justice in the within proceeding.

2. This Brief is not intended to provide substantive arguments with respect to the Application of Sugarbud Craft Grower Corp. ("**SCGC**"), Trichome Holdings Corp. ("**THC**"), and 1800905 Alberta Ltd. ("**Opco**", together with SCGC and THC, "**Sugarbud**" or the "**Debtors**") with respect to the priming charges, and primarily replies to the arguments made by the Attorney General of Canada as they relate to CFCU.

II. FACTS

3. Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Affidavit of Ajibola (AJ) Omo-Loto, sworn October 17, 2022 (the "**Omo-Loto Affidavit**").

4. On September 26, 2022, the Debtors each filed a Notice of Intention to Make a Proposal (the "**NOI Proceedings**") pursuant to s.50.4(1) of the *Bankruptcy and Insolvency Act,* RSC 1985 c B-3 (the "**BIA**") and appointed Alvarez & Marshal Canada Inc. as its proposal trustee.[1]

5. CFCU is the first secured creditor of Sugarbud. CFCU agreed to provide interim financing to Sugarbud during the NOI Proceedings pursuant to the IF Facility. As of September 29, 2022, a draft interim financing sheet was finalized but remained unsigned (the "**Draft IFTS**").[2]

6. CFCU made it clear to Sugarbud, from the outset, that a condition of the interim financing would require Sugarbud to obtain a super-priority charge over the assets, undertaking and property of Sugarbud (the "**Property**") in favour of CFCU (subordinate only to the Administration Charge), with respect to the amounts advance under the IF Facility (the "**Interim Financing Charge**").[3]

7. On September 26, 2022, Sugarbud applied to this Honourable Court for an Order granting among other things, approval of interim financing, approval of a sale, refinancing and investment solicitation process, approval of a key employee retention plan and approval of certain priority charges, including an administration charge (the "**Administration Charge**"), director's charge, the Interim Financing Charge and a Key Employee Retention Plan charge (the "**BIA Application**").[4]

8. On the day before the BIA Application, CRA notified Sugarbud it would not agree to the priming charges contemplated in the BIA Application and NOI Proceedings unless there was a carve out with respect to His Majesty's claims for source deductions (the "**Carve Out**").[5]

9. Sugarbud and CFCU when faced with the prospect that the BIA Application could be adjourned, thereby jeopardizing the entire restructuring plan, agreed to the Carve Out.[6]

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[1] Affidavit of Daniel T. Wilson, sworn September 26, 2022 at para 4.
[2] Omo-Loto Affidavit at para 6.
[3] Omo-Loto Affidavit at para 7.
[4] Application of Sugarbud, unfiled.
[5] Omo-Loto Affidavit at para 9.
[6] Omo-Loto Affidavit at para 10.

10. On September 29, 2022, Sugarbud obtained an Initial Order pursuant to the BIA which consolidated the estates of Sugarbud into one (the "**Initial Order**") and contained the Carve Out requested by the CRA.[7]

11. Following the granting of the Initial Order, a revised term sheet was finalized and entered into between Sugarbud and CFCU (the "**IF Term Sheet**"). The IF Term Sheet required, among other things, that (i) the NOI Proceedings be continued as proceedings (the "**CCAA Proceedings**") under the *Companies' Creditors Arrangement Act,* RSC 1985, c C-36 ("**CCAA**"), and (ii) Sugarbud obtain a super-priority charge over the Property in favour of CFCU, subordinate only to the Administration Charge.[8]

12. On October 7, 2022, Sugarbud filed an application to continue the NOI Proceedings into the CCAA Proceedings.[9]

III. RELIEF SOUGHT

13. Approval of the Interim Financing Charge in the CCAA Proceedings, ranking behind the Administration Charge.

IV. LAW AND ARGUMENT

A. The Court Has Jurisdiction Under Section 11 of the CCAA to Grant Priming Charges in Priority to Claims of His Majesty

10. Section 11 of the CCAA grants jurisdiction to the supervising court to make any order that it considers appropriate in the circumstances.[10]

11. The Supreme Court of Canada confirmed in *Canada North*[11] that a supervising judge under the CCAA has the authority to grant charges in priority to claims of His Majesty the King in Right of Canada, as represented by the Minister of National Revenue and the CRA.

12. The Honourable Madame Justice Côté confirmed that super-priority charges shall be granted only when necessary, and the Court must consider whether the priority order will achieve the objectives of the CCAA.[12] The Court is aware that it is necessary to subordinate CRA's claims when the supervising judge believes that without the super-priority charge, a professional or lender would not act.[13]

13. In *Canada North*, the Court confirmed the necessity and benefit of a super-priority financing charge:

> This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To

[7] Initial Order, dated September 29, 2022 ("**Initial Order**").
[8] Omo-Loto Affidavit at para 13.
[9] Application of Sugarbud, filed October 7, 2022.
[10] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 11 [**TAB 1**].
[11] *Canada v Canada North Group Inc,* 2021 SCC 30 ("**Canada North**) at para 21 [**TAB 2**].
[12] *Ibid* at para 72.
[13] *Ibid* at para 73.

> ensure the integrity, predictability and fairness of the CCAA process, certainty must accompany the granting of such super-priority charges" (*First Leaside Wealth Management Inc. (Re)*, 2012 ONSC 1299, at para. 51 (CanLII)).
>
> Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality . . . that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CanLII 43 (SCC), [1989] 2 S.C.R. 24, at p. 33).[14]

14. As set out above, CFCU is providing interim financing to Sugarbud. In order to protect CFCU's interests, CFCU requires the Interim Financing Charge. As such, the super-priority of the Interim Financing Charge is necessary to facilitate the purposes of the CCAA.

15. CFCU requires certainty of priority in respect of the IF Facility. Without this certainty, CFCU is hesitant to commit to the IF Facility. It is not the case, as set out by the Attorney General, that CFCU would have continued to provide interim financing into the CCAA Proceedings with or without the priority charge.[15]

16. It is respectfully submitted that CRA was either aware that CFCU always wanted and expected a priority charge in respect of the IF Facility, or it ought to have been aware.

17. Should CFCU not finance the CCAA Proceedings or NOI Proceedings, Sugarbud will be forced to liquidate and will not be able to restructure or reorganize.

18. The super-priority of the Interim Financing Charge is neither extraordinary nor unexpected in a CCAA transaction such as this. The Interim Financing Charge is necessary to maintain the confidence of CFCU and fund the CCAA Proceedings.

B. The Interim Lender Acted in Good Faith Throughout the NOI Proceedings and Leading Into the CCAA Proceedings

(1) Good Faith Requirement in Insolvency Proceedings

19. Pursuant to the amendments of the BIA and CCAA there has been a codification of the "duty of good faith" in insolvency proceedings.

20. This duty is on "all interested parties" to act in good faith with respect to those insolvency proceedings.

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[14] *Ibid* at paras 29-30.
[15] Omo-Loto Affidavit at para 7.

> 4.2 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.[16]
>
> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.[17]

21. Neither the BIA or CCAA defines "good faith", and the Honourable Justice D. Mah in *CWB Maximum Financial Inc.* stated that:

> It is less obvious what is meant by "good faith" itself". There is no statutory definition. In the insolvency context, the Supreme Court of Canada in Century Services Inc v (Attorney General) 2010 SCC 60 at para 70 said that good faith, along with appropriateness and due diligence, are "baseline considerations" for the Court when exercising authority under the *CCAA*, without elaborating on the nature of good faith.[18]

22. When the Court is determining whether a party in insolvency proceedings is acting in good faith, the motives of a party are important when upholding the intent and policy objectives of the insolvency statute.[19] Further, the intent and policy objectives of the statutes should inform the Court's consideration of the behaviour of the interested party.[20]

23. The duty of good faith does not rise to a fiduciary duty and the duty of good faith does not require one party to serve the interests of the other.[21] The duty simply requires that a party does not undermine another's interest in bad faith.[22]

24. The Court in *Re Bellatrix Explorations Ltd*, referenced Dr. Janis Sarra in "La bonne foi est une considération de base – Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014 which sets out bad faith in the context of s. 18.6 of the CCAA:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.[23]

25. As noted by the Court in *Bhasin,* parties are free to pursue their individual self interest; even in the face of intentional loss to another party, so long as it is in the legitimate pursuit of economic self-interest.[24]

> The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In

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[16] *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ,s 4.2 **[TAB 3]**.
[17] CCAA, s 18.6 **[TAB 1]**.
[18] *CWB Maximum Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137 ("**CWB**") at para 41 **[TAB 4]**.
[19] *Ibid* at para 43.
[20] *Ibid* at para 44.
[21] *Ibid* at para 52.
[22] *Ibid* at para 52.
[23] *Re Bellatrix Explorations Ltd*, 2020 ABQB 809 at para 105 **[TAB 5]**.
[24] *Bhasin v Hrynew*, 2014 SCC 71 ("***Bhasin***") at para 70 **[TAB 6]**.

> commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: Bram Enterprises Ltd. v. A.I. Enterprises Ltd., 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: Bank of America Canada v. Mutual Trust Co., 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.[25]

26. All parties involved in the NOI Proceedings were aware, or ought to have known, that CFCU was seeking a super-priority charge. It is not uncommon for an interim lender to seek such a charge, in fact, it is uncommon for an interim lender in an insolvency proceeding to not seek a super-priority charge.

27. During the course of the NOI Proceedings, it became known that the CRA opposed the super-priority charge with respect to the assets of SCGC.

28. Sugarbud and CFCU faced a situation where the NOI Proceedings would likely fail if they opposed the Carve Out.

29. As such, CFCU had little choice but to agree to the strong arm of the CRA. Failing to agree was a lose, lose situation for Sugarbud.

30. The CRA is using the principle of good faith to hinder the commercial requirements of CFCU, thereby trying to force CFCU's hand to subordinate its interim financing to the interests of the CRA.

31. Without the interim financing, Sugarbud would not be in a position to restructure and reorganize. Sugarbud requires the IF Facility and CFCU requires certainty as to its priority position as CFCU is the party bearing all of the financial risk during the restructuring process.

(2) Re-Ordering Priorities via Insolvency Regimes

32. It is well established that a party may use the insolvency regime to re-order priorities to its benefit. The Court in *Re Ivaco Inc*[26] and in *Grant Forest*[27] confirmed that a party may advocate to enhance their position in insolvency proceedings such, as in receiverships or CCAA proceedings, by converting same to a bankruptcy.

33. The Court in *Grant Forest* stated that "reversing priorities can be a legitimate purpose for the institution of bankruptcy proceedings".[28]

34. CFCU required the NOI Proceedings be converted to CCAA Proceedings in order to protect its financial interest. It is respectfully submitted that parties operating within the insolvency realm are permitted to utilize the insolvency schemes to protect their priority position.

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[25] *Ibid* at para 70.
[26] *Re Ivaco Inc* [2005] O.J. No. 3337 (ONSC) (**"Ivaco"**) at para 13 **[TAB 7]**.
[27] *Grant Forest Products Inc. v GE Canada Leasing Services Co*, 2013 ONSC 5933 (**"Grant Forest"**) at paras 120-122 **[TAB 8]**.
[28] *Ibid* at para 63.

35. The actions of CFCU are not lacking good faith. CFCU is operating, as any prudent lender bearing all the risk would, by ensuring its financial position is certain and protected.

(3) Severity of Allegations of Lack of Good Faith Against A Lender

36. The CRA describes the actions of CFCU in the NOI Proceedings and leading into the CCAA Proceedings to be lacking good faith, as required under s. 4.2 of the BIA and s. 18.6 of the CCAA.

37. The allegations set out in the Attorney General's Brief could be harmful and damaging to the reputation of CFCU.

38. Although the Attorney General does not go so far as to say CFCU is acting in bad faith, it does say that CFCU did not act in good faith when participating in the NOI Proceedings and CCAA Proceedings, which is a serious assertion.[29]

39. It is respectfully submitted that baseless allegations without the support of sworn evidence should be given little to no weight.

40. It is respectfully submitted that, CFCU has acted in good faith. CFCU has not taken any steps that could be deemed to be lacking in good faith when agreeing to provide interim financing to Sugarbud.

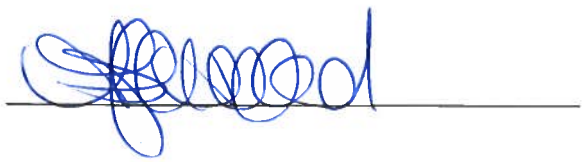
41. As set out above, a party is not required to jeopardize its own self-interest for that of others. CFCU pursued its economic interests in protecting itself via the Interim Financing Charge, and nothing more.

V. CONCLUSION

42. Based upon the materials filed and the foregoing submissions, CFCU respectfully requests the Court grant the Interim Financing Charge, as a super-priority charge on the Property, subordinate only to the Administration Charge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF OCTOBER, 2022

DENTONS CANADA LLP

Per: 

Afshan Naveed

Solicitor for Connect First Credit Union Ltd.

[29] *Simpson's Island Salmon and Tidal Run Aqua Inc Review of Status*, 2006 NBQB 279 at para 54 **[TAB 9]**.

VI. TABLE OF AUTHORITIES

Tab	Authority Referenced
1	*Companies' Creditors Arrangement Act, RSC 1985, c C-36*
2	*Canada v Canada North Group Inc*, 2021 SCC 30
3	*Bankruptcy and Insolvency Act, RSC 1985 c B-3*
4	*CWB Maximum Financial Inc v 2026998 Alberta Ltd*, 2021 ABQB 137
5	*Re Bellatrix Explorations Ltd*, 2020 ABQB 809
6	*Bhasin v Hrynew*, 2014 SCC 71
7	*Re Ivaco Inc [2005] O.J. No. 3337*
8	*Grant Forest Products Inc. v GE Canada Leasing Services Co.*, 2013 ONSC 5933
9	*Simpson's Island Salmon and Tidal Run Aqua Inc Review of Status*, 2006 NBQB 279

TAB 1

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 22, 2022

Last amended on November 1, 2019

À jour au 22 septembre 2022

Dernière modification le 1 novembre 2019

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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.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

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

General power of court

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

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

Pouvoir général du tribunal

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

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

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.

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.

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.

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.

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*;

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*;

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

18.2 [Abrogé, 2005, ch. 47, art. 131]

18.3 [Abrogé, 2005, ch. 47, art. 131]

18.4 [Abrogé, 2005, ch. 47, art. 131]

18.5 [Abrogé, 2005, ch. 47, art. 131]

PART III

General

Duty of Good Faith

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.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company

PARTIE III

Dispositions générales

Obligation d'agir de bonne foi

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

1997, ch. 12, art. 125; 2005, ch. 47, art. 131; 2019, ch. 29, art. 140.

Réclamations

Réclamations considérées dans le cadre des transactions ou arrangements

19 (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir

TAB 2

2021 SCC 30, 2021 CSC 30
Supreme Court of Canada

Canada v. Canada North Group Inc.

2021 CarswellAlta 1780, 2021 CarswellAlta 1781, 2021 SCC 30, 2021 CSC 30, [2021] 10 W.W.R. 1, [2021] 5 C.T.C. 111, [2021] A.W.L.D. 3408, [2021] A.W.L.D. 3521, 19 B.L.R. (6th) 1, 2021 D.T.C. 5080, 2021 D.T.C. 5081, 28 Alta. L.R. (7th) 1, 333 A.C.W.S. (3d) 23, 460 D.L.R. (4th) 309, 91 C.B.R. (6th) 1, EYB 2021-397318

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

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: December 1, 2020
Judgment: July 28, 2021
Docket: 38871

Proceedings: affirming *Canada v. Canada North Group Inc.* (2019), *(*sub nom. *The Queen v. Canada North Group Inc.)* 2019 D.T.C. 5111, 11 P.P.S.A.C. (4th) 157, [2019] 12 W.W.R. 635, 93 Alta. L.R. (6th) 29, 437 D.L.R. (4th) 122, 72 C.B.R. (6th) 161, 2019 ABCA 314, 2019 CarswellAlta 1815, 95 B.L.R. (5th) 222, Frederica Schutz J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.); affirming *Canada North Group Inc (Companies' Creditors Arrangement Act)* (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, [2018] 2 W.W.R. 731, 60 Alta. L.R. (6th) 103, 52 C.B.R. (6th) 308, J.E. Topolniski J. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Estates and Trusts; Income Tax (Federal); Insolvency; Tax — Miscellaneous
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.5 Claims of Crown
X.5.a Federal
X.5.a.iv Income tax, unemployment insurance, and Canada Pension Plan
X.5.a.iv.B Creation of statutory trust
Tax
II Income tax
II.22 Special rules

II.22.d Bankruptcy
II.22.d.i Corporations

Headnote

Tax --- Income tax — Special rules — Bankruptcy — Corporations

In debtors' restructuring proceedings under Companies' Creditors Arrangement Act (CCAA), court granted "super-priority" or priming charges in favour of interim financier and others — Motion by Canada Revenue Agency (CRA) for order that such court-ordered interests did not take priority over statutory deemed trusts for unremitted source deductions was dismissed on basis that CCAA allowed court to rank priority charges necessary for restructuring ahead of CRA's interest — Crown's appeal was dismissed — Crown appealed — Appeal dismissed — CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, even those protected by deemed trusts, and financing was critical aspect of CCAA regime premised on restructuring to preserve debtors' greater value as going concerns — Most important feature of CCAA was broad discretionary power vested in supervising court by s. 11 — Preservation by s. 37(2) of CCAA of deemed trusts created by s. 227(4.1) of Income Tax Act (ITA) does not modify their characteristics — Section 227(4.1) of ITA does not establish proprietary interest because Crown's claim does not attach to any specific asset — Deemed removal of property from debtor's estate does not prevent judge from ordering super priority — There was no conflict between CCAA and ITA, as deemed trust created by ITA has priority only over defined set of security interests into which super-priority charge ordered under s. 11 of CCAA does not fall — Section 227(4.1) of ITA does not create true trust because there is no certainty of subject matter, so Crown's beneficial ownership was weaker than under common law and its content could not be inferred solely from ITA — Broad discretionary power under s. 11 of CCAA permits court to rank priming charges ahead of deemed trust for unremitted source deductions, as s. 6(3) of CCAA gives specific effect to Crown's deemed trust for CCAA purposes by requiring plan of compromise to pay Crown in full Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 11; Income Tax Act, s 227(4.1).

Bankruptcy and insolvency --- Priorities of claims — Claims of Crown — Federal — Income tax, unemployment insurance, and Canada Pension Plan — Creation of statutory trust

Taxation --- Impôt sur le revenu — Règles spéciales — Faillite — Sociétés

Dans le cadre des procédures de restructuration des débitrices en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC), le tribunal a accordé des charges super prioritaires en faveur du prêteur intérimaire et d'autres personnes — Requête de l'Agence du revenu du Canada (ARC) en vue d'une ordonnance déclarant qu'une telle sûreté ou charge super prioritaire accordée par le tribunal n'avait pas priorité sur les fiducies réputées créées par la loi pour les retenues à la source non versées a été rejetée au motif que la LACC permettait aux tribunaux d'accorder aux charges prioritaires nécessaires au processus de restructuration un rang supérieur à la sûreté de l'ARC — Appel interjeté par la Couronne a été rejeté — Couronne a formé un pourvoi — Pourvoi rejeté — LACC habilite de façon générale les juges surveillants à faire passer des charges super prioritaires devant toutes les autres créances, y compris celles qui sont protégées par des fiducies réputées, et l'obtention d'un financement constituait un aspect fondamental de ce régime fondé sur la prémisse qu'une compagnie débitrice est susceptible de posséder une plus grande valeur lorsqu'elle poursuit ses activités — Caractéristique la plus importante de la LACC est le vaste pouvoir discrétionnaire qu'elle confère au tribunal de surveillance par l'art. 11 — Que l'art. 37(2) de la LACC permette aux fiducies réputées créées par l'art. 227(4.1) de la Loi de l'impôt sur le revenu (LIR) de continuer à produire leurs effets ne modifie en rien les caractéristiques de ces fiducies — Article 227(4.1) de la LIR ne crée pas d'intérêt à titre de propriétaire, parce que la créance de Sa Majesté ne se rattache à aucun bien spécifique — Que des biens soient réputés soustraits au patrimoine du débiteur n'empêche pas un juge d'ordonner des charges super prioritaires — Il n'y avait pas de conflit entre la LACC et la LIR, car la fiducie réputée créée en vertu de la LIR n'a priorité que sur un ensemble bien précis de garanties dont la charge super prioritaire constituée en vertu de l'art. 11 de la LACC ne fait partie — Article 227(4.1) de la LIR ne crée pas une fiducie véritable puisqu'il n'existe aucune certitude quant à sa matière, de sorte que le droit de bénéficiaire de la Couronne était plus faible que le sens qui lui est généralement donné en common law, et la teneur du droit de la Couronne dans un contexte d'insolvabilité ne peut être déduite uniquement du texte de la LIR — Vaste pouvoir discrétionnaire conféré par l'art. 11 de la LACC permet au tribunal de faire passer les charges super prioritaires devant la fiducie réputée créée en faveur de la Couronne à l'égard des retenues à la source non versées, car l'art. 6(3) de la LACC donne explicitement effet à la fiducie réputée de la Couronne pour les fins de l'application de la LACC en exigeant que le plan de transaction prévoit le paiement intégral à la Couronne.

Faillite et insolvabilité --- Priorité des créances — Réclamations de la Couronne — Fédérale — Impôt sur le revenu, assurance-chômage, et Régime de pensions du Canada — Création de fiducies statutaires

In restructuring proceedings under the Companies' Creditors Arrangement Act (CCAA), debtor companies received interim financing and the court granted three super-priority charges in favour of the interim financier and the administrators of the monitor, counsel and restructuring officer for their fees, and the debtors' directors and officers for liabilities incurred after the commencement of the proceedings. The motion by the Canada Revenue Agency (CRA) for an order that such court-ordered super-priority security interests or priming charges did not take priority over the statutory deemed trusts in favour of the Minister or the CRA for unremitted source deductions was dismissed. The motion judge found that the CCAA gave the court the ability to rank priority charges necessary for the restructuring ahead of the CRA's security interest arising out of the deemed trusts. The Crown's appeal was dismissed by the majority of the Court of Appeal. The Crown appealed.

Held: The appeal was dismissed.

Per Côté J. (Wagner C.J.C., Kasirer J. concurring): As previously held, the CCAA generally empowers supervising judges to order super-priority charges with priority over all other claims, including claims protected by deemed trusts. The view underlying the entire CCAA regime was that debtors would retain more value as going concerns than in liquidation scenarios, and financing was a critical aspect of this system that required the protection of these priming charges. The most important feature of the CCAA, which enabled it to be adapted so readily to each reorganization, is the broad discretionary power vested in the supervising court by s. 11 of the CCAA. The preservation by s. 37(2) of the CCAA of the deemed trusts created by s. 227(4.1) of the Income Tax Act (ITA) does not modify the characteristics of these trusts. Section 227(4.1) of the ITA does not establish a proprietary interest because the Crown's claim does not attach to any specific asset. By choosing not to protect the Crown's claim to any particular asset, Parliament protected the Crown from the risks associated with asset ownership, including damage, depreciation and loss. The statement in s. 227(4.1) of the ITA that property is deemed to be removed from the debtor's estate does not prevent a judge from ordering a super-priority charge over the debtor's property. This interpretation is supported by the existence of s. 227(4.2) of the ITA that specifically anticipates other interests taking priority over the deemed trust, which would be impossible if there was an ownership interest. There was no conflict between the CCAA and the ITA, as the deemed trust created by the ITA has priority only over a defined set of security interests. A super-priority charge ordered under s. 11 of the CCAA does not fall within the definition in s. 224(1.3) of the ITA. As the Crown had been repaid and the case was technically moot, it was not critical to review the basis in this case for subordinating the Crown's claim to the super-priority charges.

Per Karakatsanis J. (concurring) (Martin J. concurring): Defining the Crown's entitlement as a "security" or "propriety" interest did not resolve the issues in the case. The meaning of "beneficially owned" in s. 227(4.1) of the ITA could only be understood in the specific statutory context. Section 227(4.1) of the ITA does not create a true trust because there is no certainty of subject matter, and so the Crown's beneficial ownership was weaker than would be generally understood by that term at common law. Section 227(4.1) of the ITA is structured as a security interest but also uses the mechanism of deemed trust. The content of the Crown's right for the purposes of insolvency could not be inferred solely from the text of the ITA. Interim financing is crucial to the restructuring process under the CCAA. Section 37(2) of the CCAA continues the Crown's statutory deemed trust but does not explain what to do with that right. Section 11 of the CCAA gives the court broad discretion to consider and give effect to the Crown's interest, while s. 6(3) of CCAA gives specific effect to the Crown's right by barring the court from sanctioning a plan of compromise unless it pays the Crown in full for unremitted source deductions within six months of the plan's approval or the Crown agrees otherwise. The CCAA thus gives the deemed trust concrete meaning for its purposes, namely that a plan of compromise has to pay the Crown in full. The Crown's interest did not fit within the relevant statutory definition of "secured creditor" under the CCCA as required for ss. 11.2, 11.51 and 11.52 of the CCAA, but the broad discretionary power under s. 11 of the CCAA permits the court to rank priming charges ahead of the deemed trust for unremitted source deductions.

Per Brown, Rowe JJ. (dissenting) (Abella J. concurring): The text of the ITA and other fiscal statutes is clear and gives ultimate priority to the deemed trusts for source deductions over all security interests, notwithstanding the CCAA or any other Act. The priming charges are "security interests" within the meaning of s. 224(1.3) of the ITA such that the Crown's interest under the deemed trust enjoys priority over them pursuant to s. 227(4.2) of the ITA. The fiscal statutes operated harmoniously with the CCAA, since s. 37(2) of the CCAA restricted the court's powers under s. 11 of the CCAA. Section 6(3) of the CCAA protects different reasons than those captured by the deemed trusts. Policy reasons did not support a different interpretation where Parliament chose to prioritize the integrity of the tax system over the interests of secured creditors, and the majority's view that interim financing would simply end without priming charges was not supported by evidence.

charge over all of the assets of the tax debtor in the amount of the default" (*First Vancouver*, at para. 40). She found further support for this in the fact that the deemed trust also falls squarely within the *ITA*'s definition of "security interest" in s. 224(1.3).

14 After determining that Her Majesty's interest in the Debtors' property was a security interest, Rowbotham J.A. turned to the question of whether the deemed trust could be subordinated to the court-ordered super-priority charges. She found that "while a conflict may appear to exist at the level of the 'black letter' wording" of the *ITA* and the *CCAA*, "the presumption of statutory coherence require[d] that the provisions be read to work together" (para. 45). A deemed trust that could not be subordinated to super-priority charges would undermine both Acts' objectives because fewer restructurings could succeed and thus less tax revenue could be collected. If the Crown's position prevailed, then absurd consequences could follow. Approximately 75 percent of restructurings require interim lenders. Without the assurance that they would be repaid in priority, these lenders would not come forward, nor would monitors or directors. The reality is that all of these services are provided in reliance on super priorities. Without these priorities, *CCAA* restructurings may be severely curtailed or at least delayed until Her Majesty's exact claim could be ascertained, by which point the company might have totally collapsed.

15 Justice Wakeling dissented. In his view, none of the arguments raised by the majority could overcome the text of the *ITA*. On his reading, the text of s. 227(4.1) is clear: Her Majesty is the beneficial owner of the amounts deemed to be held separate and apart from the debtor's property, and these amounts must be paid to Her Majesty notwithstanding any type of security interest, including super-priority charges. In his view, nothing in the *CCAA* overrides this proprietary interest. Section 11 of the CCAA cannot permit discretion to be exercised without regard for s. 227(4.1) of the ITA, nor can ss. 11.2, 11.51 and 11.52 of the CCAA be used, as they only allow a court to make orders regarding "all or part of the company's property" (s. 11.2(1)). In conclusion, since no part of the *CCAA* authorizes a court to override s. 227(4.1), a court must give effect to the clear text of s. 227(4.1) and cannot subordinate Her Majesty's claims to super-priority charges.

IV. Issue

16 The central issue in this appeal is whether the *CCAA* authorizes courts to grant super-priority charges with priority over a deemed trust created by s. 227(4.1) of the ITA. In order to answer this question, I proceed in three stages. First, I assess the nature of the *CCAA* regime and the power of supervising courts to order such charges. Given that supervising courts generally have the authority to order super-priority charges with priority over all other claims, I then turn to s. 227(4.1) of the ITA to determine whether it gives Her Majesty an interest that cannot be subordinated to super-priority charges. Here I assess the Crown's two arguments as to why s. 227(4.1) provides for an exception to the general rule, namely that Her Majesty has a proprietary or ownership interest in the insolvent company's assets and that, even if Her Majesty does not have such an interest, s. 227(4.1) provides Her with a security interest that has absolute priority over all claims. I conclude by assessing how courts should exercise their authority to order super-priority charges where Her Majesty has a claim against an insolvent company protected by a s. 227(4.1) deemed trust.

V. Analysis

17 In order to determine whether the *CCAA* empowers a court to order super-priority charges over assets subject to a deemed trust created by s. 227(4.1) of the ITA, we must understand both the *CCAA* regime and the nature of the interest created by s. 227(4.1).

A. CCAA Regime

18 The *CCAA* is part of Canada's system of insolvency law, which also includes the BIA and the Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1), for banks and other specified institutions. Although both the *CCAA* and the *BIA* create reorganization regimes, what distinguishes the *CCAA* regime is that it is restricted to companies with liabilities of more than $5,000,000 and "offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations" (Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 14).

19 The *CCAA* works by creating breathing room for an insolvent debtor to negotiate a way out of insolvency. Upon an initial application, the supervising judge makes an order that ordinarily preserves the status quo by freezing claims against the

debtor while allowing it to remain in possession of its assets in order to continue carrying on business. During this time, it is hoped that the debtor will negotiate a plan of arrangement with creditors and other stakeholders. The goal is to enable the parties to reach a compromise that allows the debtor to reorganize and emerge from the *CCAA* process as a going concern (*Century Services*, at para. 18).

20 The view underlying the entire *CCAA* regime is thus that debtor companies retain more value as going concerns than in liquidation scenarios (*Century Services*, at para. 18). The survival of a going-concern business is ordinarily the result with the greatest net benefit. It often enables creditors to maximize returns while simultaneously benefiting shareholders, employees, and other firms that do business with the debtor company (para. 60). Thus, this Court recently held that the *CCAA* embraces "the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10, at para. 42, quoting J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at p. 14).

21 The most important feature of the *CCAA* — and the feature that enables it to be adapted so readily to each reorganization — is the broad discretionary power it vests in the supervising court (*Callidus Capital*, at paras. 47-48). Section 11 of the CCAA confers jurisdiction on the supervising court to "make any order that it considers appropriate in the circumstances". This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, "On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be 'appropriate in the circumstances'" (*Callidus Capital*, at para. 67). Keeping in mind the centrality of judicial discretion in the *CCAA* regime, our jurisprudence has developed baseline requirements of appropriateness, good faith and due diligence in order to exercise this power. The supervising judge must be satisfied that the order is appropriate and that the applicant has acted in good faith and with due diligence (*Century Services*, at para. 69). The judge must also be satisfied as to appropriateness, which is assessed by considering whether the order would advance the policy and remedial objectives of the *CCAA* (para. 70). For instance, given that the purpose of the *CCAA* is to facilitate the survival of going concerns, when crafting an initial order, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize" (para. 60).

22 On review of a supervising judge's order, an appellate court should be cognizant that supervising judges have been given this broad discretion in order to fulfill their difficult role of continuously balancing conflicting and changing interests. Appellate courts should also recognize that orders are generally temporary or interim in nature and that the restructuring process is constantly evolving. These considerations require not only that supervising judges be endowed with a broad discretion, but that appellate courts exercise particular caution before interfering with orders made in accordance with that discretion (Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368 (C.A.), at paras. 30-31).

23 In addition to s. 11, there are more specific powers in some of the provisions following that section. They include the power to order a super-priority security or charge on all or part of a company's assets in favour of interim financiers (s. 11.2), critical suppliers (s. 11.4), the monitor and financial, legal or other experts (s. 11.52), or indemnification of directors or officers (s. 11.51). Each of these provisions empowers the court to "order that the security or charge rank in priority over the claim of any secured creditor of the company" (ss. 11.2(2), 11.4(4), 11.51(2) and 11.52(2)).

24 As this Court held in Century Services, at para. 70, the general language of s. 11 is not restricted by the availability of these more specific orders. In fact, courts regularly grant super-priority charges in favour of persons not specifically referred to in the aforementioned provisions, including through orders that have priority over orders made under the specific provisions. These include, for example, key employee retention plan charges (Grant Forest Products Inc., Re (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); *Timminco Ltd., Re*, 2012 ONSC 506, 85 C.B.R. (5th) 169), and bid protection charges (*In the Matter of a Plan of Compromise or Arrangement of Green Growth Brands Inc.*, 2020 ONSC 3565, 84 C.B.R. (6th) 146).

25 In Sun Indalex Finance, LLC v. United Steelworkers, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 60, quoting the amended initial order in that case, this Court confirmed that a court-ordered financing charge with priority over "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", had priority over a deemed trust established by the Personal Property Security Act, R.S.O. 1990, c. P.10 ("PPSA"), to protect employee pensions. Justice Deschamps wrote for a unanimous

Court on this point. She found that the existence of a deemed trust did not preclude orders granting first priority to financiers: "This will be the case only if the provincial priorities provided for in s. 30(7) of the PPSA ensure that the claim of the Salaried Plan's members has priority over the [debtor-in-possession ("DIP")] charge" (para. 48).

26 Justice Deschamps first assessed the supervising judge's order to determine whether it had truly been necessary to give the financing charge priority over the deemed trust. Even though the supervising judge had not specifically considered the deemed trust in the order authorizing a super-priority charge, he had found that there was no alternative but to make the order. Financing secured by a super priority was necessary if the company was to remain a going concern (para. 59). Justice Deschamps rejected the suggestion "that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust", because "[t]he harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries" (para. 59).

27 After determining that the order was necessary, she turned to the statute creating the deemed trust's priority. Section 30(7) of the PPSA provided that the deemed trust would have priority over all security interests. In her view, this created a conflict between the court-ordered super priority and the statutory priority of the claim protected by the deemed trust. The super priority therefore prevailed by virtue of federal paramountcy (para. 60).

28 There are also practical considerations that explain why supervising judges must have the discretion to order other charges with priority over deemed trusts. Restructuring under the *CCAA* often requires the assistance of many professionals. As Wagner C.J. and Moldaver J. recently recognized for a unanimous Court, the role the monitor plays in a *CCAA* proceeding is critical: "The monitor is an independent and impartial expert, acting as 'the eyes and the ears of the court' throughout the proceedings .... The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing" (*Callidus Capital*, at para. 52, quoting Ernst & Young Inc. v. Essar Global Fund Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109). In the words of Morawetz J. (as he then was), "[i]t is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position" (*Timminco*, at para. 66).

29 This Court has similarly found that financing is critical as "case after case has shown that 'the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout'" (*Indalex*, at para. 59, quoting J. P. Sarra, *Rescue! The* Companies' Creditors Arrangement Act (2007), at p. 97). As lower courts have affirmed, "Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges" (First Leaside Wealth Management Inc. (Re), 2012 ONSC 1299, at para. 51 (CanLII)).

30 Super-priority charges in favour of the monitor, financiers and other professionals are required to derive the most value for the stakeholders. They are beneficial to all creditors, including those whose claims are protected by a deemed trust. The fact that they require super priority is just a part of "[t]he harsh reality ... that lending is governed by the commercial imperatives of the lenders" (*Indalex*, at para. 59). It does not make commercial sense to act when there is a high level of risk involved. For a monitor and financiers to put themselves at risk to restructure and develop assets, only to later discover that a deemed trust supersedes all claims, smacks of unfairness. As McLachlin J. (as she then was) said, granting a deemed trust absolute priority where it does not amount to a trust under general principles of law would "defy fairness and common sense" (*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 33).

31 It is therefore clear that, in general, courts supervising a *CCAA* reorganization have the authority to order super-priority charges to facilitate the restructuring process. Similarly, courts have ensured that the *CCAA* is given a liberal construction to fulfill its broad purpose and to prevent this purpose from being neutralized by other statutes: [TRANSLATION] "As the courts have ruled time and again, the purpose of the *CCAA* and orders made under it cannot be affected or neutralized by another [Act], whether of public order or not" (Triton Électronique inc. (Arrangement relatif à), 2009 QCCS 1202, at para. 35 (CanLII)). "This case is not so much about the rights of employees as creditors, but the right of the court under the [*CCAA*] to serve not the special interests of the directors and officers of the company but the broader constituency referred to in Chef Ready Foods

Ltd. [v. Hongkong Bank of Can. (1990), 51 B.C.L.R. (2d) 84 (C.A.)] ... Such a decision may inevitably conflict with provincial legislation, but the broad purposes of the [*CCAA*] must be served" (*Pacific National Lease Holding*, at para. 28). Courts have been particularly cautious when interpreting security interests so as to ensure that the *CCAA*'s important purpose can be fulfilled. For instance, in *Chef Ready Foods*, Gibbs J.A. observed that if a bank's rights under the Bank Act, S.C. 1991, c. 46, were to be interpreted as being immune from the provisions of the *CCAA*, then the benefits of *CCAA* proceedings would be "largely illusory" (p. 92). "There will be two classes of debtor companies: those for whom there are prospects for recovery under the [*CCAA*]; and those for whom the [*CCAA*] may be irrelevant dependent upon the whim of the [creditor]" (p. 92). It is important to keep in mind that *CCAA* proceedings operate for the benefit of the creditors as a group and not for the benefit of a single creditor. Without clear and direct instruction from Parliament, we cannot countenance the possibility that it intended to create a security interest that would limit or eliminate the prospect of reorganization and recovery under the *CCAA* for some companies. To do so would turn the *CCAA* into a dead letter. With this in mind, I turn to the specific provision at issue in this appeal.

B. Nature of the Interest Created by Section 227(4.1) of the ITA

32 The Crown argues that, despite the authority a supervising court may have to order super-priority charges, Her Majesty's claim to unremitted source deductions is protected by a deemed trust, and that ordering charges with priority over the deemed trust is contrary to s. 227(4.1) of the ITA. To determine whether this is true, we must begin by understanding how the deemed trust comes about.

33 Section 153(1) of the ITA requires employers to withhold income tax from employees' gross pay and forward the amounts withheld to the CRA. When an employer withholds income tax from its employees in accordance with the *ITA*, it assumes its employees' liability for those amounts (s. 227(9.4)). As a result, Her Majesty cannot have recourse to the employees if the employer fails to remit the withheld amounts. Instead, Her Majesty's interest is protected by a deemed trust. Section 227(4) of the ITA provides that amounts withheld are deemed to be held separate and apart from the employer's assets and in trust for Her Majesty. If an employer fails to remit the amounts withheld in the manner provided by the ITA, s. 227(4.1) extends the trust to all of the employer's assets. In this case, the Debtors failed to remit the amounts withheld to the CRA, bringing s. 227(4.1) into operation.

34 When a company seeks protection under the *CCAA*, s. 37(1) of the CCAA provides that most of Her Majesty's deemed trusts are nullified (unless the property in question would be regarded as held in trust in the absence of the statutory provision creating the deemed trust). However, s. 37(2) of the CCAA exempts the deemed trusts created by s. 227(4) and (4.1) of the ITA from the nullification provided for in s. 37(1). These deemed trusts continue to operate throughout the *CCAA* process (*Century Services*, at para. 45). In my view, this preservation by the *CCAA* of the deemed trusts created by the *ITA* does not modify the characteristics of these trusts. They continue to operate as they would have if the insolvent company had not sought *CCAA* protection. Therefore, the Crown's arguments must be assessed by reviewing the nature of the interest created by s. 227(4.1) of the ITA.

35 Before doing so, and while it is not strictly speaking required of me given the reasons I set out below, I pause here to clarify the role of s. 6(3) of the CCAA, which provides as follows:

> **(3)** Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under
>
> (a) subsection 224(1.2) of the *Income Tax Act* ....

36 Section 6(3) merely grants Her Majesty the right to insist that a compromise or arrangement not be sanctioned by a court unless it provides for payment in full to Her Majesty of certain claims within six months after court sanction. Section 6(3) does not say that it modifies the deemed trust created by s. 227(4.1) of the ITA in any way, and it comes into operation only at the end of the *CCAA* process when parties seek court approval of their arrangement or compromise. Section 6(3) also

> to play in advancing the legislative purpose" (p. 158). This principle is often invoked by courts to resolve ambiguity or to determine the scope of general words.

(Para. 36, quoting R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 158; see also Placer Dome Canada Ltd. v. Ontario (Minister of Finance), 2006 SCC 20, [2006] 1 S.C.R. 715, at para. 45.)

65 The *ITA* contains two definitions of "security interest", in s. 224(1.3) and s. 18(5). For the purposes of computing taxpayer income, Parliament chose to define "security interest" in s. 18(5) in nearly the same manner as in s. 224(1.3), but without listing the ten specific security instruments: "*security interest*, in respect of a property, means an interest in, or for civil law a right in, the property that secures payment of an obligation". The presumption against tautology means that we must presume that Parliament included the specific additional words in s. 224(1.3) because they "have a specific role to play in advancing the legislative purpose" (*Placer Dome*, at para. 45, quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 159). Applying the presumption against tautology demonstrates that Parliament intended interpretive weight to be placed on the examples.

66 To come back to *Caisse populaire Desjardins de l'Est de Drummond*, I agree with Rothstein J. that the definition of "security interest" in s. 224(1.3) of the ITA is expansive such that it "does not require that the agreement between the creditor and debtor take any particular form" (para. 15). However, I am of the view that there is a key restriction in this expansive definition. The definition focuses on interests created either by consensual agreement or by operation of law, and these types of interests are usually designed to protect the rights of a single creditor, usually to the detriment of other creditors. In that case, the Court was considering whether a right to compensation conferred on a single creditor by a contract entered into between that creditor and the debtor was a security interest within the meaning of s. 224(1.3). The situation at issue in that case was completely different than the one at issue in the present case. Indeed, in the present case, the interest of the participants in the restructuring is created by a court order, not by an agreement or by operation of law. As I have said above, when a judge orders a super-priority charge in *CCAA* proceedings, it is quite a different type of interest as the *CCAA* restructuring process benefits all creditors and not one in particular.

67 Finally, if Parliament had wanted to include court-ordered super-priority charges in the definition of "security interest", it would have said so specifically. Parliament must be taken to have legislated with the operation of the *CCAA* in mind. In the words of Professor Sullivan, "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation" (Sullivan (2014), at p. 422 (footnote omitted)). Given that, in *Indalex*, this Court has already found that granting super-priority charges is critical as "a key aspect of the debtor's ability to attempt a workout", one would expect Parliament to use clearer language where such a definition could jeopardize the operation of another one of its Acts. I am therefore in total disagreement with my colleagues Justices Brown and Rowe that "nothing in the definition of security interest in the *ITA* precludes the inclusion of an interest that is designed to operate to the benefit of all creditors" (para. 210). To the contrary, everything hints at priming charges being excluded from the definition of security interest.

68 In conclusion, a court-ordered super-priority charge under the *CCAA* is not a security interest within the meaning of s. 224(1.3) of the ITA. As a result, there is no conflict between s. 227(4.1) of the ITA and the Initial Order made in this case. I therefore respectfully disagree with my colleague Justice Moldaver's suggestion that there may be a conflict between s. 11 of the CCAA and the *ITA* (para. 258). The Initial Order's super-priority charges prevail over the deemed trust.

C. Was It Necessary for the Initial Order to Subordinate Her Majesty's Claim Protected by a Deemed Trust in This Case?

69 Finally, I must now identify the provision in which the Initial Order here should be grounded. While the initial order under consideration in *Indalex* was based on the court's equitable jurisdiction, in most instances, orders in *CCAA* proceedings should be considered an exercise of statutory power (*Century Services*, at paras. 65-66).

70 As discussed above, a supervising court's authority to order super-priority charges is grounded in its broad discretionary power under s. 11 of the CCAA and also in the more specific grants of authority under ss. 11.2, 11.4, 11.51 and 11.52. Those

provisions authorize the court to grant certain priming charges that rank ahead of the claims of "any secured creditor". While I have already concluded that Her Majesty does not have a proprietary interest as a result of Her deemed trust, it is less certain whether Her Majesty is a "secured creditor" under the *CCAA*. Professor Wood is of the view that Her Majesty is not a "secured creditor" under the *CCAA* by virtue of Her deemed trust interest; rather, ss. 37 to 39 of the CCAA create "two distinct approaches — one that applies to a deemed trust, the other that applies when a statute gives the Crown the status of a secured creditor" (p. 96). Therefore, the ranking of a priming charge ahead of the deemed trust would fall outside the scope of the express priming charge provisions. I do not need to definitively determine if Her Majesty falls within the definition of "secured creditor" under the *CCAA* by virtue of Her trust. Instead, I would ground the supervising court's power in s. 11, which "permits courts to create priming charges that are not specifically provided for in the *CCAA*" (p. 98). I respectfully disagree with the suggestion of my colleagues Brown and Rowe JJ. that Professor Wood or any other author has suggested that s. 11 is limited by the specific provisions that follow it (para. 228). To the contrary, this Court said in *Century Services*, at paras. 68-70, that s. 11 provides a very broad jurisdiction that is not restricted by the availability of more specific orders.

71 My colleagues Brown and Rowe JJ. also argue that "priming charges cannot supersede the Crown's deemed trust claim because they may attach *only* to *the property of the debtor's company*" (para. 223 (emphasis in original)). With respect, this argument cannot stand because, although ss. 11.2, 11.51 and 11.52 of the CCAA contain this restriction, there is no such restriction in s. 11. As Lalonde J. recognized, [TRANSLATION] "In exercising the authority conferred by the *CCAA*, including inherent powers, the courts have not hesitated to use this jurisdiction to intervene in contractual relationships between a debtor and its creditors, even to make orders affecting the rights of third parties" (*Triton Électronique*, at para. 31). There may be circumstances where it is appropriate for a court to attach charges to property that does not belong to the debtor — if, for instance, this deemed trust were to be equivalent to a proprietary interest. However, that circumstance does not arise in this case because the property subject to Her Majesty's deemed trust remains the property of the debtor, as the deemed trust does not create a proprietary interest. My colleagues' reliance on s. 37(2) of the CCAA is similarly ill-founded. As I said earlier, s. 37(2) simply preserves the status quo. It does not alter Her Majesty's interest. It merely continues that interest and excludes it from the operation of s. 37(1), which would otherwise downgrade it to the interest of an ordinary creditor.

72 That said, courts should still recognize the distinct nature of Her Majesty's interest and ensure that they grant a charge with priority over the deemed trust only when necessary. In creating a super-priority charge, a supervising judge must always consider whether the order will achieve the objectives of the *CCAA*. When there is the spectre of a claim by Her Majesty protected by a deemed trust, the judge must also consider whether a super priority is necessary. The record before us contains no reasons for the Initial Order, so this is difficult to determine in this case. Given that Her Majesty has been paid and that the case is in fact moot, it is not critical for us to determine whether the supervising judge believed it was necessary to subordinate Her Majesty's claim to the super-priority charges. Based on Justice Topolniski's reasons for denying the Crown's motion to vary the Initial Order, it is clear that she would have found that the super-priority charges deserved priority over Her Majesty's interest (paras. 100-104). However, I wish to say a few words on when it may be necessary for a supervising judge to subordinate Her Majesty's interest to super-priority charges.

73 It may be necessary to subordinate Her Majesty's deemed trust where the supervising judge believes that, without a super-priority charge, a particular professional or lender would not act. This may often be the case. On the other hand, I agree with Professor Wood that, although subordinating super-priority charges to Her Majesty's claim will often increase the costs and complexity of restructuring, there will be times when it will not. For instance, when Her Majesty's claim is small or known with a high degree of certainty, commercial parties will be able to manage their risks and will not need a super priority. After all, there is an order of priority even amongst super-priority charges, and therefore it is clear that these parties are willing to have their claims subordinated to some fixed claims. A further example of where different considerations may be in play is in so-called liquidating *CCAA* proceedings. As this Court recently recognized, *CCAA* proceedings whose fundamental objective is to liquidate — rather than to rescue a going concern — have a legitimate place in the *CCAA* regime and have been accepted by Parliament through the enactment of s. 36 (*Callidus Capital*, at paras. 42-45). Liquidating *CCAA* proceedings often aim to maximize returns for creditors, and thus the subordination of Her Majesty's interest has less justification beyond potential unjust enrichment arguments.

VI. Disposition

74 I would dismiss the appeal with costs in this Court in accordance with the tariff of fees and disbursements set out in Schedule B of the Rules of the Supreme Court of Canada, SOR/2002-156.

Karakatsanis J. **(Martin J. concurring):**

I. Overview

75 When a company seeks to restructure its affairs in order to avoid bankruptcy, the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), allows the court to order charges in favour of parties that are necessary to the restructuring process: lenders who provide interim financing, the monitor who administers the company's restructuring, and directors and officers who captain the sinking ship (among others). These charges, often referred to as "priming charges", are meant to encourage investment in the company as it undergoes reorganization. A company's reorganization, as an alternative to the devastating effects of bankruptcy, serves the public interest by benefitting creditors, employees, and the health of the economy more generally.

76 In this case, the *CCAA* judge ordered priming charges over the estates of Canada North Group and six related companies (Debtor Companies) in favour of an interim lender, the monitor, and directors. Property of two of the Debtor Companies, however, was also subject to a deemed trust in favour of the Crown, under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (ITA), for unremitted source deductions consisting of employees' income tax, Canada Pension Plan contributions, and employment insurance premiums. While this appeal is moot because there are sufficient assets to satisfy both the Crown's deemed trust claim and the priming charges, this Court is asked to determine which has priority in the restructuring: the priming charges under the *CCAA* or the deemed trust under the *ITA*.

77 Section 227(4.1) of the ITA provides that, when an employer fails to remit source deductions to the Crown, a deemed trust attaches to the property of the employer to the extent of the unremitted source deductions. The deemed trust operates "notwithstanding any security interest in such property" and "[n]otwithstanding ... any other enactment of Canada". Sections 11.2, 11.51 and 11.52 of the CCAA give the court authority to order priming charges over a company's property in favour of interim lenders, directors and officers, and estate administrators. Priming charges can rank ahead of any other secured claim. Read on their own, these provisions appear to give different parties super-priority in an insolvency. This issue of statutory interpretation has been described as the collision of an unstoppable force with an immoveable object (R. J. Wood, “Irresistible Force Meets Immovable Object: Canada v. Canada North Group Inc.” (2020), 63 Can. Bus. L.J. 85).

78 The appellant, the Crown, argues that s. 227(4.1) of the ITA creates a proprietary right in the Crown because, through the mechanism of a deemed trust, it gives the Crown beneficial ownership of the amount of the unremitted source deductions. In other words, that *amount* is the Crown's property and a *CCAA* judge cannot, therefore, order a charge over it; it should be taken out of the estate and can play no role in the restructuring process.

79 In contrast, the respondents argue that s. 227(4.1) creates a security interest in the Crown squarely contemplated by ss. 11.2, 11.51 and 11.52 of the CCAA. They further submit that there is no conflict between the relevant provisions because the policies underlying both Acts can be harmonized in favour of giving effect to the *CCAA* provisions.

80 For the reasons below, I conclude that there is no conflict between the *ITA* and *CCAA* provisions. The right that attaches to "beneficial ownership" under s. 227(4.1) of the ITA must be interpreted in the specific statutory context in which it arises. Here, the Crown's right to unremitted source deductions in a *CCAA* restructuring is protected by the requirement that the plan of compromise pay the Crown in full. Because I do not conclude that the Crown's interest fits within the relevant statutory definition of "secured creditor" under the *CCAA*, it is not captured by the court's authority to order priming charges under ss. 11.2, 11.51 and 11.52 of the CCAA. However, in my view, the broad discretionary power under s. 11 of the CCAA permits a court to rank priming charges ahead of the Crown's deemed trust for unremitted source deductions. This conclusion harmonizes the purposes of both federal statutes. I would dismiss the appeal.

TAB 3

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 22, 2022

Last amended on September 1, 2022

À jour au 22 septembre 2022

Dernière modification le 1 septembre 2022

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persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

R.S., 1985, c. B-3, s. 4; 2000, c. 12, s. 9; 2004, c. 25, s. 9(F); 2005, c. 47, s. 5; 2007, c. 36, s. 2.

de même, sauf preuve contraire, pour l'application des alinéas 95(1)b) ou 96(1)b).

L.R. (1985), ch. B-3, art. 4; 2000, ch. 12, art. 9; 2004, ch. 25, art. 9(F); 2005, ch. 47, art. 5; 2007, ch. 36, art. 2.

Her Majesty

Binding on Her Majesty

4.1 This Act is binding on Her Majesty in right of Canada or a province.

1992, c. 27, s. 4.

Sa Majesté

Obligation de Sa Majesté

4.1 La présente loi lie Sa Majesté du chef du Canada ou d'une province.

1992, ch. 27, art. 4.

Duty of Good Faith

Good faith

4.2 (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 any interested person, the court may make any order that it considers appropriate in the circumstances.

2019, c. 29, s. 133.

Obligation d'agir de bonne foi

Bonne foi

4.2 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

2019, ch. 29, art. 133.

PART I

Administrative Officials

Superintendent

Appointment

5 (1) The Governor in Council shall appoint a Superintendent of Bankruptcy to hold office during good behaviour for a term of not more than five years, but the Superintendent may be removed from office by the Governor in Council for cause. The Superintendent's term may be renewed for one or more further terms.

Salary

(1.1) The Superintendent shall be paid the salary that the Governor in Council may fix.

Extent of supervision

(2) The Superintendent shall supervise the administration of all estates and matters to which this Act applies.

Duties

(3) The Superintendent shall, without limiting the authority conferred by subsection (2),

PARTIE I

Fonctionnaires administratifs

Surintendant

Nomination

5 (1) Le gouverneur en conseil nomme à titre inamovible un surintendant des faillites pour un mandat renouvelable d'au plus cinq ans, sous réserve de révocation motivée de la part du gouverneur en conseil.

Traitement

(1.1) Le surintendant des faillites reçoit le traitement que fixe le gouverneur en conseil.

Surveillance

(2) Le surintendant contrôle l'administration des actifs et des affaires régis par la présente loi.

Fonctions

(3) Le surintendant, sans que soit limitée l'autorité que lui confère le paragraphe (2) :

Excluded secured creditor

50.2 A secured creditor to whom a proposal has not been made in respect of a particular secured claim may not file a proof of secured claim in respect of that claim.

1992, c. 27, s. 19.

Rights in bankruptcy

50.3 On the bankruptcy of an insolvent person who made a proposal to one or more secured creditors in respect of secured claims, any proof of secured claim filed pursuant to section 50.1 ceases to be valid or effective, and sections 112 and 127 to 134 apply in respect of a proof of claim filed by any secured creditor in the bankruptcy.

1992, c. 27, s. 19.

Notice of intention

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

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

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

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

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

Certain things to be filed

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

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

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

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the

Le cas des autres créanciers garantis

50.2 Le créancier garanti à qui aucune proposition n'a été faite relativement à une réclamation garantie en particulier n'est pas admis à produire une preuve de réclamation garantie à cet égard.

1992, ch. 27, art. 19.

Droits en cas de faillite

50.3 En cas de faillite d'une personne insolvable ayant fait une proposition à un ou plusieurs créanciers garantis relativement à des réclamations garanties, les preuves de réclamations garanties déposées aux termes de l'article 50.1 sont sans effet, et les articles 112 et 127 à 134 s'appliquent aux preuves de réclamations déposées par des créanciers garantis dans le cadre de la faillite.

1992, ch. 27, art. 19.

Avis d'intention

50.4 (1) Avant de déposer copie d'une proposition auprès d'un syndic autorisé, la personne insolvable peut, en la forme prescrite, déposer auprès du séquestre officiel de sa localité un avis d'intention énonçant :

a) son intention de faire une proposition;

b) les nom et adresse du syndic autorisé qui a accepté, par écrit, les fonctions de syndic dans le cadre de la proposition;

c) le nom de tout créancier ayant une réclamation s'élevant à au moins deux cent cinquante dollars, ainsi que le montant de celle-ci, connu ou indiqué aux livres du débiteur.

L'avis d'intention est accompagné d'une copie de l'acceptation écrite du syndic.

Documents à déposer

(2) Dans les dix jours suivant le dépôt de l'avis d'intention visé au paragraphe (1), la personne insolvable dépose les documents suivants auprès du séquestre officiel :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

b) un rapport portant sur le caractère raisonnable de l'état, établi, en la forme prescrite, par le syndic et signé par lui;

c) un rapport contenant les observations — prescrites par les Règles générales — de la personne insolvable

TAB 4

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Spady v. Spady Estate | 2022 ABQB 591, 2022 CarswellAlta 2367 | (Alta. Q.B., Aug 31, 2022)

2021 ABQB 137
Alberta Court of Queen's Bench

CWB Maxium Financial Inc v. 2026998 Alberta Ltd

2021 CarswellAlta 392, 2021 ABQB 137, [2021] 7 W.W.R. 299, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 25 Alta. L.R. (7th) 3, 331 A.C.W.S. (3d) 229, 88 C.B.R. (6th) 196

CWB Maxium Financial Inc. and Canadian Western Bank (Plaintiffs) and 2026998 Alberta Ltd., Grandin Prescription Centre Inc., 517751 Alberta Ltd., 1396987Alberta Ltd., 1396966 Alberta Ltd. and Harold Douglas Loder (Defendants)

Douglas R. Mah J.

Heard: January 11-12, 2021
Judgment: February 23, 2021
Docket: Edmonton 2003-04457

Counsel: Terrence M. Warner, Spencer Norris, for Plaintiffs
Jim Schmidt, for Defendants
Ryan F.T. Quinlan, for Interim Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.2 Petition by only creditor
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.6 Practice and procedure on petition
III.6.e Evidentiary issues
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.5 Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.5 Orders
XVII.5.c Miscellaneous
Bankruptcy and insolvency
XX Miscellaneous
Estoppel
IV Practice and procedure
IV.3 Miscellaneous

Evidence
VI Witnesses
VI.4 Credibility
VI.4.a Duty of judge in assessing
Evidence
VII Examination of witnesses
VII.4 Cross-examination
VII.4.m Effect of failure to cross-examine
Guarantee and indemnity
II Guarantee
II.1 Contract of guarantee
II.1.d Consideration
II.1.d.ii Forbearance to sue
Personal property security
I Nature and scope of legislation
I.10 Miscellaneous

Headnote

Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Petition by only creditor

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider refinancing, and recovery action was started — 195 (which was amalgamation of MFSI and DFS) acquired bank's debt and security, and DFS, had acquired loan related to purchase of L Group, and it was agreed between L and DFS that 114 (L Group company that owned C pharmacy) would execute new promissory note and amount was not paid — Drug supplier, K had one outstanding loan guarantee and this was part of bank's security for L Group indebtedness, it was assigned to 195, and having acquired bank's debt and security, 195 carried on with receivership application, causing PwC to be court-appointed as Receiver over L Group in 2016 — PwC reported in 2017 that shortfall to 195 was $2.37 million, and M Inc. said amount remaining unpaid from C Pharmacy, that had been converted to unpaid new promissory note, was part of shortfall, that amount was reduced to $970,000, after 195 reached settlement of $1.4 million with K in respect of its $2 million guarantee of L — Interim receivership order has been in place since March 2020 and extended several times, pending final determination, and M Ltd. was appointed interim receiver — Plaintiffs brought application for final receivership order — Application granted — Application of good faith doctrines in contractual context may lead to finding that transgressing party was liable in damages for breach of contract, and adopting those doctrines to inform good faith requirement in s. 4.2 of Bankruptcy and Insolvency Act (BIA) may lead to invocation of broad discretionary authority to grant "any order that it considers appropriate in the circumstances" — Secured creditor seeking Receivership Order was "interested person" subject to good faith requirement, and its conduct in events preceding application was covered by that requirement, where that conduct was factually and temporally connected to proceedings, i.e. such conduct is "with respect to" BIA proceeding — Remedy, at least in this case and given broad discretion of court under s. 4.2 of BIA, may include denial of Receivership Order, and conduct of party alleged to have breached good faith requirement should be assessed in light of intent and policy objectives of BIA .

Personal property security --- Nature and scope of legislation — Miscellaneous

Plaintiffs, which were comprised of M Inc. and CWB, with M Inc. being wholly owned subsidiary of CWB, were creditors, and defendant, which included L Group, which owned and operated pharmacies, were debtors — M Inc. was incorporated in Ontario in 2016 in conjunction with CWB's acquisition of certain assets of M Financial Services Inc. (MFSI) and D Financial Services (DFS), and MFSI and DFS were related companies but operated as one larger enterprise — In 2014, L, who was principal of corporate defendant, moved entirety of L Group's loan portfolio to major bank, and L had granted personal guarantees to bank and guaranteed L Group's indebtedness, L Group's cash flow was reduced, L unsuccessfully requested that bank consider

36 Counsel were unable to agree to the language of an Order emanating from my October 6, 2020 decision, and no Order was entered. As a result, submissions during the summary trial were not restricted to the matters outlined above. Mr. Loder's counsel also argued:

> • Seventh, Maxium's failure to disclose to Mr. Loder that it did not have the authority on its own to approve the restructuring of 202's loans in 2019-2020, but had to obtain approval from CWB's head office in Edmonton, was a material omission that is also indicative of bad faith.

37 Legally, Mr. Loder contends that:

> • Maxium's promises to re-amortize the smaller loan, increase the LOC and restructure 202's overall financing lulled him into a false sense of security. Had Maxium not made those commitments, or had he known they would not be honoured, he would have taken steps to refinance the pharmacy operation elsewhere and would not currently be staring down this receivership application. In other words, the defendants have established an estoppel by words or conduct that precludes the plaintiffs from relying upon their strict legal rights under their security: Vision West Development Ltd v McIvor Properties Ltd 2012 BCSC 302 at paras 63-65.
>
> • Maxium's conduct, in the form of misrepresentations and material omissions, disentitle the plaintiffs from the remedy of a final order of receivership because of lack of good faith, invoking section 4.2 of the BIA and section 66(1) of the PPSA.
>
> • Finally, because receivership is an equitable remedy, having regard to the equities, it would not be just and convenient to grant the remedy in this case.

G. What does 'Good Faith' mean in this case?

1. Section 4.2 of the BIA

38 The defendants invoke section 4.2 of the BIA to say a receivership order should not be granted. This recently enacted provision has two components:

> • first, any interested person in any proceedings under the *BIA* shall act in good faith with respect to those proceedings; and
>
> • second, if the Court is satisfied that an interested person fails to act in good faith, on application by any interested person, the Court may make any order that it considers appropriate in the circumstances.

39 Here, the defendants say that the plaintiffs have through misrepresentation, mistruth or omission not acted in good faith and that the remedy that flows should be a denial of the receivership order.

40 As a new provision, there is a dearth of case law to guide its application. However, it is obvious that the debtors and the secured creditors here are interested parties within the meaning of the section and that "with respect to" means invoking and conducting insolvency proceedings under the *BIA*.

41 It is less obvious what is meant by "good faith" itself. There is no statutory definition. In the insolvency context, the Supreme Court of Canada in Century Services Inc v Canada (Attorney General) 2010 SCC 60 at para 70 said that good faith, along with appropriateness and due diligence, are "baseline considerations" for the Court when exercising authority under the *CCAA*, without elaborating on the nature of good faith.

42 More specifically, the duty to act in good faith in Court-supervised proceedings under Quebec's Civil Code, was recently considered by the Supreme Court of Canada in *9354-9186 Québec Inc. v Callidus Capital Corp*, 2020 SCC 10. In that case, the Court held a secured creditor's refusal to value its security before a proposal vote, so as to enable it to vote as an unsecured creditor and control the outcome of the vote, was done for an improper purpose and therefore in bad faith. The result in *Callidus*

is consistent with the earlier decision of the Court of Appeal of Quebec in *Uniforêt Inc, Re*, (2002), 119 ACWS (3d) 185, another restructuring case, to deny special status to a debenture-holder's group due to self-serving motives.

43 In both of these Quebec cases, it can be fairly said that the respective Courts in impugning the motives of the unsuccessful parties were concerned with upholding the intent and policy objectives of the *CCAA*: *Callidus* at paras 78 and 79; Uniforêt Inc, Re (2002), QJ No. 5457 (Quebec Superior Court) at para 95 aff'd by Quebec CA.

44 The Quebec cases shed some light on acceptable creditor behaviour during the course of restructuring proceedings. Overall, given the comments of the Supreme Court of Canada in Callidus, I am prepared to say that the intent and policy objectives of the *BIA* should inform the Court's consideration of the propriety of creditor behaviour in invoking and during receivership proceedings.

45 I need to comment on one further Quebec case concerning *when* the good faith requirement arises. The addition of section 4.2 to the BIA was concurrent with insertion of the identically-worded section 18.6 in the *CCAA*. In *Arrangement Relating to Nemaska Lithium Inc*, 2020 QCCS 1884, Gouin JCS held at paras 23-25 that the good faith requirement in section 18.6 arises only *after* the proceedings (in this case, restructuring) are initiated. This runs counter to my statement above that the good faith requirement in the section 4.2 covers previous conduct where it involves events precipitating Court involvement.

46 Importantly, in *Nemaska*, Gouin JCS was dealing with an application by an unsecured creditor for payment of an unpaid account for the manufacture of custom equipment, incurred prior to the granting of the initial Order under the *CCAA*, which Order included the usual stay provision. The applicant alleged that Nemaska's representatives had engaged in bad faith during the negotiations for the manufacturing contract and relied on section 18.6 to avoid operation of the stay and get paid before any other creditors.

47 Gouin CJS, in my view, rightly rejected the application on the basis that awarding payment to the creditor at this stage would seriously thwart the reorganization effort and was antithetical to the purpose of the *CCAA*. The creditor's remedy was to file a claim in the proceedings, not to skirt the proceedings by means of section 18.6.

48 In *Nemaska*, the conduct of Nemaska alleged by the creditor was unconnected to the *CCAA* proceedings. Here, the defendants are saying, in effect, that the *bringing* of a receivership application, in the circumstances they allege, lacks good faith. Within this context, I am prepared to say that section 4.2 of the BIA applies.

49 Still, the effect of section 4.2 should not reach back into time indefinitely. The conduct in question must be connected to the proceedings. The prospect of receivership proceedings first materialized with the sending of the first set of demand letters in October 2019. The sending of the demand letters and Maxium's conduct in relation to the loans thereafter, when receivership loomed, can be said factually and temporally to be connected to or "in respect of" the proceedings.

50 The next question is: where does one look to find the content of this good faith requirement?

51 In the contractual context, in Bhasin v Hrynew 2014 SCC 71 at para 33, the Court recognized good faith as a general organizing principle under the common law of contract, which (at para 66):

> ... manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed ...

52 In this context (at para 65), the Supreme Court of Canada comments that the duty of good faith does not require one party to serve the interests of the other but rather not to undermine the other's interests in bad faith. It is not elevated to a fiduciary duty. Then at para 73, the Court imposes a duty of honesty in contractual performance as a key aspect of the duty of good faith:

> ... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a

> simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance: Recent Developments", at p. 78; Belobaba; ***Greenberg v. Meffert*** (1985), 1985 CanLII 1975(ON CA), 50 O.R. (2d) 755 (C.A.), at p. 764; Gateway Realty, at para. 38, *per* Kelly J.; ***Shelanu Inc. v. Print Three Franchising Corp***. (2003), 2003 CanLII 52151 (ON CA), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: ***Wallace***, at para. 98; ***Honda Canada***, at para. 58.

53 A closer analogy to the present case is found in the Supreme Court of Canada's recent decision in *CM Callow Inc v Zollinger*, 2020 SCC 45 where the Court agreed with the trial judge who found that the defendant condo corporations (through their agent Zollinger) had by means of omission or silence misled the plaintiff into believing its snow removal contract would be renewed, when in actuality the decision had been made months earlier to terminate it. By making the plaintiff believe that the contract would be renewed, the defendants induced the plaintiff to provide an entire summer season of free services as an incentive for renewal.

54 In *Callow*, the Court extended the general duty of honesty in contractual performance to the exercise of discretionary decisions, even where the decision-maker has an absolute right by contract to make the decision.

55 In speaking for the majority, Kassirer J helpfully observes with regard to modes of dishonesty:

> [90] These examples encourage the view that the requirements of honesty in performance can, and often do, go further than prohibiting outright lies. Indeed, the concept of "misleading" one's counterparty — the term invoked separately by Cromwell J. — will in some circumstances capture forms of silence or omissions. One can mislead through action, for example, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct. To me these are close cousins in the catalogue of deceptive contractual practices (see, e.g., ***Yam Seng Pte Ltd. v. International Trade Corp. Ltd.***, [2013] E.W.H.C. 111, [2013] 1 All E.R. (Comm.) 1321 (Q.B.), at para. 141).
>
> [91] At the end of the day, whether or not a party has "knowingly misled" its counterparty is a highly fact-specific determination, and can include lies, half- truths, omissions, and even silence, depending on the circumstances. I stress that this list is not closed; it merely exemplifies that dishonesty or misleading conduct is not confined to direct lies. ...

56 The relationship between lender and debtor is contractual. The remedy of receivership sought from the Court is a contractual component and its initiation is subject to the exercise of the lender's discretion, although the legal test is statutory. The good faith to be exhibited must be "in respect of" *BIA* proceedings which, as I concluded, encompasses not only conduct in the course of such proceedings but also the conduct that precipitated the proceedings, as it relates to the indebtedness in question and the relationship between lender and borrower.

57 The application of good faith doctrines in the contractual context may lead to a Court finding that the transgressing party is liable in damages for breach of contract. Adopting those doctrines to inform the good faith requirement in section 4.2 of the BIA may lead to the Court invoking a broad discretionary authority to grant "any order that it considers appropriate in the circumstances", which presumably includes denial of the requested receivership order.

58 At least so far as a creditor invoking insolvency proceedings is concerned, I find it appropriate to import common law concepts stated in *Bhasin* and developed in *Callow* [1] , as cited above, to give content to the notion of "good faith" as found in section 4.2 of the BIA. I temper that statement only by saying that the Court must also remain cognizant of and seek to advance the policy objectives underlying the *BIA*.

59 I summarize and conclude on this point as follows:

TAB 5

2020 ABQB 809
Alberta Court of Queen's Bench

Bellatrix Exploration Ltd (Re)

2020 CarswellAlta 2545, 2020 ABQB 809, [2020] A.J. No. 1453, [2021] A.W.L.D. 478, [2021] A.W.L.D. 481, [2021] A.W.L.D. 483, [2021] A.W.L.D. 568, 327 A.C.W.S. (3d) 166, 86 C.B.R. (6th) 191

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

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

B.E. Romaine J.

Judgment: December 22, 2020
Docket: Calgary 1901-13767

Counsel: Kelly Bourassa (agent), James Reid (agent), for National Bank of Canada
Robert J Chadwick, Caroline Descours, for Bellatrix Exploration Ltd.
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Subject: Civil Practice and Procedure; Insolvency; Restitution
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.b Forms of secured interests
X.1.b.i Liens
X.1.b.i.D Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Procedure
XIX.2.a.iv Miscellaneous
Restitution and unjust enrichment
I General principles
I.1 When remedy available
Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous
Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or

to lift stay — Corporation was not entitled to equitable relief — Disclaimer provisions did not require performance of contract — Rather, these provisions provided opportunity for orderly termination of contract when necessary.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Corporation had no right to set-off either legal or equitable — Corporation's damages arose from pre-filing contract — Company had not violated Act process — Court was reluctant to interfere with contract between parties — Continuation of stay would not prejudice corporation.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Procedure — Miscellaneous

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — Company was transparent as to its situation after bankruptcy took place — No bad faith claim was tenable — If court was in error on issue of equitable rights, company could be entitled to relief on basis of delay — Corporation had not provided evidence of its claimed damages — Claim of corporation remained unliquidated and unsecured.

Restitution and unjust enrichment --- General principles — When remedy available

Parties in bankruptcy matter were originally parties to contract for sale and purchase of natural gas — Bankrupt company was granted protection under Companies' Creditors Arrangement Act in 2019 — Bankrupt company sent corporation disclaimer notice, regarding contract between parties — Corporation successfully applied to find that contract was eligible financial contract — Company was indebted to third party lenders — Lenders sought declaration that they had first priority interest in company's property — Corporation claimed company was obligated to perform remainder of contract — Corporation also claimed equitable relief — Parties applied for above-noted relief — Lenders granted declaratory relief, as to first priority interest in property of company — Corporation's claim as to obligation dismissed — Corporation did not have right to subject funds or to lift stay — Corporation was not entitled to equitable relief — There was juristic reason for enrichment — Corporation could not claim constructive trust.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

Alberta Energy Regulator v. Lexin Resources Ltd (2019), 2019 ABQB 23, 2019 CarswellAlta 73, 69 C.B.R. (6th) 39 (Alta. Q.B.) — considered

Alignvest Private Debt Ltd. v. Surefire Industries Ltd. (2015), 2015 ABQB 148, 2015 CarswellAlta 485, 23 C.B.R. (6th) 66, 39 B.L.R. (5th) 87, 16 Alta. L.R. (6th) 1, 3 P.P.S.A.C. (4th) 308, 608 A.R. 292 (Alta. Q.B.) — considered

Bank of Montreal v. Probe Exploration Inc. (2000), 2000 CarswellAlta 1659, 33 C.B.R. (4th) 173 (Alta. Q.B.) — followed

Bellatrix Exploration Ltd v. BP Canada Energy Group ULC (2020), 2020 ABCA 178, 2020 CarswellAlta 807, 79 C.B.R. (6th) 205 (Alta. C.A.) — referred to

Bellatrix Exploration Ltd., Re (2020), 2020 CarswellAlta 350, 77 C.B.R. (6th) 230 (Alta. Q.B.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 200, 2000 CarswellAlta 731, 261 A.R. 162, 225 W.A.C. 162, [2000] 11 W.W.R. 117, 84 Alta. L.R. (3d) 65 (Alta. C.A.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 239, 2000 CarswellAlta 1004, 192 D.L.R. (4th) 281, 20 C.B.R. (4th) 187, 266 A.R. 98, 228 W.A.C. 98, [2001] 2 W.W.R. 454, 87 Alta. L.R. (3d) 329 (Alta. C.A.) — followed

90 BP submits that the timing of Bellatrix's purported disclaimer and breach of contract was not a coincidence, in that Bellatrix knew payments for gas delivery under the GasEDI Agreement would be subject to BP's contractual right to set them off against BP's damages for Bellatrix's breach of contract. It argues that Bellatrix timed its delivery of the disclaimer notice and its breach of contract for the day immediately after BP made its payment for October gas deliveries on November 25, 2019, thus depriving BP of the ability to set that payment off against damages.

91 However, although it issued a disclaimer notice on November 25, 2019, Bellatrix continued to deliver gas under the agreement until November 24, 2019 and thus was not in breach of the contract until after that date. It did not mislead BP about the timing of its decision. While the decision on the timing of the disclaimer notice may have been strategic, it was not wrongful conduct.

92 BP also alleges that the timing of the disclaimer notice put it in the position of being an involuntary interim lender, as Bellatrix was able to use funds that BP may have been able to set-off if it had known about the disclaimer earlier.

93 BP's position is different from the position of an interim lender that advances funds to an insolvent debtor to finance an uncertain restructuring process. BP did not advance the roughly $14.5 million that Bellatrix estimated it would be able to achieve in additional revenue by selling its gas elsewhere, and BP it is not out of pocket for that amount.

94 BP also submits that failure to perform the agreement allowed Bellatrix to sell the gas it would have been required to sell BP to other parties and use the proceeds to fund operations and pay other creditors, including the actual interim lender, and that this was wrongful conduct.

95 As noted previously, Bellatrix's decision to cease performing an uneconomic contract during the CCAA process is not wrongful conduct: it allowed the company to generate increased revenue it would not be able to generate under the BP agreement to fund the company's operations while it attempted to restructure. BP was not required to pay for gas that was not delivered or provide any services to Bellatrix. While the outcome of the process was a liquidation, it was a going concern liquidation that was the best opportunity for the preservation of jobs and likely the maximization of value.

96 As noted previously, there is no merit to the allegation that Bellatrix misled the Court. As was the case with unjust enrichment, there is no link or causal connection between the alleged wrongful acts and the proceeds of sale of Bellatrix's assets.

97 In short, BP has no basis to claim a constructive trust based on wrongful conduct.

98 In *Hollinger Inc., Re*, 2013 ONSC 5431 (Ont. S.C.J. [Commercial List]) at para 39, leave to appeal denied in 2014 ONCA 282 (Ont. C.A.), the Ontario Court of Justice found that there is no legitimate reason for the proprietary remedy where the claimant relies on the remedy to try and gain a super-priority over other creditors in the CCAA. BP has an unsecured monetary damages claim and it should not be entitled to a constructive trust that would subvert the priorities of other creditors unless it has established that it would be unconscionable not to recognize such a trust. BP has not done so.

3. Bad Faith

99 BP also relies on section 18.6 of the CCAA, a new provisison that provides that any interested person in any proceedings under the *Act* shall act in good faith with respect to the proceedings, and that if it is satisfied that an interested person fails to act in good faith, the Court may make the appropriate order. The duty of acting in good faith is not a new duty for a CCAA debtor: sections 11.02(3), 33(3), 50(12), 50.4(11) and 65.12(2)

100 As I have noted previously, BP has not established any wrongful conduct by Bellatrix, which has merely used the tools available to it under the CCAA. Bellatrix was faced with an uneconomic agreement that it could not afford to perform while attempting to restructure. Bellatrix advised BP at an early stage of the proceedings that, in the circumstances, the agreement would never be accepted by a purchaser of Bellatrix's assets, which BP as a sophisticated party would likely have recognized. BP had the option of terminating the agreement as an EFC and exercising its right to set-off after termination, but chose the option of maintaining that Bellatrix was required to continue to perform the agreement.

101 While Bellatrix breached the GasEDI Agreement by non-performance, it has been transparent and candid throughout with respect to its position and conduct. Although it did not abide by the statutory 30 days notice under its notice of disclaimer, that was after BP refused to accept the disclaimer and advised Bellatrix of its view that the agreement was an EFC.

102 It is not unusual for a CCAA debtor to fail to perform uneconomic ongoing monthly contracts, both before and after filing, whether formally disclaimed or not, and such failure to perform is not per se bad faith.

103 The December payment has been held in trust pending a resolution of the issues of set-off and priority, so Bellatrix has not failed to act in good faith with respect to the payment. The timing of the disclaimer notice, while strategic, was not bad faith conduct, and Bellatrix has not, as alleged by BP, misled the Court or failed to comply with a Court order.

104 The Monitor has stated that it is satisfied that Bellatrix has acted in good faith throughout the proceedings.

105 As noted by Dr. Janis Sarra in "La bonne foi est une considération de base — Requiring Nothing Less than Good Faith in Insolvency Law Proceedings", Annual Review of Insolvency Law, eds Janis Sarra & Barbara Romaine, Toronto: Thomson Reuters Canada, 2014:

> The court will find bad faith conduct where a debtor, creditor or their professionals fail to meet the requirements to act candidly, honestly, forthrightly and reasonably in their dealings with one another and the court; where parties act capriciously and arbitrarily; or where they lie or otherwise knowingly mislead each other about matters relating to the insolvency proceedings.

106 Bellatrix has not exhibited conduct that would fall within these categories and has not acted in bad faith.

107 The First Lien Lenders and Bellatrix point out that BP failed to allege that Bellatrix was not acting in good faith through four stay applications, and only raised the allegation at the end of August, 2020. However, BP responds that, as Bellatrix as a concession to BP agreed to hold back an amount from the sale proceeds to cover BP's damages claim, it had no need to object to the stay extension. While I have not found bad faith by Bellatrix, I accept that BP's failure to object to the stay does not preclude its claim of bad faith in the circumstance.

4. Delay

108 The First Lien Lenders and Bellatrix submit that it would be inequitable to grant BP the super-priority it seeks for damages in priority to the stakeholders of Bellatrix.

109 They note that BP initially applied for various forms of relief, including orders directing Bellatrix to resume performance of the GasEDI Agreement and to remedy any existing default, but ultimately only pursued the issue of characterization of the GasEDI Agreement as an EFC. While BP may have been constrained by time limits in its initial application heard on January 23, 2020, it knew by February 25, 2020, that Jones, J's decision dealt only with the characterization of the GasEDI Agreement as an EFC, and that it was free to proceed with the remainder of the relief it sought before any other commercial duty judge. The order emanating from the decision grants BP leave to apply for further advice and direction with respect to the remaining relief.

110 While the pandemic interfered with regular commercial duty chambers in March and April, during Bellatrix's May 22, 2020 application before Hollins, J. to make interim distributions to certain priority and secured lenders. BP advised the Court that it may have a priority claim against Bellatrix and asked the Court to set aside US$14.5 million to be held in trust pending resolution of the disclaimer dispute with Bellatrix. The Court refused and suggested that BP bring its own application if it was concerned that it was facing disadvantage. It was not until August 7, 2020, in response to First Lien Lenders priority application, that BP brought a cross-application seeking relief similar to that it had originally sought in December, 2019.

111 The First Lien Lenders submit that it would be inequitable and prejudicial to the First Lien Lenders if BP were now allowed a priority claim in relation to Bellatrix's breach of the GasEDI Agreement. Bellatrix remains indebted to the First Lien

Lenders in excess of $44 million and it is clear that Bellatrix would not be able to pay the First Lien Lenders' secured claims in full if BP's unsecured damages claim is paid in priority to its claim.

112 Bellatrix points out that BP did not proceed to seek the remainder of its relief at a time when Bellatrix may have been able to perform the contract if ordered to do so. Now, nine months later, it has no assets that would allow performance.

113 BP responds that it has protested its treatment from the start, and that the First Lien Lenders have suffered no prejudice from the delay, as they and Bellatrix were aware of BP's claim from December, 2019, even though BP did not act on it until after the sale of assets had been concluded. As noted in *Blue Range Resource Corp., Re*, 2000 ABCA 285 (Alta. C.A.), albeit in a different context, the fact that creditors will receive less money if late claims are allowed is not prejudice. "Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: *Cohen, Re* (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31": *Blue Range* at para 40.

114 Bellatrix and the First Lien Lenders were fully aware of BP's claim, and there is no evidence that earlier determination of the claim would have caused Bellatrix to do anything differently with respect to the sale of assets. This is not a case of a creditor "lying in the weeds", or even a case where BP implied that it had changed its position even though it did not take earlier action. In the specific circumstances of this case, including the disruption of court proceedings caused by the COVID pandemic, I would find that BP is not disentitled to relief on the basis of delay if I am incorrect on its entitlement to equitable relief.

E. Has BP proved the amount of its claim for damages?

115 The amount of damages claimed by BP, in this application, $14.5 million, is equal to the amount that Bellatrix estimated, as part of the EFC determination application, that it could generate as additional revenue from the date of the disclaimer until the end of October, 2020, based on certain assumptions.

116 BP concedes that its damages claim is based on this estimate. However, that estimate must be reduced by the fact that Bellatrix did not realize any revenues for its natural gas after the sale of its assets closed on June 1, 2020.

117 I agree with Bellatrix and the First Lien Lenders that benefits to Bellatrix of the disclaimer do not necessarily equate to BP's entitlement to damages. BP has not provided any evidence of its actual damages relating to the disclaimer of or non-performance under the GasEDI Agreement, taking into account any mitigation BP would have been able to obtain by entering into other arrangements for the purchase of natural gas or otherwise.

118 Therefore, the claim remains an unliquidated unsecured claim.

V Conclusion

119 The First Lien Lenders are entitled to a declaration that they have a first priority interest in all the property of Bellatrix, including the December payment held in trust and funds held back from the sale of assets. Any amounts owing to BP are an unsecured claim. The Monitor is authorized to make a further distribution to the Agent in the amount of approximately $28.9 million, the exact amount subject to its final calculations.

120 BP's cross-application is dismissed.

Lenders' application granted; corporation's application dismissed.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Related Abridgment Classifications

Contracts
IX Performance or breach
IX.4 Obligation to perform
IX.4.d Sufficiency of performance
IX.4.d.i Duty to perform in good faith
Contracts
XIV Remedies for breach
XIV.5 Damages
XIV.5.q Miscellaneous
Torts
III Conspiracy
III.1 Elements
III.1.d Miscellaneous
Torts
X Interference with contractual relations and inducing breach of contract
X.1 Elements
X.1.b Interference or breach

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H

were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
>
> . . . . .
>
> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general

organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Indalex Ltd., Re | 2011 ONCA 265, 2011 CarswellOnt 2458, [2011] O.J. No. 1621, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 89 C.C.P.B. 39, 201 A.C.W.S. (3d) 553, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433 (headnote only) | (Ont. C.A., Apr 7, 2011)

2005 CarswellOnt 3445
Ontario Superior Court of Justice [Commercial List]

Ivaco Inc., Re

2005 CarswellOnt 3445, [2005] W.D.F.L. 3789, [2005] O.J. No. 3337, 12 C.B.R. (5th) 213, 141 A.C.W.S. (3d) 366, 47 C.C.P.B. 62

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

AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Farley J.

Heard: June 13-15, 2005
Judgment: July 18, 2005
Docket: 03-CL-5145

Counsel: Andrew J. Hatnay (Ontario Agent) for Quebec Pension Committee of Ivaco Inc.
Fred Mayers, Susan Rowland for Superintendent of Financial Services
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Jeffrey S. Leon, Sheryl E. Seigel, Richard B. Swan for National Bank of Canada
Daniel V. MacDonald for Bank of Nova Scotia
Robert W. Staley, Kevin J. Zych, Evangelia Kriaris for Informal Committee of Noteholders
Stephanie Fraser for Pension Benefit Guaranty Company
Peter F.C. Howard, Ashley John Taylor for Ernst & Young Inc., the Court-Appointed Monitor

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles
Pensions
I Private pension plans
I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.ii Registered plans
Headnote
Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles
Pension funds — I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which

subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

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Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) — referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 216 A.R. 328, (sub nom. *Bossano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199 (Alta. C.A.) — referred to

Beverley Bedding Corp., Re (1982), 40 C.B.R. (N.S.) 95, 1982 CarswellOnt 147 (Ont. Bktcy.) — referred to

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163, 1982 CarswellBC 480 (B.C. S.C.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — referred to

British Columbia v. National Bank of Canada (1994), 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 1994 CarswellBC 639, 2 G.T.C. 7348 (B.C. C.A.) — referred to

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Continental Casualty Co. v. MacLeod-Stedman Inc. (1996), 141 D.L.R. (4th) 36, [1997] 2 W.W.R. 516, 13 C.C.P.B. 271, 43 C.B.R. (3d) 211, 113 Man. R. (2d) 212, 131 W.A.C. 212, 1996 CarswellMan 537, C.E.B. & P.G.R. 8318 (headnote only) (Man. C.A.) — referred to

Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) — referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

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Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — referred to

I.B.L. Industries Ltd., Re (1991), 76 D.L.R. (4th) 439, 2 O.R. (3d) 140, 4 C.B.R. (3d) 301, 1991 CarswellOnt 180 (Ont. Bktcy.) — referred to

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — referred to

New Brunswick v. Peat Marwick Thorne Inc. (1995), 37 C.B.R. (3d) 268, 170 N.B.R. (2d) 373, 435 A.P.R. 373, 1995 CarswellNB 114 (N.B. C.A.) — referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — distinguished

Unisource Canada Inc. v. Hongkong Bank of Canada (1998), 1998 CarswellOnt 5122, 43 B.L.R. (2d) 226, 14 P.P.S.A.C. (2d) 112 (Ont. Gen. Div.) — referred to

Unisource Canada Inc. v. Hongkong Bank of Canada (2000), 2000 CarswellOnt 893, 15 P.P.S.A.C. (2d) 95, 131 O.A.C. 24 (Ont. C.A.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 2(1) — considered

s. 42 — referred to

s. 43(7) — considered

s. 136(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 57(3) — considered

s. 57(4) — referred to

s. 57(5) — considered

Régimes complémentaires de retraite, Loi sur les, L.R.Q. 1989, c. 38

Generally — referred to

s. 11 — referred to

MOTION by superintendent of financial services for order directing that portion of sale of insolvent business be distributed to its pension plans.

***Farley J.*:**

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

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

> Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.
>
> 87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order
>
> > (a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;
> >
> > (b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;
> >
> > (c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

2 The Superintendent's factum also stated at para. 2:

> 2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent — and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

3 The November 28, 2003 order provided:

> **Pension Payments**
>
> 3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.
>
> 4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

> 5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.
>
> 6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

4 The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

5 Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

6 While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

7 The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

8 It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14 $^{1}/_{2}$ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

9 The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

10 The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT — Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.); *Christian Brothers of Ireland in Canada, Re*

(2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]). See also *Unisource Canada Inc. v. Hongkong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bktcy.).

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

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

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

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

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

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

See also *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 73 C.B.R. (N.S.) 273 (B.C. C.A.); *Beverley Bedding Corp., Re* (1982), 40 C.B.R. (N.S.) 95 (Ont. Bktcy.); *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why

the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this — see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, *only* relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

14 Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is this type of situation of the nature envisaged at para. 12 of *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at p. 241 where Tysoe J. stated:

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

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

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

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

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

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

19 However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

20 While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper — but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

21 With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

22 In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

23 This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction — and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:
>
> > The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.
>
> Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that

> the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

24 The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank N.V. v. BCE Inc.* [2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List])] (April 30, 2003) a decision of mine at para. 26. This motion is dismissed.

25 Orders accordingly.

Motion dismissed.

End of Document

TAB 8

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONSC 5933
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc. v. GE Canada Leasing Services Co.

2013 CarswellOnt 14057, 2013 ONSC 5933, [2013] W.D.F.L. 5418, 233 A.C.W.S. (3d) 373, 6 C.B.R. (6th) 1, 7 C.C.P.B. (2nd) 239, 93 E.T.R. (3d) 15

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

In the Matter of a Plan of Compromise of Arrangement of Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc. and Grant U.S. Holdings GP Applicants and GE Canada Leasing Services Company, et al, Defendants

C.L. Campbell J.

Heard: July 23, 2013
Judgment: September 20, 2013
Docket: CV-09-8247-00CL

Counsel: Craig J. Hill, Roger Jaipargas for West Face Capital
Alex Cobb for PWC, Pension Administrator
Mark Bailey for Superintendent of Financial Services
Richard Swan, Jonathan Bell for Peter Grant Sr.
David Byers, Daniel Murdoch for Ernst & Young
Jane Dietrich for remaining applicants

Subject: Corporate and Commercial; Employment; Insolvency; Family; Property; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.c Paramountcy of Federal legislation
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.3 Pension funds
Bankruptcy and insolvency
X Priorities of claims
X.2 Preferred claims
X.2.d Wages and salaries of employees
X.2.d.ii Creation of statutory trust
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.f Lifting of stay
Pensions
I Private pension plans
I.1 Administration of pension plans
I.1.l Winding up of plan
I.1.l.ii Distributions on winding-up

Pensions
I Private pension plans
I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.i General principles

Headnote

Pensions --- Private pension plans — Payment of pension — Bankruptcy or insolvency of employer — General principles
In 2009, initial order was made in Companies' Creditors Arrangement Act (CCAA) proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to wind-up two defined benefit pension plans — Orders directed monitor to hold back from distribution to creditors amount estimated at that time to be wind-up deficit in plans — Issue arose of deemed trust arising as result of winding up orders — There was priority issue regarding remaining funds in hands of monitor between administrator of pension plans and second lien creditor of G Inc. — Creditor brought motion to lift stay and allow bankruptcy petition to proceed — Motion granted — Stay lifted — In 2013, Supreme Court of Canada released decision holding that, prior to initial order, deemed trust arose when pension plan was wound up in respect of wind-up deficits notwithstanding difficulty in determining precise amount of trust — Deemed trust that arises upon wind-up prevails when wind-up occurs prior to insolvency — Provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency regime applies — In circumstances G Inc. was not obliged to make special wind-up payments and was correct to seek directions — Court did not authorize deemed trust to prevail in insolvency by granting wind-up orders — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Pensions --- Private pension plans — Administration of pension plans — Winding up of plan — Distributions on winding-up
In 2009, initial order was made in Companies' Creditors Arrangement Act (CCAA) proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to wind-up two defined benefit pension plans — Orders directed that monitor hold back from distribution to creditors amount estimated at that time to be wind-up deficit in plans — Issue arose of deemed trust arising as result of winding up orders — There was priority issue regarding remaining funds in hands of monitor between administrator of pension plans and second lien creditor of G Inc. — Creditor brought motion to lift stay and allow bankruptcy petition to proceed — Motion granted — Stay lifted — In 2013, Supreme Court of Canada released decision holding that, prior to initial order, deemed trust arose when pension plan was wound up in respect of wind-up deficits notwithstanding difficulty in determining precise amount of trust — Deemed trust that arises upon wind-up prevails when wind-up occurs prior to insolvency — Provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency regime applies — In circumstances G Inc. was not obliged to make special wind-up payments and was correct to seek directions — Court did not authorize deemed trust to prevail in insolvency by granting wind-up orders — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Bankruptcy and insolvency --- Property of bankrupt — Pension funds
Deemed trust — In 2009, initial order was made in Companies' Creditors Arrangement Act (CCAA) proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to wind-up two defined benefit pension plans — Orders directed that monitor hold back from distribution to creditors amount estimated at that time to be wind-up deficit in plans — Issue arose of deemed trust arising due to wind-up orders — There was priority issue in respect of remaining funds in hands of monitor between administrator of pension plans and second lien creditor of G Inc. — Creditor brought motion to lift stay and allow bankruptcy petition to proceed — Motion granted — Stay lifted — In 2013, Supreme Court of Canada released decision holding that, prior to initial order, deemed trust arose when pension plan was wound up in respect of wind-up deficits notwithstanding difficulty in determining precise amount of trust — Deemed trust that arises upon wind-up prevails when wind-up occurs prior to insolvency — Provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency regime applies — In circumstances G Inc. was not obliged to make special wind-up payments and was correct to seek directions — Court did not authorize deemed trust to prevail in insolvency by granting wind-up orders — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Bankruptcy and insolvency --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Federal government and provinces — Paramountcy of Federal legislation

In 2009, initial order was made in Companies' Creditors Arrangement Act (CCAA) proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to wind-up two defined benefit pension plans — Orders directed that monitor hold back from distribution to creditors amount estimated at that time to be wind-up deficit in plans — Issue arose of deemed trust arising as result of wind-up orders — There was priority issue as to remaining funds in hands of monitor between administrator of plans and second lien creditor of G Inc. — Creditor brought motion to lift stay and allow bankruptcy petition to proceed — Motion granted — Stay lifted — Provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency regime applies — In circumstances G Inc. was not obliged to make special wind-up payments and was correct to seek directions — Court did not authorize deemed trust to prevail in insolvency by granting wind-up orders — In absence of provisions in plan under CCAA or specific court order, any creditor was at liberty to request CCAA proceedings be terminated if creditor's position could be better advanced under Bankruptcy and Insolvency Act — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Creation of statutory trust

Pensions — In 2009, initial order was made in Companies' Creditors Arrangement Act (CCAA) proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to wind-up two defined benefit pension plans — Orders directed monitor to hold back from distribution to creditors of G Inc. amount estimated to be wind-up deficit in plans — Issue arose of deemed trust arising as result of wind-up orders — There was priority issue in respect of remaining funds in hands of monitor between administrator of plans and second lien creditor of G Inc. — Creditor brought motion to lift stay to allow bankruptcy petition to proceed — Motion granted — Stay lifted — Deemed trust that arises upon wind-up prevails when wind-up occurs prior to insolvency — Provincial provisions in pension areas prevail prior to insolvency but once federal statute is involved, insolvency provision regime applies — In circumstances G Inc. was not obligated to make special wind-up payments and was correct to seek directions — In absence of provisions in plan under CCAA or specific court order, any creditor was at liberty to request CCAA proceedings be terminated if creditor's position could be better advanced under Bankruptcy and Insolvency Act — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Lifting of stay

In 2009, initial order was made in Companies' Creditors Arrangement Act proceedings regarding G Inc. — In 2011, orders were made authorizing G Inc. to take steps to wind-up two defined benefit pension plans — Orders directed that monitor hold back from any distribution to creditors of G Inc. amount estimated at that time to be wind-up deficit in plans — Issue arose of deemed trust arising as result of winding up orders — There was priority issue in respect of remaining funds in hands of monitor between administrator of pension plans and second lien creditor of G Inc. — Creditor brought motion to lift stay to allow bankruptcy petition to proceed — Motion granted — Stay lifted — Creditor's interests should prevail because otherwise deemed trust which did not exist at time of Initial Order would de facto be given priority by requirement that G Inc. make wind up deficiency payments, to pay priorities that would not be recognized under Bankruptcy and Insolvency Act — Supreme Court of Canada released 2013 decision holding that, prior to initial order, deemed trust arose when pension plan was wound up in respect of wind-up deficits notwithstanding difficulty in determining precise amount of trust — In that decision, Supreme Court of Canada limited deemed trust provisions of Pension Benefits Act to obligations prior to insolvency — To deny relief sought by creditor would be at odds with that decision — In absence of provisions in plan under CCAA or specific court order, any creditor was at liberty to request CCAA proceedings be terminated if creditor's position could be better advanced under Bankruptcy and Insolvency Act — Amounts held by monitor should not be applied to pension plans — Priority of proceeds would be to secured creditors in respect of amounts that would otherwise be payable in respect of wind-up deficiencies.

Table of Authorities

Cases considered by *C.L. Campbell J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (2002), 2002 CarswellOnt 2136, 35 C.B.R. (4th) 43 (Ont. S.C.J.) — referred to

[50] The Appellants' first argument would expand the holding of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII), 2010 SCC 60, [2010] 3 S.C.R. 379, so as to apply federal bankruptcy priorities to *CCAA* proceedings, with the effect that claims would be treated similarly under the *CCAA* and the *BIA*. In *Century Services*, the Court noted that there are points at which the two schemes converge:

> Another point of convergence of the CCAA and the BIA relates to priorities. Because the CCAA is silent about what happens if reorganization fails, the BIA scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. [para. 23]

[51] In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements, Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.

[52] The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (Crystalline Investments Ltd. v. Domgroup Ltd,, 2004 SCC 3 (CanLII), 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the PPSA's scheme rather than the federal scheme set out in the *BIA*.

[56] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law" *(Canadian Western Bank*, at para. 75). This Court has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation *(Husky Oil)*.

[57] None of the parties question the validity of either the federal provision that enables a *CCAA* court to make an order authorizing a DIP charge or the provincial provision that establishes the priority of the deemed trust. However, in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):

> When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

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

62 Now, the usefulness of the *CCAA* proceedings has come to an end. Is it appropriate for the Court to allow the Second Lien Lenders to institute bankruptcy proceedings and to forthwith issue a Bankruptcy Order in respect of GFPI? The Second Lien Lenders urge that the regime that will be in place as a result of the Bankruptcy Order will be that contemplated by Parliament

in the context of a liquidation and distribution of a bankrupt's assets. The process carried out for the transition from the *CCAA* proceedings to the *BIA* will it is suggested be as intended by Parliament and consistent with the principles established by the Supreme Court of Canada in the *Ted Leroy Trucking Ltd., Re* case.

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

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

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

66 Where there is a liquidating *CCAA* which proceeds by way of an Initial Order and the subsequent sale of assets with Vesting Orders all the creditors have an opportunity to object to the sales or process which is in effect an implicit *CCAA* Plan. A vote becomes necessary only when there is lack of consensus and a priority dispute requires resolution by a vote. In this case the claim of the secured creditors exceeded and continues to exceed, the value of the assets.

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

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

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

> i) GFPI should not be excused from any obligation with respect to the pension plans.
>
> ii) The wind ups which triggered the deemed trusts were the subject of specific judicial authorization and even assuming the stay of proceedings under the Initial Order applies, leave of the Court has been given to windup which triggers the deemed trusts.
>
> iii) The deemed trusts are triggered automatically upon wind up by independent operation of a valid provincial law which has not been overridden by specific order.
>
> iv) The Second Lien Creditor should not be permitted to challenge the deemed trusts at this stage since they did not challenge the windup orders. [5]

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

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

72 The *Indalex Ltd., Re* decision provides predictability and certainty of entitlement to the stakeholders of an insolvent company. If on the application for an Initial Order any party seeks to challenge that priority for the purpose of providing DIP financing in furtherance of a Plan or work out liquidation they are free to do so at the time of the Initial Order. Secured creditors can then decide whether they are willing to pursue a Plan or immediately apply for a bankruptcy order. [6]

Should GFPI be excused from wind up deficiency payments?

73 I am of the view that the question advanced by the Pension Administrators should be put another way "Is GFPI obligated in view of the provisions in para. 5 of the Initial Order (see paragraph 54) above to make the special payments that arise by virtue of the provisions of the *PBA*?

74 I accept the argument of the Pension Administrator and all those urging the deemed trust application that the Approval and Vesting Orders necessarily do not for all purposes freeze priorities at the point of sale. Absent other order of the Court, made at the time however, they do provide the certainty required by creditors who are asked to concur with the sales.

75 In the situation of GFPI there was a recognition in para. 5 of the Initial Order that there may be a challenge to expenses on an ongoing basis.

76 Where distribution to creditors is made following a sale of assets on full notice, that distribution in accordance with an Approval and Vesting Order does freeze the priorities with respect to that distribution, absent specific direction otherwise.

77 In this case, the issue of priority is said to arise in respect of a specific sum of money in the hands of the Monitor in respect of funds from assets sold and not distributed and is said to be determined in accordance with the Court Order made at the time of determination which acknowledged all the pension obligations including wind up.

78 To suggest that all claims and priorities never sought would apply to the Approval Orders past or future would, in my view, be entirely contrary to the principles and scheme of the *CCAA*. To conclude otherwise would risk that secured creditors to whom distribution had been made would be at risk of disgorgement and unpaid secured creditors to uncertainty of priority in future recovery.

79 This is why in my view the only consistent and predictable operation of the *CCAA* should give predictability as of the Initial Order to enable an informed decision to be made whether or not to proceed with bankruptcy. This issue is implicitly revisited every time there is a sale and distribution of assets.

80 The Supreme Court of Canada decision in *Indalex Ltd., Re* stands for the proposition that provincial provisions in pension areas prevail prior to insolvency but once the federal statute is involved the insolvency provision regime applies.

81 Justice Cromwell at paragraphs 177 and 178 in *Indalex Ltd., Re* spoke of the problem of extending the deemed trust. While he was speaking of the entirety of the issue his comments below are equally applicable to a deemed trust said to arise during insolvency:

> 177 Second, extending the deemed trust protections to the wind-up deficiency might well be viewed as counter-productive in the greater scheme of things. A deemed trust of that nature might give rise to considerable uncertainty on the part of other creditors and potential lenders. This uncertainty might not only complicate creditors' rights, but it might also affect the availability of funds from lenders. The wind-up liability is potentially large and, while the business is ongoing, the extent of the liability is unknown and unknowable for up to five years. Its amount may, as the facts of this case disclose, fluctuate dramatically during this time. A liability of this nature could make it very difficult to assess the creditworthiness of a borrower and make an appropriate apportionment of payment among creditors extremely difficult.

100 The Court did not authorize a deemed trust to prevail in insolvency by granting windup orders.

Should the Stay be lifted to permit the petition in bankruptcy to proceed?

101 If one accepts the above analysis a lifting of the stay to permit bankruptcy is not necessary to defeat a deemed trust said to arise after the Initial Order.

102 The basis of the motion on behalf of West Face Capital Inc. (the Second Lien Lenders) is set out in paragraph 2 of their factum:

> The Second Lien Lenders seek an Order lifting the stay of proceedings in respect of GFPI for the purpose of facilitating the issuance of a Bankruptcy Order in respect of GFPI forthwith. It is appropriate that a bankruptcy proceeding be put into place immediately, otherwise the priority secured interests of the Second Lien Lenders will be irrevocably prejudiced. In the absence of a bankruptcy proceeding, certain parties with an interest in advancing the claims of the pension beneficiaries have taken steps to re-position claims as priority claims or claims that must be paid immediately. The factual and legal basis for those claims have been advanced during the *CCAA* proceedings, notwithstanding the stay of proceedings.

103 Those opposed to the motion to lift the stay (which is supported by GFPI and the Monitor) urge that what is being requested is extraordinary relief from the requirements of the *PBA* and GFPI should not be excused from its obligation to make special payments simply at the asking.

104 While acknowledging that the court does have broad discretion, it is urged there is nothing in the circumstances of this case which would justify relieving GFPI of its obligation to make special payments.

105 It is further submitted that there is no decision that stands for the proposition that bankruptcy is automatic at the end of a *CCAA* proceeding and no independent reason for granting the bankruptcy order.

106 It is well settled that bankruptcy may well be an appropriate outcome of a *CCAA* process that has failed or has run its course. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at paragraph 23, Justice Deschamps noted "because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation distribution necessarily supplies the backdrop for what will happen if a *CCAA* is ultimately unsuccessful".

107 The issue of terminating a CCAA proceeding by permitting a petition in bankruptcy to proceed is one of discretion on the part of the supervising judge (see *Ivaco Inc., Re*, [2006] O.J. No. 4152 (Ont. C.A.) para. 77 and *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.) at para 41.)

108 Those who seek to have a stay lifted or to oppose the stay being lifted to obtain other relief must be acting in good faith. There is no evidence of lack of good faith here beyond the suggestion of delay.

109 The parties resisting the lifting of the stay urge that it not be granted on several grounds. The first is based on the delay on the part of West Face in bringing the motion. It is asserted that the motion should have been brought when the applicant first made it returnable on its motion for direction.

110 It is also urged that given the passage of time that the Monitor should be directed to make payments of those amounts which would otherwise have been made to date under the windup orders of the Superintendent.

111 The argument advanced by the Pension Administrator is that the *CCAA* process has completed what it set out to do, namely, liquidate the assets of GFPI and therefore there is no purpose to be served by lifting the stay and therefore the Order should not be granted to allow bankruptcy.

112 West Face seeks to lift the stay of proceedings granted by the Initial Order to enable the Petition commenced in March 2010 to proceed.

113 Like those opposing, West Face takes the position that the *CCAA* process has run its course and there is no likelihood of recovery on any other assets and adds therefore no reason for the applicant to continue to make any pension payments on account of pension plans. Since the security of West Face on behalf of the Second Liens Lenders is valid they are entitled to be paid from the assets on hand and a bankruptcy Order would expedite recovery.

114 What then is the process that is involved under the CCAA when there is not one but several sales of assets of an insolvent company over a period of time during which no one objects to the continuation of "payments being made in the ordinary course" which include ongoing payments to pension plans.

115 The *CCAA* continues to be sufficiently flexible to allow for an ongoing sale of assets without the necessity of a formal plan voted on by creditors. As I noted above, a sale of assets following an Initial Order is an implicit plan.

116 In this case following the sale of the major assets to Georgia Pacific there was a distribution the effect of which was to pay out the First Lien Lenders in entirety and indeed some payments to the Second Lien Lenders.

117 Following the granting of leave in *Indalex Ltd., Re* by the Supreme Court of Canada all of the parties in this case recognized that the issue of priority of deemed trusts would likely be clarified by that Court's decision in that case.

118 From the time that the motion of GFPI for direction with respect to payments on windup deficiency was first brought before this court, there was agreement by all Counsel that the Supreme Court decision in *Indalex Ltd., Re* if not determinative would provide considerable guidance on the issues in this case.

119 To my knowledge no party has been prejudiced by the delay in dealing with the priority issue. For this reason I do not accept the proposition that West Face should be denied leave on the basis of delay.

120 This leaves the question as to whether or not on the facts of this case leave to lift the stay should be granted. It was to the advantage of all stakeholders presumably including the pension plans and the Second Lien Lenders that the *CCAA* process be utilized for the sale of assets rather than the *BIA* process.

121 I am of the view that in the absence of provisions in a Plan under the *CCAA* or a specific court order, any creditor is at liberty to request that the *CCAA* proceedings be terminated if that creditor's position may be better advanced under the *BIA*.

122 The question then is whether it is fair and reasonable bearing in mind the interests of all creditors that those of the creditor seeking preference under the *BIA* be allowed to proceed. In this Court's decision in *Indalex Ltd., Re*, I questioned whether it would be fair to permit the stay to be lifted if it was simply because of the uncertainty as to whether at that time prior to the later appeals that the deemed trust provisions of the *PBA* prevailed.

123 In this case West Face urges its interests should prevail because otherwise a deemed trust which did not exist at the time of the Initial Order would *de facto* be given priority by the requirement that GFPI make wind up deficiency payments, to pay priorities that would not be recognized under the *BIA*.

124 I conclude that the argument on behalf of West Face should succeed. The purpose of the process under insolvency is to provide predictability to the interests of creditors but at the same time allow for flexibility as under the *CCAA* where that provides a greater return than would the operation of the *BIA*. That has been the case here.

125 If the purpose under the insolvency statutes is to maximize recovery to the extent possible for all concerned, then the imposition of a priority which arises only in the middle of insolvency except where made like a DIP financing, for the purpose of enhancing recovery would likely result in credit being much more difficult if not impossible to obtain in the first instance.

126 The Supreme Court of Canada in *Indalex Ltd., Re* limited the deemed trust provisions of the *PBA* to obligations prior to insolvency. To deny the relief sought by West Face would in my view be at odds with that decision.

127 For the above reasons the Order sought by West Face will be granted. Those opposing the stay urged that all payments that should have been made under the deficiency wind up be made until the date of this decision.

128 While I have some sympathy for the position of the pension plans in these circumstances I am satisfied that the amounts held by the Monitor should not be applied to the pension plans. From the time of the return of the motion for directions all parties were aware of the need for a determination to be made following the Supreme Court of Canada decision in *Indalex Ltd., Re*.

Conclusion

129 As noted above in this decision virtually all of the judges who have had to deal with this difficult issue of pensions and insolvency have commented that ultimately these are matters to be dealt with by the Federal and Provincial governments.

130 The difficulty of dealing with these complex issues is not restricted to Canada. In her book of 2008 [7] Prof. Janis Sara has chronicled the way in which various countries around the world have sought to deal with the difficulty of pension priority in the context of business financing and insolvency. The conclusion is there is no easy answer.

131 I have no doubt that the question of pensions will be an ongoing issue for some time to come. There is an urgency that legislators both Federal and Provincial address the issue.

132 In this case and for the above reasons the priority of proceeds will be to the Secured Creditors in respect of those amounts that otherwise would be payable in respect of windup deficiencies.

133 I would not think this is an appropriate matter for costs disposition but if any Counsel disagrees or there is any further issue with respect to an Order following from this decision I may be spoken to.

Motion granted.

Footnotes

1 Decision in this Court at 2010 ONSC 1114 (Ont. S.C.J. [Commercial List]) and in Court of Appeal for Ontario, 2011 ONCA 265 (Ont. C.A.).

2 2010 ONSC 1114 (Ont. S.C.J. [Commercial List]), 2011 ONCA 265 (Ont. C.A.).

3 Pension Benefit Act RSO 1990, c. P.8 57 Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into a pension fund. R.S.O. 1990, c. P.8, s. 57 (3).

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations. R.S.O. 1990, c.P.9, s.57 (4).

4 2010 SCC 60 (S.C.C.) at para. 77.

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

TAB 9

2006 NBQB 279
New Brunswick Court of Queen's Bench

Simpson's Island Salmon Ltd., Re

2006 CarswellNB 453, 2006 NBQB 279, 24 C.B.R. (5th) 17, 302 N.B.R. (2d) 10, 784 A.P.R. 10

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

And In the Matter of a plan of compromise or arrangement of the
applicants, Simpson's Island Salmon Ltd., and Tidal Run Aqua Inc.

P.S. Glennie J.

Heard: June 14, 2006
Judgment: June 16, 2006
Docket: S/M/69/05

Counsel: Rodney J. Gillis, Q.C., John C. Gillis for Applicants
Raymond P. Gorman, Q.C. for Monitor
R. Gary Faloon, Q.C. for Farm Credit Corporation, The Bank of Nova Scotia
Catherine A. Lahey, Stephen J. Hutchinson for Heritage Salmon Limited
Mel K. Norton for 047759 N.B. Ltd.
John B.D. Logan for Minister of Business New Brunswick

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues
Two companies had business of salmon farming and harvesting, and brought application seeking extension of stay termination date pursuant to Companies' Creditors Arrangement Act ("CCAA") — Major creditor which was feed supplier opposed application — Application granted — Extension of stay termination date was ordered and date for filing plan of arrangement ("plan") was set since CCAA proceeding constituted viable restructuring of companies' business — Evidence showed that companies acted in good faith and with due diligence in putting forth plan — Circumstances existed that made extension of stay of termination appropriate since plan with plausible financing could be finalized and filed for review by creditors in near future if extension was granted — Evidence of monitor appointed by court showed that proposed plan would significantly pay outstanding indebtedness and allow companies to continue operating salmon business — Delay in putting together plan was caused by delay in sale of 2004 crop of salmon since plan required financing arrangements that depended on knowing price realized from salmon and extent of debt — Need for flexibility with respect to delay in CCAA proceedings existed since value of salmon assets increased with time as they grew — Monitor found no evidence that purpose of CCAA proceeding was to fund litigation against major creditor which was feed supplier — CCAA proceeding did not constitute liquidation of major asset which was salmon and evidence showed that proposed plan was for viable restructuring of companies — Monitor's evidence showed that if extension was not granted for filing plan and process proceeded to liquidation of assets by way of receivership, returns to creditors would be diminished.

of reorganization and financing with potential financers, the Applicants' accountant, Applicants' counsel, the Monitor and other stakeholders in the industry.

In conjunction with the Applicants' counsel, we have prepared a draft Plan of Arrangement, outlining, in a general way at this time, the reorganization and financing of the operations of SISL.

The draft Plan was reviewed with the Monitor at a meeting in Saint John on June 5, 2006. Also, present at the meeting was the Applicants' accountant, Lori Toombs, who discussed with the Applicants' counsel and the Monitor draft projected figures for SISL's continued operation and placement of smolt in the water by the fall of 2006.

The related litigation, cause No. S/C/123/06, is not part of the Plan and the Plan is in no way contingent on, or funded by that litigation.

The Applicants intend to resolve the issue of outstanding debt to Heritage, and all other Creditors, at least for the purposes of voting on the Plan through a claims bar process to be approved by this Honourable Court. The Applicants intend to file a Motion requesting the Court approve such a process by late June 2006.

Once the value of the harvest is known, and the extent of debt determined, financing efforts can be finalized which will complete the Plan. The Plan will then be put to the Creditors for a vote expected by mid to late July 2006.

The Need for an Extension

An extension of the stay of termination date will permit the Applicants to complete the steps outlined above, necessary to put the Plan to the creditors by July 2006.

I believe that if the Stay Termination date is not extended, the Applicants' creditors may commence proceedings against the Applicants which would highly prejudicial to the operation of the Applicants and would impair their ability to complete a successful restructuring.

The management of the Applicants believes that they have acted, and will continue to act in good faith and due diligence and request an extension of the stay of termination date and other relief as set out in the Notice of Motion.

50 The Monitor comments on the Status of the Plan of Arrangement under the *CCAA* as follows in his most recent report:

6.1 On June 5, 2006, the Monitor (Paul Goodman of GRI) and legal counsel (Ray Gorman) met in Saint John with Mr. Donald Richardson (Officer of the Applicants); Lori Toombs, C.A. (Applicants' Accountant); Rod Gillis, John Gillis, and Cathy Fawcett, (legal counsel to the Applicants) and a Potential Lender.

6.2 At the June 5, 2006 meeting, a frank discussion was held as to status of the CCAA Plan and various scenarios. Simpson's provided the Monitor with a draft Plan Of Arrangement and Financial Projections through to and including the fiscal year ended April 30, 2009.

6.3 The Monitor raised a number of questions regarding the materials presented and discussions included possible timings related to the filing of the Plan, Cash Flow associated with the sale of the 2004 salmon crop, and the future financing of operations.

6.4 Of significant importance in the finalizing of the CCAA along with the determination of the Heritage claim discussed in Section 5, is the amount of the final net proceeds available to Simpson's from the sale of the 2004 salmon crop, which amount will not be received until the end of July, 2006. This amount should be determined shortly after the last salmon are harvested on or about July 1, if the harvest concludes as planned and there are no further delays in the said harvest.

6.5 Having met with the Applicants and their advisors and having reviewed the Simpson's preliminary draft plan and Financial Projections, and having heard that significant progress is being made as to the future financing of operations,

including the funding needed to address the claims of the pre-December 5, 2005 creditors, the Monitor concludes that the Applicants have acted, and continue to act, in good faith and with due diligence if given sufficient time by this Honourable Court, can and will file a Plan of Arrangement under CCAA that will have a significant chance of being successful.

6.9 It is the view of the Monitor that if the Extension Of Time to file the Plan Order is not granted by June 16, 2006, and the process proceeds to a liquidation of assets by way of a Receivership, the costs of doing such will only diminish returns to creditors. The motion advises that the salmon will still have to be harvested and sold and it believes Simpson's is the best party to do so. The CCAA process can be revisited once the salmon are sold and funds collected, in the event a Plan of Arrangement has not been filed.

51 In his report, Mr. Goodman writes at Section 7:

7. Recommendations

. . . . .

7.2 THAT whereas a preliminary draft Plan of Arrangement has been presented by Simpson's to the Monitor, along with plausible financial projections and preliminary indications of available future financing, and given that there has been a delay in the harvest of the 2004 salmon crop through no fault of Simpson's, the Monitor would support an Extension Of Time for the Applicants to file their Plan Of Arrangement under CCAA.

7.3 AS the Applicants have requested an extension, the Monitor believes such extension should be no longer than to July 28, 2006, by which time the total proceeds of the sale of the 2004 salmon crop should be known and which proceeds should be substantially received by the Monitor's Escrow Account.

7.4 THE Monitor recommends that Simpson's forthwith commence the process to establish the quantum of the amounts owed to its creditors by sending a communication to the creditors along with a Proof of Claim and ask that such claim be directed to the Monitor within ten (10) days of the said communication being given. This process may allow the convening of a Creditors' Meeting to occur more quickly once a Plan Of Arrangement has been filed with the Court.

7.5 THE Monitor respectfully confirms that it supports an extension of time to file a Plan Of Arrangement, because such a request we believe is reasonable in the circumstances, the recommendation is supported by the opinion of the Monitor's counsel and by the actions of the Applicants in acting in good faith and with due diligence in preparing a plan and is consistent with the anticipated Cash Flow.

52 I am satisfied on the evidence before me that viable plans of compromise or arrangement are forthcoming in the near future from both Simpson's Island and Tidal Run.

53 Counsel for Heritage asserts that by Simpson's Island and the Monitor now stating that the related litigation is not part of the Plan and that the Plan is in no way contingent upon that litigation or as the monitor states "*there is a CCAA scenario that may provide an opportunity for a successful plan to be made without the quantification and security positions first being determined*", there has been a change of plan which can be construed to be evidence of bad faith.

54 An allegation of bad faith is a serious assertion. The Monitor has advised this Court that the new *CCAA* "*scenario*" came about as the result of the new Monitor meeting with the officers of Simpson's Island and their legal and financial advisors. I accept the Monitor's explanation. This is the right of any *CCAA* applicant in the process of drafting a plan of arrangement. I conclude that Heritage allegations of bad faith are without merit.

55 After the granting on April 26, 2006 of the Third Extension of the Stay Order until June 16, 2006, Heritage Salmon sought leave to appeal the decision of this Court to grant the third extension. Leave to appeal was denied in a decision reported at *Heritage Salmon Ltd. v. Simpson's Island Salmon Ltd.*, 2006 CarswellNB 303 (N.B. C.A.). In denying the motion for leave to appeal, Madam Justice Larlee writes at ¶7:

> Turning now to the substantive issues relevant to the disposition of the application, I am convinced that there was some evidence to conclude that there was a plan of compromise or arrangement. There is affidavit evidence that the debtors were working with the Monitor diligently and in good faith.

56 Today, I am satisfied on the evidence that there is even stronger evidence that plans of arrangement or compromise are being finalized. Simpson's Island and the Monitor are waiting for Heritage to process and market the final portion of the 2004 salmon crop and to confirm the amount of money to be realized from the sale. Once the figures are received from Heritage (estimated to be during the first week of July), the figures can then be plugged into the Plan and the Plan then distributed to all creditors. It would appear on the evidence that we are approximately 20-22 days away from the Plan being filed by Simpson's Island.

57 In its written submission, Heritage states:

> At the same time, the Monitor has suggested the Applicants will not be in a position to restructure their affairs and formulate a plan at all unless and until they are provided an opportunity to prosecute their claims for unliquidated damages against Heritage and Old Heritage. Accordingly, the Monitor has essentially confirmed that no plan is forthcoming in the reasonably foreseeable future. In such circumstances, it is submitted the Applicants are not making a proper use of the CCAA.

58 As mentioned, this assertion by Heritage is not accurate. The Monitor has in fact confirmed that a Plan of Compromise or Arrangement is forthcoming in the near future, namely approximately three weeks for Simpson's Island and four weeks for Tidal Run.

59 As well, the Monitor has confirmed that there is a *CCAA* scenario that may provide an opportunity for a successful plan to be made without the quantification and security positions being first determined.

60 It should also be noted that the Harvesting, Processing and Marketing Agreement between Simpson's Island and Heritage Salmon was only recently executed after various court applications had to be made and the processing of the balance of the 2004 salmon crop will not begin until next Monday, June 18th.

61 There is no question on the evidence, and I so find, that the Applicants are closer today to proposals than they were at the beginning of these proceedings and at the hearing of the last application for an extension.

62 As mentioned, to obtain an extension, the applicant must establish three pre-conditions:

> (a) that circumstances exist that make the order appropriate;
>
> (b) that the applicant has acted and continues to act in good faith; and
>
> (c) that the applicant has acted and continues to act with due diligence.

63 In his report dated June 12, 2006, the Monitor concluded that Simpson's Island and Tidal Run have acted and continue to act in good faith and with due diligence and "*if given sufficient time by this Honourable Court, can and will file a Plan of Arrangement under CCAA that will have a significant chance of being successful*."

64 As mentioned, the Plan of Arrangement for Simpson's Island is expected to be available for circulation to its creditors by July 7, 2006, to be voted on around mid-July. The Plan of Arrangement for Tidal Run is expected to be ready for circulation to creditors by July 15th and will be voted on during the first week of August. It is, in both cases a matter of weeks. I am satisfied that circumstances exist that make an extension order appropriate.

65 I am also satisfied that the Applicants have acted and are continuing to act in good faith and with due diligence.

66 In the result, an order will issue extending the Stay Termination Date and the date for filing a Plan of Arrangement to July 28, 2006 at 4 p.m.

Application granted.

