

THE KING'S BENCH
WINNIPEG CENTRE

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
WAREHOUSE ONE CLOTHING LTD.

(the "Applicant")

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

MOTION BRIEF OF THE APPLICANT
(Comeback Hearing - Amended and Restated Initial Order)
DATE OF HEARING: FRIDAY, MAY 15, 2026 AT 10:00 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE GRAMMOND

PITBLADO LLP
2500 - 360 Main Street
Winnipeg, Manitoba
R3C 4H6

Catherine E. Howden / Johanna Thiessen

Phone No. (204) 956-3532/(204) 956-3577
Fax No. (204) 957-0227
Email. howden@pitblado.com/jthiessen@pitblado.com

(File No. 71342.1)

THE KING'S BENCH
WINNIPEG CENTRE

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
WAREHOUSE ONE CLOTHING LTD.

(the "Applicant")

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

INDEX

	<u>Page No.</u>
PART I DOCUMENTS AND AUTHORITIES RELIED UPON	3
PART II OVERVIEW	4
PART III FACTS	6
PART IV ISSUES	6
PART V ARGUMENT	7
PART VI CONCLUSION	23

PART I
DOCUMENTS AND AUTHORITIES TO BE RELIED UPON

Documents To Be Relied Upon

1. Notice of Application filed April 30, 2026;
2. Affidavit of Shamsh Kassam affirmed May 1, 2026 (the "**First Kassam Affidavit**");
3. Consent of Alvarez & Marsel Canada Inc. to act as Monitor dated May 1, 2026;
4. Pre-Filing Report of Alvarez & Marsel Canada Inc. (the "**Monitor**") dated May 4, 2026 ("**Pre-Filing Report**");
5. Initial Order, pronounced by the Honourable Madam Justice Grammond on May 6, 2026 ("**Initial Order**");
6. First Report of the Monitor dated May 12, 2026 ("**First Report**"); and
7. Notice of Motion filed May 12, 2026.

Authorities to Be Relied Upon

TAB

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11, 11.02(2), 11.02(3), 11.2(4), 11.52, and 36(3);
2. *Court of King's Bench Rules*, Man. Reg. 553/88, as amended, Rules 2.03, 3.02, 14.05, 16.04, 16.08 and 37;
3. *The Court of King's Bench Act*, C.C.S.M. c. C280, s. 38;
4. *North American Tungsten Corp., Re*, 2015 BCSC 1376;
5. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60;
6. *Nortel Networks Corp., Re*, 2014 ONSC 5274;
7. *Federal Gympsum Co., RE*. 2007 NSCC 347;
8. *Grant Forest Products Inc., Re*, 2009 O.J. No. 3344
9. *9354-9186 Quebec inc. v Callidus Capital Corp*, 2020 SCC 10;
10. *Mountain Equipment Co-operative (Re)*, 2020 BCSC 2037;
11. *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ONSC);
12. *Aralez Pharmaceuticals Inc., (Re)*, 2018 ONSC 6980;
13. *Indalex Ltd., Re* 2011 ONCA 265; and
14. Compare draft ARIO to Initial Order.

PART II
OVERVIEW

1. On May 6, 2026 this Honourable Court granted to the Applicant, Warehouse One Clothing Ltd., an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") (hereinafter the "Initial Order") which ordered, *inter alia*, an initial stay of proceedings against the Applicant and the Monitor until May 15, 2026 (the "Initial Stay Period"), appointed Alvarez & Marsal Canada Inc. as monitor (in such capacity the "Monitor"), approved a DIP Loan and DIP Agreement to fund the Applicant's financial requirements during the Initial Stay Period, authorized payment of certain pre-filing amounts with the consent of the Monitor, and granted certain Priority Charges over the Applicant's Property (as defined in the Initial Order).

2. The Applicant seeks an Amended and Restated Initial Order (the "ARIO"), substantially in the form attached as Schedule 1 to the Notice of Motion including, *inter alia*, for an Order:

- a) Abridging the time for service, validating service or dispensing with service if necessary of the within Notice of Motion and the materials filed in support thereof, such that this motion is properly returnable on May 15, 2026 at 10:00 a.m. and dispensing with further service thereof;
- b) Extending the stay of proceedings granted in the Initial Order to August 28, 2026 (the "Stay Period");
- c) Authorizing the Applicant to pay employee retention and incentive payments, with the consent of the Monitor and DIP Lender, not exceeding \$350,000 in the aggregate (the "Employee Retention Payments");

- d) To increase the amount secured by the Administration Charge from \$500,000 to a maximum of \$750,000;
- e) To approve and authorize the Applicant to access the full availability under the DIP Loan in accordance with the conditions set out in the DIP Agreement, to the maximum aggregate principal amount of \$3,000,000;
- f) To increase the maximum amount secured by the DIP Lender's Charge from \$1,000,000 to a maximum principal amount of \$3,000,000, plus accrued interest and other amounts payable to the DIP Lender under the DIP Agreement;
- g) Approving the Sale Guidelines for the sale of all or substantially all of the Applicant's inventory, merchandise and furniture, fixtures and equipment (the "**Sale**");
- h) Approving the Consulting Agreement between the Applicant and Gordon Brother Canada ULC (the "**Consultant**") dated May 6, 2026 (the "**Consulting Agreement**");
- i) Authorizing the Applicant, with the assistance of the Monitor and the Consultant, to undertake the Sale; and
- j) Authorizing the Applicant, with the assistance of the Monitor, to pursue all opportunities for any sale, assignment or other transaction to maximize the value of the Applicant's business (the "**Business**") and its remaining property (the "**Transaction**"), subject to Court approval of any material Transaction.

3. Highgate Capital Ltd. ("**Senior Lender**" and "**DIP Lender**") and WHO Industries Inc., R.I.S. Media Ltd. (together with Highgate Capital Ltd., each an "**Affiliate Lender**") are in support of the proposed ARIO.

PART III

FACTS

4. The facts relied upon by the Applicant in support of this Motion are set out in detail in the First Kassam Affidavit, the Pre-Filing Report and the First Report.

PART IV

ISSUES

5. The primary issues to be determined by this Honourable Court are:

May 15, 2026 Hearing – Notice of Motion

- a) Should this Court abridge the time for service, validate service of the Notice of Motion and materials filed in support?
- b) Should the Stay Period be approved?
- c) Should the Applicant be granted authority to pay certain Employment Retention Payments, with the Consent of the Monitor and DIP Lender?
- d) Should the Administration Charge be increased?
- e) Should the Applicant's access to full availability under the DIP Loan be authorized and approved to the maximum principal amount of \$3,000,000 and the DIP Lender's Charge be increased?
- f) Should this Court approve the Consulting Agreement and the Sale and authorize the undertaking of the Sale?

- g) Should the Applicant, with the assistance of the Monitor, be authorized to pursue all opportunities for any sale, assignment or other Transaction to maximize the value of the Business and its remaining property, subject to Court approval of any material Transaction?

PART V
ARGUMENT

May 15, 2026 Hearing – Notice of Motion

A. This Court should abridge the time for service, validate service of the Notice of Motion and materials filed in support.

6. Notwithstanding the ordinary requirements for service pursuant to the *Court King's Bench Rules*, this Court has authority to abridge time requirements, validate defective service, and to dispense with service where necessary in the interests of justice.

**Court of King's Bench Rules, ManReg 553/88,
Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended [TAB 2]**

7. As such, the Applicant submits that, to the extent it may be necessary, service of the Notice of Motion and supporting materials ought to be abridged and/or validated.

B. The Stay Period should be approved.

8. Subsection 11.02(2) of the CCAA provides that a court may extend the stay of proceedings granted under an Initial Order for such period of time as the Court may deem appropriate. Section 11.02(2) provides as follows:

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

CCAA ss. 11.02(2) [TAB 1]

9. Subsection 11.02(3) of the CCAA establishes that the onus is on the Applicant to establish that circumstances exist that make the order appropriate and that the applicant has also acted, and is acting, in good faith and with due diligence:

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

CCAA ss. 11.02(3) [TAB 1]

10. In considering whether to grant an extension to the Stay Period, courts have regard to whether “circumstances exist that make the order appropriate,” specifically whether an extension to the Stay Period will advance the remedial purposes of the CCAA. The Supreme Court of Canada has held that the key question is whether the order meaningfully furthers the CCAA’s remedial objective of “avoiding the social and economic losses resulting

from with liquidation," with appropriateness relating to both the order's purpose and the means used.

**North American Tungsten Corp., Re, 2015 BCSC 1376 ("Tungsten"), para 25
citing Ted Leroy Trucking Ltd. Re, 2010 SCC 60 at para 70 [TAB 4]**

11. When granting an extension, it is a prerequisite for the moving party to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the CCAA. The debtor must show at least it has a "kernel of a plan".

Tungsten, para 26 [TAB 4]

12. It is appropriate to give deference to the debtor and its monitor when the CCAA proceedings are in their early stages provided the requirements of s 11.02(3) have been met.

Tungsten, para 28 [TAB 4]

13. The good faith and due diligence requirements of s. 11.02(3) include observing reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the CCAA process.

Tungsten, para 29 [TAB 4]

14. Additionally, courts have granted stays in the context of liquidating CCAA proceedings:

21 ... In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

Nortel Networks Corp., Re, 2014 ONSC 5274, paras 21-23 [TAB 6]

15. Courts may consider: (i) the debtor company's progress during the previous stay periods, and (ii) whether creditors will be prejudiced if the extension is granted versus prejudice to the debtor, creditors and other stakeholders in not granting the extension.

Federal Gympsum Co., RE. 2007 NSCC 347 at paras 29-30 [TAB 7]

16. Since the pronouncement of the Initial Order, the Applicant, with the assistance of the Monitor, has been acting in good faith and with due diligence to:

- a) notify creditors and its stakeholders, including landlords, employees, logistics suppliers, trade suppliers and others of the granting of the Initial Order;
- b) engage with critical stakeholders;
- c) stabilize the business and operations of the Applicant to enable an orderly liquidation of its business through the CCAA proceedings;
- d) terminate employees who are non-essential to the implementation of the liquidation;
- e) disclaim certain real property leases under s. 32 of the CCAA; and
- f) prepare for the commencement of the liquidation, including by engaging the Consultant (subject to Court approval) and formulating the Sale Guidelines.

First Report, s. 4

17. The extension of the Stay Period is necessary and appropriate to permit the Applicant, with the assistance of the Consultant and under the supervision and oversight of the Monitor to, *inter alia*, commence and implement an orderly liquidation of its inventory, furniture, fixtures and equipment (“**FF&E**”) in order to maximize recovery for the Applicant and its stakeholders.

18. Further, the extension of the Stay Period is necessary and appropriate for the Applicant, with the assistance of the Monitor, to pursue all transaction or restructuring opportunities to maximize the value of the Business and its remaining property, subject to Court approval of any material transaction.

First Report, s. 6

19. The cash flow projections prepared by the Applicant with the assistance of the Monitor (the “**Updated Cash Flow Forecast**”) support that the Applicant will have sufficient liquidity during the Stay Period to conduct an orderly liquidation and funds the costs of the CCAA proceedings.

First Report, s. 7

20. The Monitor, Senior Lender, DIP Lender and Affiliate Lenders are in support of the extension of the Stay Period to August 28, 2026.

C. The Employee Retention Payments should be authorized.

21. The Applicant submits that payment of Employee Retention Payments, not exceeding \$350,000 in the aggregate, with the consent of the Monitor and the DIP Lender, should be approved.

22. A key employee retention plan (“KERP”) has been described as a plan designed to retain employees who are critical to the management or operations of a debtor company, ensuring their continued service at a time when financial distress may otherwise prompt them to seek alternative employment.

**Grant Forest Products Inc., Re, 2009 O.J. No.3344
 (“Grant Forest”) at para 8 [TAB 8]**

23. The granting of KERP provisions in CCAA proceedings is a matter left to the Court’s discretion.

Grant Forest at para 8 [TAB 8]

24. The courts, in determining whether KERP provisions should be ordered in a CCAA proceeding, consider the following factors:

- a) *Arm's length safeguards*: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process — from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input;
- b) *Necessity*: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching;

- c) *Reasonableness of Design*: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

**Aralez Pharmaceuticals Inc., (Re), 2018 ONSC 6980,
para 30 [TAB 12]**

25. The Applicant submits that it be granted authority to pay the Employee Retention Payments with the Consent of the Monitor and the DIP Lender, not exceeding \$350,000 in the aggregate for the following reasons:

- a) it is contemplated that the retention payments will be made to certain designated head office, store-level and regional employees who are considered by the Applicant, exercising its business judgment, to be critical to the success of the CCAA proceedings;
- b) the retention payments are structured to ensure the recipients maintain their employment with the Applicant and provide services to the Applicant as necessary through liquidation process;
- c) the requested authorization is intended to provide stability to the Applicant by encouraging key employees to remain employed with the Applicant during the CCAA proceedings; and
- d) the Monitor and DIP Lender supports the Applicant's request for authority to pay the Employee Retention Payments.

First Report s. 6.5 0 6.8

D. The Administration Charge should be increased.

26. The Court may grant an administration charge pursuant to subsection 11.52 of the CCAA.

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

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

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

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

Priority

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

CCAA, ss. 11.52(1)(2) [TAB 1]

27. The courts have considered the following factors in determining whether to grant an administration charge:

- a) the size and complexity being restructured;
- b) the proposed role of the beneficiaries of the charge;
- c) whether there is an unwarranted duplication of roles;
- d) whether the quantum of the proposed charge appears to be fair and reasonable;

- e) the position of the secured creditors likely to be affected by the charge; and
- f) the position of the Monitor.

**Mountain Equipment Co-operative (Re), 2020 BCSC 2037,
para 58 [TAB 10]**

28. The Initial Order approved an Administration Charge in an amount not to exceed \$500,000 in favour of the Monitor, counsel to the Monitor, and counsel to the Applicant.

29. The Applicant submits that the Administration Charge should be increased to a maximum of \$750,000 to secure the payment of the professional fees and disbursements of the Monitor, the Monitor's counsel and counsel to the Applicant during the Stay Period.

30. The Updated Cash Flow Forecast reflects the payment of the professional fees and disbursements of the beneficiaries of the Administration Charge.

31. Further, the Monitor, Senior Lender, DIP Lender and Affiliate Lenders support the increase to the Administration Charge.

First Report s. 6.5 - 6.8

E. The Applicant's access to full availability under the DIP Loan should be authorized and approved to the maximum principal amount of \$3,000,000 and the DIP Lender's Charge should be increased.

32. The CCAA outlines the factors that must be considered by this Court in determining whether a DIP Loan may be approved:

Factors to be considered

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

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

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

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

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

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

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

(g) the monitor's report.

CCAA, ss. 11.2(4) [TAB 1]

33. On May 1, 2026, the Applicant entered into a DIP financing term sheet (the "**DIP Agreement**") with the DIP Lender with respect to an interim loan facility (the "**DIP Loan**"), in the maximum principal amount of \$3,000,000, to ensure the Applicant has access to sufficient liquidity during the CCAA proceedings.

34. The Court approved the DIP Agreement and the DIP Loan in the Initial Order, and authorized the Applicant to borrow up to a principal amount of \$1,000,000 only during the Initial Stay Period.

35. The Applicant seeks approval to access the full availability under the DIP Agreement to the maximum aggregate principal amount of \$3,000,000, and an increase to the DIP Lender's Charge from \$1,000,000 to the maximum principal amount of \$3,000,000, plus all accrued interest and other amounts payable to the DIP Lender under the DIP Agreement.

36. As set out in the Updated Cash Flow Forecast, the Applicant is expected to generate positive cash flow over the course of the Stay Period as a result of the liquidation process. However, there is a high degree of variability in the quantum and timing of receipts and disbursements during the Stay Period, and authorization for the Applicant to access the full availability under the DIP Loan during the Stay Period will ensure that it has sufficient

liquidity to bridge any short-term funding needs and complete the liquidation process without disruption.

37. The benefits to access the full availability under the DIP Loan outweigh any potential prejudice that may result.

38. The Monitor, Senior Lender, DIP Lender and Affiliate Lenders support the approval for the Applicant to access the full availability under the DIP Loan, subject to the increase in the DIP Lender's Charge as set out in the proposed ARIO.

First Report s. 6.15 - 6.4, 6.12-6.14

F. This Court should approve the Consulting Agreement and the Sale and authorize the undertaking of the Sale.

39. This Court has jurisdiction to approve a sale process authorizing the realization of the debtor's assets, which courts have frequently done in the context of retail insolvencies.

Indalex Ltd., Re 2011 ONCA 265, para 180 [TAB 13]

40. The Court may authorize the sale or disposition of the assets outside the ordinary course of business, provided notice is given to the Secured Creditors who are likely to be affected by the proposed sale or disposition.

CCAA, s 36(1) and s. 36(2) [TAB 1]

41. Courts have previously applied the factors outlined in *Nortel Networks Corp (Re)*, 2009 CanLII 39492 (ONSC) ("**Nortel**"). In applying the *Nortel* factors, the Court considers the following questions:

a) Is the sale transaction warranted at this time?

- b) Will the sale benefit the whole economic community?
- c) Do any of the debtors' creditors have *bona fide* reason to object to a sale?
- d) Is there a better viable alternative?

Nortel, para 49 [TAB 11]

42. In addition to the *Nortel* factors, Courts have also evaluated proposed realization processes using the criteria set out in subsection 36(3) of the CCAA:

- a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- b) whether the monitor approved the process leading to the proposed sale or disposition;
- c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- d) the extent to which the creditors were consulted;
- e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA s. 36(3) [TAB 1]

43. The Applicant submits that both the *Nortel* criteria and the factors outlined in subsection 36 of the CCAA are satisfied with respect to the Consulting Agreement and the Sale.

a) The Sale is warranted at this time

44. The realization of the Applicant's merchandise and FF&E is warranted at this time, as it is an integral and urgent part of the realization process. The Applicant's severe liquidity constraints necessitated the engagement of a consultant and the commencement of steps required to plan for the liquidation process on an expedited basis. Any delay would negatively impact recoveries generated from the Sale.

First Report, s. 5.2

b) The Process to Select the Consultant was Reasonable

45. The process by which the Applicant selected the Consultant was reasonable.

46. The Applicant, with the input of the Monitor, selected the Consultant based on:

- a) its qualifications and prior experience implementing retail liquidation processes in Canada;
- b) its prior working relationship and familiarity with the Applicant and other retailers affiliated with the Applicant's shareholders; and
- c) its ability to mobilize resources and prepare for the Sale on an expedited basis.

47. The Consultant submitted a proposal setting out the key terms of the consulting arrangement to the Applicant and the Monitor. After review and negotiation, the Applicant, in consultation with the DIP Lender (Senior Lender) and the Monitor, engaged the Consultant to

assist with the Sale, subject to court approval. In the Monitor's experience, this process is in line with similar processes which have been approved by courts in other retail insolvencies.

First Report, ss. 5.1 - 5.3

c) The Consulting Agreement and Sales Guidelines are Fair and Reasonable

48. The Sale contemplated by the Consulting Agreement and Sale Guidelines is fair and reasonable and was developed by the Applicant and the Consultant, in consultation with the Monitor and with the DIP Lender's consent, to maximize recoveries from the Inventory and FF&E for the benefit of creditors.

First Report, s. 5.3

49. The fee structure contained in the Consulting Agreement incentivizes the Consultant to maximize the value of the Applicant's merchandise and FF&E for the benefit of the stakeholders, and the quantum of the merchandise fee and FF&E fee are reasonable and consistent with the fees charged by liquidation consultants in similar situations.

First Report, s. 5.3(iii) and 5.4

50. Further, the Consulting Agreement and the Sale Guidelines account for the interest of the Applicant's landlords in a manner consistent with similar arrangements previously approved by courts in CCAA retail liquidations.

First Report, s. 5.6

d) The Monitor Supports the Approval of the Sale and Consulting Agreement

51. The involvement and support of the Monitor is an important consideration in determining whether to approve a proposed sale process.

52. The Monitor was closely involved and assisted the Applicant in the process of selecting the Consultant, negotiating the terms of the Consultant Agreement and designing the Sales Guidelines.

First Report, ss. 5.3, 5.5

53. The Monitor supports the engagement of the Consultant pursuant to the Consulting Agreement and the Sale Guidelines for the following reasons:

- a) given the scale of the Applicant's operations and the complexity of the store closing process, an experienced liquidation consultant is required to maximize the value of the Applicant's merchandise and FF&E in an efficient and cost-effective manner;
- b) the Consultant has extensive experience in conducting a retail liquidation of this type and magnitude in Canada;
- c) the Consultant is available to commence the Sale immediately following the granting of the ARIO;
- d) the fee structure contained in the Consulting Agreement incentivizes the Consultant to maximize the value of the Applicant's merchandise and FF&E for the benefit of the stakeholders.

First Report, s. 5.6

G. The Applicant, with the assistance of the Monitor, should be authorized to pursue all opportunities for any sale, assignment or other Transaction to maximize the value of the Business and its remaining property, subject to Court approval of any material Transaction.

54. Section 11 of the CCAA grants the Court broad discretion to make any order it "considers appropriate in the circumstances". Courts have recognized that this discretion

reflects the broad remedial authority developed in the jurisprudence. The “appropriateness” requirement is met where the applicant has acted in good faith and with due diligence.

**9354-9186 Québec inc. v. Callidus Capital Corp., 2020
SCC 10 at para 48 to 52 [TAB 9]**

**Century Services Inc. v. Canada (Attorney General), 2010 SCC 60,
paras 67, 68, and 69 [TAB 5]**

CCAA, s. 11 [TAB 1]

55. Should the ARIO be granted, the Applicant intends to reach out to parties known to the Monitor and/or the Applicant who may have an interest in exploring a Transaction with the Applicant, *inter alia*, the sale of the Kenora Property. Depending on the level and nature of interest expressed, the Monitor may, in consultation with the Applicant and the DIP Lender, establish a solicitation process letter setting out bid procedures. If such bid procedures are established, the Monitor will communicate such procedures to the potentially interested parties identified by the Applicant and the Monitor. Depending on the level of interest, the Monitor may, in its reasonable judgment, directly negotiate a Transaction in lieu of a formal sale process. To the extent a material Transaction results, it will be subject to prior approval of this Court.

56. Given the nature of the Applicant’s ancillary assets, the Applicant’s limited liquidity, and the limited pool of potential purchasers, the proposed ARIO provides appropriate flexibility to explore all value-enhancing options for the Business and assets in parallel with the conduct of the Sale.

57. The Senior Lender and the Affiliate Lenders, who are the only creditors with a remaining economic interest in the proceeds of any Transaction, support the authorization for the Applicant and the Monitor to pursue Transaction opportunities during the CCAA proceedings.

First Report, ss. 6.15-6.19

58. The Applicant submits that an order permitting the Applicant, with the Assistance of the Monitor, to pursue a Transaction to maximize value of the Business and remaining property, subject to Court approval of any material Transaction is appropriate and proportionate in the circumstances as it will maximize recovery for the Applicant and its stakeholders.

**PART VI
CONCLUSION**

59. For the foregoing reasons, the Applicant submits that the proposed ARIO is in the best interest of the Applicant and its stakeholders, and ought to be granted.

60. The Monitor, Senior Lender, DIP Lender and Affiliate Lender are in support of the ARIO.

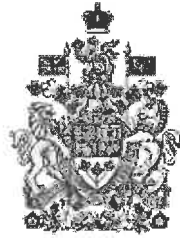
61. The Applicant is acting in good faith and with due diligence in the CCAA proceedings.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF MAY,
2026.**

PITBLADO LLP

Per: 
Catherine E. Howden/Johanna Thiessen
Counsel to the Applicant

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 March 17, 2026

À jour au 17 mars 2026

Last amended on December 12, 2024

Dernière modification le 12 décembre 2024

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

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

Single judge may exercise powers, subject to appeal

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

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

Form of applications

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

Documents that must accompany initial application

(2) An initial application must be accompanied by

- (a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;
- (b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and
- (c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

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

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

General power of court

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

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

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

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

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

Forme des demandes

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

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

- a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;
- b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;
- c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

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

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

Pouvoir général du tribunal

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

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

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

- a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;
- b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
- b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
- c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

- a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, *ès qualités*, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, *ès qualités*, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

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

Priority — other orders

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

Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;
- b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;
- c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;
- d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- (a) an agreement entered into on or after the day on which proceedings commence under this Act;
- (b) an eligible financial contract; or
- (c) a collective agreement.

Factors to be considered

(3) In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed assignment;
- (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) whether it would be appropriate to assign the rights and obligations to that person.

- e) la nature et la valeur des biens de la compagnie;
- f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;
- g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

- a) l'acquiescement du contrôleur au projet de cession, le cas échéant;
- b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;
- c) l'opportunité de lui céder les droits et obligations.

is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

1997, c. 12, s. 124; 2005, c. 47, s. 128.

Security or charge relating to director's indemnification

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

Priority

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

Restriction — indemnification insurance

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

Negligence, misconduct or fault

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

convaincu que ce dernier, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de conclure une transaction ou un arrangement viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Vacance

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

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

2005, c. 47, s. 128; 2007, c. 36, s. 66.

Bankruptcy and Insolvency Act matters

11.6 Notwithstanding the *Bankruptcy and Insolvency Act*,

- (a) proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
- (b) an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but no application may be made under this Act by a bankrupt whose bankruptcy has resulted from
 - (i) the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or
 - (ii) the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.

1997, c. 12, s. 124.

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

- a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;
- b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;
- c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

2005, ch. 47, art. 128; 2007, ch. 36, art. 66.

Lien avec la Loi sur la faillite et l'insolvabilité

11.6 Par dérogation à la *Loi sur la faillite et l'insolvabilité* :

- a) les procédures intentées sous le régime de la partie III de cette loi ne peuvent être traitées et continuées sous le régime de la présente loi que si une proposition au sens de la *Loi sur la faillite et l'insolvabilité* n'a pas été déposée au titre de cette même partie;
- b) le failli ne peut faire une demande au titre de la présente loi qu'avec l'aval des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*, aucune demande ne pouvant toutefois être faite si la faillite découle, selon le cas :
 - (i) de l'application du paragraphe 50.4(8) de la *Loi sur la faillite et l'insolvabilité*,
 - (ii) du rejet — effectif ou présumé — de sa proposition par les créanciers ou le tribunal ou de l'annulation de celle-ci au titre de cette loi.

1997, ch. 12, art. 124.

Nomination du contrôleur

11.7 (1) Le tribunal qui rend une ordonnance sur la demande initiale nomme une personne pour agir à titre de contrôleur des affaires financières ou autres de la compagnie débitrice visée par la demande. Seul un syndic au sens du paragraphe 2(1) de la *Loi sur la faillite et l'insolvabilité* peut être nommé pour agir à titre de contrôleur.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

2005, c. 47, s. 131; 2007, c. 29, s. 109, c. 36, ss. 77, 112; 2012, c. 31, s. 421.

Obligations and Prohibitions

Obligation to provide assistance

35 (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

Obligation to duties set out in section 158 of the *Bankruptcy and Insolvency Act*

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

2005, c. 47, s. 131.

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

2005, ch. 47, art. 131; 2007, ch. 29, art. 109, ch. 36, art. 77 et 112; 2012, ch. 31, art. 421.

Obligations et interdiction

Assistance

35 (1) La compagnie débitrice est tenue d'aider le contrôleur à remplir adéquatement ses fonctions.

Obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité*

(2) Elle est également tenue de satisfaire aux obligations visées à l'article 158 de la *Loi sur la faillite et l'insolvabilité* selon ce qui est indiqué et applicable dans les circonstances.

2005, ch. 47, art. 131.

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

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

- (a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b)** whether the monitor approved the process leading to the proposed sale or disposition;
- (c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d)** the extent to which the creditors were consulted;
- (e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

- (a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

- (a)** a director or officer of the company;
- (b)** a person who has or has had, directly or indirectly, control in fact of the company; and
- (c)** a person who is related to a person described in paragraph (a) or (b).

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

- a)** la justification des circonstances ayant mené au projet de disposition;
- b)** l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;
- c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;
- d)** la suffisance des consultations menées auprès des créanciers;
- e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;
- f)** le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

- a)** d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;
- b)** d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

- a)** le dirigeant ou l'administrateur de celle-ci;
- b)** la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;
- c)** la personne liée à toute personne visée aux alinéas a) ou b).

TAB 2

As of 13 May 2026, this is the most current version available. It is current for the period set out in the footer below.

Last amendment included: M.R. 4/2024

Forms are not included in this version.
See the list of court forms.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 13 mai 2026. Son contenu était à jour pendant la période indiquée en bas de page.

Dernière modification intégrée : R.M. 4/2024

La présente codification ne comprend pas les formules.
Consultez la liste des formules de la cour.

THE COURT OF KING'S BENCH ACT
(C.C.S.M. c. C280)

Court of King's Bench Rules

Regulation 553/88
Registered December 13, 1988

TABLE OF CONTENTS

Rule

PART I GENERAL MATTERS

- 1 Citation, Application and Interpretation
- 2 Non-Compliance with the Rules
- 3 Time
- 4 Court Documents

PART II PARTIES AND JOINDER

- 5 Joinder of Claims and Parties
- 6 Consolidation or Hearing Together
- 7 Parties Under Disability
- 8 Partnerships and Other Unincorporated Entities
- 9 Estates and Trusts
- 10 Representation Order
- 11 Transfer or Transmission of Interest
- 12 Class Proceedings
- 13 Intervention

LOI SUR LA COUR DU BANC DU ROI
(c. C280 de la C.P.L.M.)

Règles de la Cour du Banc du Roi

Règlement 553/88
Date d'enregistrement : le 13 décembre 1988

TABLE DES MATIÈRES

Règle

PARTIE I DISPOSITIONS GÉNÉRALES

- 1 Renvois, champ d'application et principes d'interprétation
- 2 Inobservation des Règles
- 3 Délais
- 4 Documents de procédure

PARTIE II PARTIES ET JONCTIONS

- 5 Jonction des demandes et des parties
- 6 Réunion ou instruction simultanée des instances
- 7 Parties incapables
- 8 Sociétés en nom collectif et autres entités non constituées en corporation
- 9 Successions et fiducies
- 10 Représentation
- 11 Transfert ou transmission d'intérêt
- 12 Recours collectifs
- 13 Intervention

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

Modification or waiver of rules

2.04 If a person acts in a vexatious, evasive, abusive or improper manner or if the expense, delay or difficulty in complying with a rule would be disproportionate to the likely benefit, a judge may, on motion by any party or on his or her own motion, without materials being filed, do one or more of the following:

- (a) modify or waive compliance with any rule;
- (b) make a costs award or require an advance payment against costs payable, or both;
- (c) make any other order respecting a proceeding that the judge considers appropriate in the circumstances.

M.R. 130/2017

DISPENSE DU TRIBUNAL

2.03 Le tribunal peut dispenser de l'observation d'une règle seulement si cela est nécessaire dans l'intérêt de la justice.

Modification des présentes règles ou renonciation à leurs exigences

2.04 Lorsqu'une personne agit de manière vexatoire, évasive, abusive ou inappropriée ou que l'observation d'une règle entraînerait des coûts, des délais ou des difficultés dont l'ampleur serait disproportionnée face à l'avantage attendu, un juge peut, sur motion d'une des parties ou de son propre chef, et sans que des documents n'aient été déposés, prendre une ou plusieurs des mesures suivantes :

- a) modifier tout droit ou pouvoir que confère une règle ou en écarter l'application;
- b) adjuger des dépens et exiger un versement préalable en vue du paiement de frais exigibles, ou prendre une de ces mesures;
- c) rendre toute autre ordonnance concernant une instance qu'il estime indiquée compte tenu des circonstances.

R.M. 130/2017

RULE 3

RÈGLE 3

TIME

DÉLAIS

COMPUTATION

COMPUTATION DES DÉLAIS

3.01 In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words "at least" are used;

(b) where a period of less than seven days is prescribed, holidays shall not be counted;

(c) where the time for doing an act under these rules expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) service of a document, other than an originating process, after 5 p.m., or at any time on a holiday, shall be deemed to have happened on the next day that is not a holiday.

3.01 À moins que le contexte n'indique une intention contraire, la computation des délais prescrits par les présentes règles ou par une ordonnance obéit aux règles suivantes :

a) si le délai est exprimé en nombre de jours séparant deux événements, il se calcule en excluant le jour où a lieu le premier événement mais en incluant le jour où a lieu le second, même s'il est précisé qu'il s'agit de jours francs ou que les mots "au moins" sont utilisés;

b) si le délai prescrit est inférieur à sept jours, les jours fériés ne sont pas comptés;

c) si le délai pour accomplir un acte sous le régime des présentes règles expire un jour férié, l'acte peut être accompli le jour suivant qui n'est pas jour férié;

d) la signification d'un document, à l'exception d'un acte introductif d'instance, après 17 heures ou un jour férié, est réputée avoir été faite le premier jour suivant qui n'est pas jour férié.

EXTENSION OR ABRIDGMENT

PROROGATION OU ABRÈGEMENT DES DÉLAIS

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Pouvoirs généraux du tribunal

3.02(1) Le tribunal peut, par ordonnance, proroger ou abrèger le délai fixé par les présentes règles ou par une ordonnance, à des conditions justes.

Expiration of time

3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Expiration du délai

3.02(2) La motion qui vise à l'obtention d'une ordonnance prorogeant un délai peut être présentée avant ou après l'expiration du délai prescrit.

Consent in writing

3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

Consentement écrit

3.02(3) Le délai prescrit par les présentes règles pour la signification ou le dépôt d'un document peut être prorogé ou abrégé par consentement écrit.

Service at place of residence

16.03(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

and service in this manner is effective on the fifth day after the document is mailed.

Service on a corporation

16.03(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Manitoba, cannot be found at the last address recorded with the director appointed under *The Corporations Act*, service may be made on the corporation as provided in section 247 of *The Corporations Act* but such service will not be effective if there are reasonable grounds for believing that the corporation did not receive the document.

M.R. 6/98

SUBSTITUTED SERVICE OR
DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

Signification au lieu de résidence

16.03(5) Si une tentative de signification à personne au lieu de résidence échoue, le document peut être signifié :

a) en laissant une copie à son lieu de résidence, dans une enveloppe scellée adressée au destinataire, à une personne qui paraît majeure et qui semble habiter sous le même toit que lui;

b) en envoyant par la poste, le jour même ou le lendemain, une autre copie du document au lieu de résidence du destinataire.

Cette signification est valide à compter du cinquième jour suivant l'envoi par la poste du document.

Signification à une corporation

16.03(6) Si le siège social, le bureau enregistré ou le principal établissement d'une corporation ou, s'il s'agit d'une corporation extra-provinciale, son fondé de pouvoir aux fins de signification au Manitoba, ne se trouve pas à la dernière adresse figurant dans les dossiers du directeur nommé en vertu de la *Loi sur les corporations*, la signification peut être effectuée selon les dispositions de l'article 247 de la *Loi sur les corporations*. Cependant, une telle signification ne sera pas valide s'il existe des motifs raisonnables de croire que la corporation n'a pas reçu le document.

R.M. 6/98

SIGNIFICATION INDIRECTE OU DISPENSE
DE SIGNIFICATION

Décision du tribunal

16.04(1) Si la signification à personne ou un autre mode de signification directe d'un acte introductif d'instance ou d'un autre document est requis et que le tribunal considère qu'il est difficile de l'effectuer sans délai, celui-ci peut ordonner la signification indirecte ou, si l'intérêt de la justice l'exige, dispenser de la signification.

Exception

16.04(1.1) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

Effective date of service

16.04(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

Service dispensed with

16.04(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date the order is signed, for the purpose of the computation of time under these rules.

M.R. 127/94

Exception

16.04(1.1) Le paragraphe (1) ne s'applique pas si la signification doit s'effectuer en conformité avec la Convention Notification de La Haye.

R.M. 11/2018

Date de la signification

16.04(2) Si l'ordonnance prévoit la signification indirecte, le tribunal précise la date à laquelle la signification est valide.

Dispense de signification

16.04(3) Si l'ordonnance dispense de la signification d'un document, celui-ci est réputé, aux fins de la computation des délais aux termes des présentes règles, être signifié à la date à laquelle l'ordonnance est signée.

R.M. 127/94

SERVICE ON LAWYER OF RECORD

Forms of service

16.05(1) Service of a document on the lawyer of record of a party may be made by,

- (a) mailing a copy to the lawyer's office;
- (b) leaving a copy with a lawyer or employee in the lawyer's office;
- (c) faxing a copy in accordance with subrules (2), (3) and (4) but, where service is made under this clause between 5 p.m. and midnight, it shall be deemed to have been made on the following day;
- (d) by sending a copy to the lawyer's office by courier; or
- (e) attaching a copy of the document to an e-mail message sent to the lawyer's e-mail address in accordance with subrule (6), but service under this clause is effective only if the lawyer being served provides by e-mail to the sender an acceptance of service and the date of the acceptance, and where e-mail acceptance is received between 5 p.m. and midnight, it shall be deemed to have been made on the following day.

M.R. 6/98; 50/2001; 43/2003

SIGNIFICATION À L'AVOCAT

Modes de signification

16.05(1) Une personne peut signifier un document à l'avocat qui représente une partie :

- a) en lui en envoyant une copie à son bureau par la poste;
- b) en en laissant une copie à un avocat ou à un employé de son bureau;
- c) en envoyant par télécopieur une copie conformément aux paragraphes (2), (3) et (4); toutefois, lorsque la copie est envoyée entre 17 heures et minuit, la signification est réputée avoir été faite le jour suivant;
- d) en envoyant une copie à son bureau par service de messageries;

(b) a copy of the document may be sent by registered mail or certified mail in which case service is effective on the date the document was delivered to the person to be served as shown on the confirmation of delivery obtained from Canada Post Corporation.

M.R. 50/2001

b) une copie du document peut être envoyée par courrier recommandé ou par poste certifiée, auquel cas la signification est valide à compter de la date à laquelle le document a été livré au destinataire, telle qu'elle est indiquée sur la confirmation de livraison obtenue de la Société canadienne des postes.

R.M. 50/2001

WHERE DOCUMENT DOES NOT REACH PERSON SERVED

16.07 On a motion to set aside the consequences of default, for an extension of time or for an adjournment, a person may show that, even though served with a document in accordance with these rules, it did not come to the person's notice, or it did not come to the person's notice until some time later than when it was served or deemed to have been served.

NON-RÉCEPTION DU DOCUMENT

16.07 Dans le cadre d'une motion présentée par une personne en vue d'être relevée des conséquences du défaut, d'une motion en prorogation du délai ou d'une motion en ajournement de l'instance, la personne peut établir que même si elle a reçu signification d'un document conformément aux présentes règles, elle n'en a pas pris connaissance ou elle n'en a pris connaissance qu'à une date postérieure à la date à laquelle le document lui a été signifié ou est réputé le lui avoir été.

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

M.R. 11/2018

Exception

16.08(2) Subrule (1) does not apply when service must be made in accordance with the Hague Service Convention.

M.R. 11/2018

VALIDATION DE LA SIGNIFICATION

16.08(1) Si un document a été signifié d'une façon non autorisée ou irrégulière, le tribunal peut, par ordonnance, valider la signification s'il est convaincu, selon le cas :

a) que le destinataire en a pris connaissance;

b) que le document a été signifié de telle sorte que le destinataire en aurait pris connaissance s'il n'avait pas tenté de se soustraire à la signification.

R.M. 11/2018

Exception

16.08(2) Le paragraphe (1) ne s'applique pas si la signification doit s'effectuer en conformité avec la Convention Notification de La Haye.

R.M. 11/2018

PART IX

MOTIONS AND APPLICATIONS

RULE 37

MOTIONS — JURISDICTION AND PROCEDURE

Notice of motion

37.01 A motion shall be made by notice of motion (Form 37A), unless the court orders otherwise.

JURISDICTION TO HEAR A MOTION

Judge

37.02(1) A judge has jurisdiction to hear any motion in a proceeding.

Associate judge

37.02(2) An associate judge has jurisdiction to hear any motion in a proceeding, except a motion,

- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
- (b) to set aside, vary or amend an order of a judge;
- (c) to abridge or extend a time prescribed by an order that an associate judge could not have made;
- (d) for judgment on consent in favour of or against a party under disability;
- (e) relating to criminal proceedings or the liberty of the subject;
- (f) in an appeal; or
- (g) for interim relief in a family proceeding in respect of parenting time, decision-making responsibility, support or property.

M.R. 31/91; 143/2023; 4/2024

PARTIE IX

MOTIONS ET REQUÊTES

RÈGLE 37

MOTIONS — COMPÉTENCE ET PROCÉDURE

Avis de motion

37.01 Sauf disposition contraire du tribunal, la motion est présentée par voie d'avis de motion (formule 37A).

COMPÉTENCE POUR CONNAÎTRE
D'UNE MOTION**Juges**

37.02(1) Un juge a compétence pour connaître d'une motion présentée dans une instance.

Juge adjoint

37.02(2) Le juge adjoint a compétence pour connaître d'une motion présentée dans une instance, sauf s'il s'agit d'une motion, selon le cas :

- a) où le pouvoir d'accorder la mesure de redressement demandée est expressément conféré à un juge en vertu d'une loi ou d'une règle;
- b) qui vise à faire annuler ou modifier une ordonnance rendue par un juge;
- c) qui vise à abrégé ou à proroger un délai prescrit par une ordonnance qui n'aurait pu être rendue par un juge adjoint;
- d) qui demande un jugement sur consentement en faveur d'une partie incapable ou contre elle;
- e) où la liberté du sujet est en cause ou qui se rapporte à une instance criminelle;
- f) présentée dans un appel;

g) qui vise l'obtention de mesures provisoires dans une instance en matière familiale à l'égard de questions relatives au temps parental, aux responsabilités parentales, aux aliments ou aux biens.

R.M. 31/91; 143/2023; 4/2024

TO WHOM MOTION TO BE MADE

PERSONNES DEVANT LESQUELLES LES MOTIONS DOIVENT ÊTRE PRÉSENTÉES

To an associate judge

37.03(1) Subject to subrule 25.11(2) and subrule (2) of this rule, a motion within the jurisdiction of an associate judge shall be made to an associate judge.

M.R. 23/2016; 143/2023

To a judge

37.03(2) Where a motion is within the jurisdiction of an associate judge and an associate judge is not available at the centre at which the motion is to be heard or a judge grants leave to make the motion to a judge, the motion may be made to a judge.

M.R. 31/91; 143/2023

Referral to judge

37.03(3) A motion pending before an associate judge may be referred by the associate judge to a judge for decision and the judge may dispose of the motion in whole or in part or refer the motion back in whole or in part.

M.R. 143/2023

Juge adjoint

37.03(1) Sous réserve du paragraphe 25.11(2) et du paragraphe (2) de la présente règle, les motions relevant de la compétence d'un juge adjoint sont présentées à celui-ci.

R.M. 23/2016; 143/2023

Motion présentée à un juge

37.03(2) Une motion peut être présentée à un juge si elle relève de la compétence d'un juge adjoint et si aucun juge adjoint n'est disponible au centre où la motion doit être entendue ou qu'un juge autorise la présentation de la motion à un juge.

R.M. 31/91; 143/2023

Renvoi à un juge

37.03(3) Un juge adjoint peut renvoyer une motion dont il est saisi à un juge afin que ce dernier rende une décision à l'égard de la motion. Le juge peut statuer sur la motion en totalité ou en partie ou renvoyer tout ou partie de la motion au juge adjoint.

R.M. 143/2023

PLACE OF FILING

LIEU DU DÉPÔT DE LA MOTION

37.04 A motion shall be filed in the administrative centre in which the court file is located.

37.04 Une motion est déposée au centre administratif où se trouve le dossier.

PLACE AND DATE OF HEARING

LIEU ET DATE DE L'AUDIENCE

Place

37.05(1) The moving party shall name in the notice of motion as the place of hearing,

(a) where the court file is located in a judicial centre, that judicial centre; or

(b) where the court file is located in an administrative centre which is not a judicial centre, the judicial centre nearest that administrative centre.

Hearing date

37.05(2) The moving party must name in the notice of motion as the hearing date

(a) where the motion is to an associate judge or other officer, any date on which an associate judge or other officer sits to hear motions; and

(b) where the motion is to a judge, any date on which a judge sits to hear motions.

M.R. 130/2017; 143/2023

Lieu d'audience

37.05(1) L'auteur de la motion indique dans l'avis de motion comme lieu d'audience, l'un des endroits suivants :

a) si le dossier se trouve dans un centre judiciaire, ce centre judiciaire;

b) si le dossier se trouve dans un centre administratif qui n'est pas un centre judiciaire, le centre judiciaire le plus près de ce centre administratif.

Date d'audience

37.05(2) L'auteur de la motion indique dans l'avis de motion une des dates suivantes comme date d'audience :

a) si la motion doit être entendue par un juge adjoint ou un autre auxiliaire de la justice, une date à laquelle un juge adjoint ou un tel auxiliaire siège pour entendre des motions;

b) si la motion doit être entendue par un juge, une date à laquelle un juge siège pour entendre des motions.

R.M. 130/2017; 143/2023

SERVICE OF NOTICE

SIGNIFICATION DE L'AVIS

Required as general rule

37.06(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

Notice not required

37.06(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

Signification obligatoire en règle générale

37.06(1) Sauf disposition contraire des présentes règles, l'avis de motion est signifié aux personnes ou aux parties sur lesquelles l'ordonnance demandée peut avoir une incidence.

Ordonnance rendue sans préavis

37.06(2) Si les circonstances ou la nature de la motion rendent peu pratique ou inutile la signification de l'avis de motion, le tribunal peut rendre une ordonnance sans préavis.

Consent order without notice of motion

37.06(2.1) The court may make an order on consent without a notice of motion being filed.

M.R. 121/2002

Interim order without notice

37.06(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

Service of order

37.06(4) Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

M.R. 6/98

Where notice ought to have been served

37.06(5) Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

- (a) dismiss the motion or dismiss it only against the person who was not served;
- (b) adjourn the motion and direct that the notice of motion be served on the person; or
- (c) direct that any order made on the motion be served on the person.

Time for service

37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

37.07 [Repealed]

M.R. 150/89; 130/2017

Ordonnance par consentement rendue sans avis de motion

37.06(2.1) Le tribunal peut rendre une ordonnance par consentement sans qu'un avis de motion soit déposé.

R.M. 121/2002

Ordonnance provisoire sans préavis

37.06(3) Si le délai nécessaire à la signification risque d'entraîner des conséquences graves, le tribunal peut rendre une ordonnance provisoire sans préavis.

Signification de l'ordonnance

37.06(4) Sauf ordonnance contraire du tribunal ou disposition contraire des présentes règles, l'ordonnance rendue sans préavis à une personne ou à une partie qui y est visée ainsi qu'une copie de l'avis de motion, des affidavits et des autres documents utilisés à l'audition de la motion sont signifiés sans délai à la personne ou à la partie.

R.M. 6/98

Cas où l'avis aurait dû être signifié

37.06(5) Le tribunal, s'il est d'avis que l'avis de motion doit être signifié à une personne et ne l'a pas été peut, selon le cas :

- a) rejeter la motion ou la rejeter seulement contre la personne qui n'en a pas reçu signification;
- b) ajourner la motion et ordonner la signification de l'avis de motion à cette personne;
- c) ordonner la signification à cette personne de l'ordonnance rendue à la suite de la motion.

Délai de signification

37.06(6) Si la motion est présentée sur préavis, l'avis de motion est signifié au moins quatre jours avant la date d'audition de la motion.

37.07 [Abrogée]

R.M. 130/2017

SCHEDULING OF CONTESTED MOTIONS

MOTIONS CONTESTÉES — DÉTERMINATION
DE LA DATE D'AUDIENCE**To be adjourned for a hearing date**

37.08(1) Subject to subrule (2), where a notice of motion to a judge or associate judge has been served and it transpires that the motion is to be contested, the judge or associate judge shall adjourn the motion and the moving party may obtain a hearing date.

M.R. 130/2017; 143/2023

Immediate hearing where urgent, etc.

37.08(2) In a case of urgency or where otherwise appropriate, the judge or associate judge may proceed to hear the motion.

M.R. 130/2017; 143/2023

Moving party's brief

37.08(3) Where the motion is to a judge or associate judge and is to be contested, the moving party shall, at the time of obtaining a hearing date, file in the judicial centre in which the motion is to be heard and serve on all other parties, a brief consisting of

(a) a list of any documents specifically identified, including filing date, filed in court to be relied upon by the moving party, unless the court orders that copies of all documents be filed as part of the brief;

(b) a list of any cases and statutory provisions to be relied on by the moving party, together with a statement as to the principle being relied upon in each case; and

(c) a list of the points to be argued.

M.R. 186/96; 143/2023

Responding party's brief

37.08(4) A responding party who has been served with a brief under subrule (3) must file in the judicial centre in which the motion is to be heard and serve on all other parties, a brief consisting of,

Ajournement et obtention d'une date d'audience

37.08(1) Sous réserve du paragraphe (2), si un avis de motion à un juge ou juge adjoint a été signifié et qu'il semble que la motion sera contestée, le juge ou juge adjoint ajourne la motion et l'auteur de cette motion peut obtenir une date d'audience.

R.M. 130/2017; 143/2023

Audience immédiate en cas d'urgence

37.08(2) Le juge ou le juge adjoint peut entendre la motion lorsqu'il l'estime opportun, notamment en cas d'urgence.

R.M. 130/2017; 143/2023

Mémoire de l'auteur de la motion

37.08(3) Si la motion qui doit être entendue par un juge ou un juge adjoint est contestée, l'auteur de la motion doit, au moment de l'obtention d'une date d'audience, déposer au centre judiciaire où la motion sera entendue et signifier aux autres parties, un mémoire constitué de ce qui suit :

a) une liste de documents portant une marque précise, y compris la date de dépôt, déposée au tribunal afin que l'auteur de la motion puisse l'invoquer, sauf si le tribunal ordonne que les copies des documents soient déposées pour qu'elles fassent partie du mémoire;

b) une liste des causes et des dispositions législatives que l'auteur de la motion entend invoquer ainsi qu'une déclaration portant sur le principe qui est invoqué dans chaque cause;

c) une liste des questions en litige.

R.M. 186/96; 44/2022; 143/2023

Mémoire de la partie intimée

37.08(4) La partie intimée qui a reçu signification d'un mémoire en vertu du paragraphe (3) dépose au centre judiciaire où la motion sera entendue et signifie à toutes les autres parties un mémoire constitué de ce qui suit :

(a) a list of any documents described in clause (3)(a), not included in the moving party's brief and to be relied on by the responding party;

(b) a list of cases and statutory provisions not included in the moving party's brief, to be relied on by the responding party, together with a statement as to the principle being relied upon in each case; and

(c) a list of the points to be argued by the responding party, not included in the moving party's brief.

M.R. 12/92; 186/96; 130/2017

Bilingual statutory provisions in brief

37.08(4.1) If a party relies on a statutory provision that is required by law to be printed and published in English and French, their brief must contain a bilingual version of that provision.

M.R. 44/2022

Waiver

37.08(5) The court may, either before or at the hearing of the motion, waive or vary the requirements of this rule where there is insufficient time to comply or where, due to the nature of the motion, a brief is not justified.

37.08(6) [Repealed]

M.R. 186/96

Scheduling agreement

37.08.1(1) Within seven days after service of the moving party's brief, the parties may file a written agreement that establishes timelines for completion of the following preliminary steps in the motion:

(a) filing and service of affidavits by the parties, including any additional affidavits in response to affidavits filed by the responding party;

(b) scheduling and completion of all cross-examinations on affidavits;

a) une liste des documents visés à l'alinéa (3)a, qui ne sont pas inclus dans le mémoire de l'auteur de la motion et que la partie intimée entend invoquer;

b) une liste des causes et des dispositions législatives qui ne font pas partie du mémoire de l'auteur de la motion et que la partie intimée a l'intention d'invoquer ainsi qu'une déclaration portant sur le principe qui est invoqué dans chaque cause;

c) une liste des questions en litige que la partie intimée a l'intention de soulever et qui ne font pas partie du mémoire de l'auteur de la motion.

R.M. 12/92; 186/96; 130/2017

Dispositions législatives bilingues dans le mémoire

37.08(4.1) La partie qui entend invoquer une disposition législative dont la loi exige l'impression et la publication en français et en anglais inclut ces deux versions dans son mémoire.

R.M. 44/2022

Abandon des conditions de la présente règle

37.08(5) Le tribunal peut, avant ou pendant l'audition de la motion, abandonner ou modifier les conditions de la présente règle lorsque le délai est insuffisant pour l'observation de ces conditions ou qu'en raison de la nature de la motion, un mémoire n'est pas justifié.

37.08(6) [Abrogé]

R.M. 186/96

Détermination d'un échéancier par consentement

37.08.1(1) Dans les sept jours qui suivent la signification du mémoire du requérant, les parties peuvent déposer un consentement écrit faisant état des échéances à respecter pour les étapes préliminaires à la motion suivantes :

a) le dépôt et la signification par les parties des affidavits, notamment des affidavits supplémentaires en réponse à ceux déposés par l'intimé;

b) la fixation de la date de tous les contre-interrogatoires sur affidavit et la détermination de leur durée maximale;

(c) filing and service of an additional brief by the moving party;

(d) filing and service of the responding party's brief.

M.R. 130/2017

Filing deadline

37.08.1(2) No agreement may permit the filing of materials less than seven days before the hearing of the motion.

M.R. 130/2017

Motion to establish schedule if no agreement

37.08.1(3) If the parties are unable to reach an agreement under subrule (1), the moving party must bring a motion to establish a schedule for completion of the preliminary steps in the motion.

M.R. 130/2017

Who hears motion

37.08.1(4) A motion under subrule (3) must be heard

(a) by an associate judge, if the original motion is to be heard by an associate judge; or

(b) by a judge, if the original motion is to be heard by a judge.

M.R. 130/2017; 143/2023

Amending schedule by agreement

37.08.1(5) The parties may amend a schedule established under subrule (1) or (3) by filing a written agreement that sets out new time lines for completing preliminary steps in the motion.

M.R. 130/2017

Sanctions for failure to comply with schedule

37.08.1(6) If a party has failed to comply with a schedule established under this rule, a judge or associate judge may do one or more of the following:

(a) strike out the motion, if the offending party is the moving party;

(b) adjourn the hearing of the motion;

c) le dépôt et la signification d'un mémoire supplémentaire par le requérant;

d) le dépôt et la signification du mémoire de l'intimé.

R.M. 130/2017

Limite

37.08.1(2) L'échéancier ne peut autoriser le dépôt d'un document moins de sept jours avant l'audition de la motion.

R.M. 130/2017

Absence de consentement

37.08.1(3) Si les parties ne peuvent s'entendre sur un échéancier, le requérant présente une motion visant l'établissement d'un échéancier à respecter pour les étapes préliminaires.

R.M. 130/2017

Autorité compétente

37.08.1(4) La motion visée au paragraphe (3) est entendue par le juge ou le juge adjoint qui est saisi de la motion initiale.

R.M. 130/2017; 143/2023

Modification de l'échéancier

37.08.1(5) Les parties peuvent s'entendre sur une modification à apporter à l'échéancier établi en vertu du paragraphe (1) ou (3) et déposer un consentement faisant état des nouveaux délais à respecter.

R.M. 130/2017

Défaut de se conformer à l'échéancier

37.08.1(6) Si une partie fait défaut de se conformer à l'échéancier, un juge ou un juge adjoint peut prendre une ou plusieurs des mesures suivantes :

a) rejeter la motion, si la contravention est commise par le requérant;

b) ajourner l'audition de la motion;

- (c) order costs against the offending party;
- (d) direct the hearing to proceed on the scheduled date without allowing the offending party to
- (i) file or rely on any affidavit, transcript or brief that was not filed or served in accordance with the schedule, or
- (ii) conduct a cross-examination on an affidavit after the expiry of the scheduled deadline for cross-examinations to occur;
- (e) make any other order or give any other direction that he or she considers appropriate in the circumstances.

M.R. 130/2017; 143/2023

Who may impose sanctions

37.08.1(7) The sanctions set out in subrule (6) may be imposed

- (a) on motion to an associate judge, if the original motion is to be heard by an associate judge;
- (b) on motion to a judge, if the original motion is to be heard by a judge; or
- (c) by the judge or associate judge presiding at the hearing of the original motion.

M.R. 130/2017; 143/2023

Exception

37.08.1(8) This rule does not apply to an urgent motion, a motion under subrule (3) or (7) or a motion under subrule 38.07.1(3) or (7).

M.R. 130/2017

c) ordonner au contrevenant d'acquitter les dépens;

d) ordonner de procéder à l'audition à la date prévue sans autoriser le contrevenant :

(i) soit à déposer un affidavit, une transcription ou un mémoire qui n'a pas été déposé ou signifié en conformité avec l'échéancier, ou lui interdire de s'appuyer sur eux,

(ii) soit à procéder à un contre-interrogatoire sur affidavit après l'expiration du délai prévu par l'échéancier;

e) rendre les ordonnances et donner les directives qu'il estime indiquées dans les circonstances.

R.M. 130/2017; 143/2023

Autorité compétente

37.08.1(7) Les sanctions visées au paragraphe (6) peuvent être infligées par le juge ou le juge adjoint qui est saisi de la motion initiale ou qui préside à l'audition de celle-ci.

R.M. 130/2017; 143/2023

Exception

37.08.1(8) La présente règle ne s'applique pas à une motion urgente, une motion visée aux paragraphes (3) ou (7) ou aux paragraphes 38.07.1(3) ou (7).

R.M. 130/2017

HEARING BY TELEPHONE, VIDEO
CONFERENCE OR OTHER MEANS
OF COMMUNICATION

AUDIENCE PAR TÉLÉPHONE,
PAR VIDÉOCONFÉRENCE OU PAR
TOUT AUTRE MOYEN DE COMMUNICATION

Consent

37.09(1) If all the parties to a motion consent and the court permits, a motion may be heard by telephone, video conference or other means of communication.

M.R. 121/2002

Order, no consent

37.09(2) If not all the parties consent, the court may, on motion, make an order directing the manner in which the motion is to be heard.

M.R. 121/2002

Motion to determine manner

37.09(3) The motion under subrule (2) to determine the manner of hearing a motion may be held

(a) without the necessity of filing a notice of motion or evidence; and

(b) by telephone, video conference or other means of communication.

M.R. 121/2002

Arrangements

37.09(4) Where a motion is to proceed by telephone, video conference or other means of communication under subrule (1) or clause (3)(b), the moving party shall make the necessary arrangements and give notice of those arrangements, including the date, time and manner of hearing, to the other parties to the motion and to the court.

M.R. 121/2002

Consentement

37.09(1) Une motion peut être entendue par téléphone, par vidéoconférence ou par tout autre moyen de communication si les parties à la motion y consentent et que le tribunal l'autorise.

R.M. 121/2002

Ordonnance en l'absence de consentement unanime

37.09(2) Si certaines parties ne donnent pas leur consentement, le tribunal peut, sur motion, rendre une ordonnance indiquant la manière selon laquelle la motion doit être entendue.

R.M. 121/2002

Motion portant sur la détermination du mode d'audition

37.09(3) La motion portant sur la détermination du mode d'audition de la motion peut être entendue :

a) sans qu'il soit nécessaire de déposer un avis de motion ou une preuve;

b) par téléphone, par vidéoconférence ou par tout autre moyen de communication.

R.M. 121/2002

Prise de dispositions

37.09(4) Lorsqu'une motion doit être entendue en vertu du paragraphe (1) ou de l'alinéa (3)b) par téléphone, par vidéoconférence ou par tout autre moyen de communication, l'auteur de la motion prend les dispositions nécessaires et en donne avis aux autres parties à la motion et au tribunal, notamment en leur indiquant la date et l'heure auxquelles elle sera entendue ainsi que son mode d'audition.

R.M. 121/2002

DISPOSITION OF MOTION

37.10 On the hearing of a motion, the presiding judge or officer may allow, dismiss or adjourn the motion, in whole or in part, and with or without terms, and, in the alternative or in addition, may

(a) direct the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge;

(b) where the proceeding is an action, order that it be set down for trial forthwith or within a specified period; or

(c) where the proceeding is an application, order that it be heard at such time and place and upon such terms as are just.

RESCINDING OR VARYING ORDERS

Motion to rescind or vary

37.11(1) A person affected by an order made without notice, or a person who has failed to appear on a motion due to accident, mistake or insufficient notice, may, by notice of motion filed, served and made returnable promptly after the order first came to the person's notice, move to rescind or vary the order.

To original judge or officer

37.11(2) Where practicable, a motion under subrule (1) shall be made to the judge or officer who made the order.

ABANDONMENT OF MOTIONS

Abandonment of motions, where not served

37.12(1) Where a party makes a motion by filing a Notice of Motion in accordance with this rule and has not served the Notice of Motion, the party may abandon the motion by filing a Notice of

DÉCISION

37.10 Lors de l'audition d'une motion, le juge ou l'auxiliaire de la justice qui préside peut accorder, rejeter ou ajourner la motion, en totalité ou en partie, avec ou sans conditions. Comme alternative ou en plus, il peut, selon le cas :

a) ordonner l'instruction d'une question en litige, avec des directives justes, et déférer la motion au juge qui préside l'instruction;

b) si l'instance est une action, ordonner qu'elle soit inscrite au rôle afin d'être instruite immédiatement ou dans une période précise;

c) si l'instance est une motion, ordonner qu'elle soit entendue au moment et à l'endroit ainsi qu'aux conditions qui sont justes.

ANNULATION OU MODIFICATION
D'ORDONNANCES**Motion en annulation ou en modification d'une ordonnance**

37.11(1) La personne sur laquelle une ordonnance rendue sans préavis a une incidence ou celle qui n'a pas comparu à l'audition d'une motion pour cause d'accident, d'erreur ou d'avis insuffisant peut demander, par voie de motion, l'annulation ou la modification de l'ordonnance au moyen d'un avis de motion déposé, signifié et rapportable promptement après que la personne ait pris connaissance de l'ordonnance.

Présentation de la motion

37.11(2) Une motion en application du paragraphe (1) est présentée au juge ou à l'auxiliaire de la justice qui a rendu l'ordonnance, si cela est possible.

DÉSISTEMENT DE MOTION

Désistement — motion non signifiée

37.12(1) Une partie peut se désister d'une motion qu'elle a présentée par voie de dépôt d'un avis de motion conformément à la présente règle si l'avis de motion en question n'a pas été signifié. Le

Abandonment of Motion (Form 37B) and an affidavit deposing that the Notice of Motion has not been served.

M.R. 25/90

Abandonment of motions, where served

37.12(2) Where a party makes a motion by filing and serving a Notice of Motion in accordance with this rule, the party may abandon the motion

(a) by serving a Notice of Abandonment of Motion on the parties who were served with the Notice of Motion; and

(b) by filing the Notice of Abandonment of Motion along with proof of service of the Notice of Abandonment of Motion.

M.R. 25/90

Deemed abandonment of motions

37.12(3) Where a party

(a) serves a Notice of Motion on another party and, within a reasonable time after serving the Notice, does not file the Notice; or

(b) files and serves a Notice of Motion and does not appear at the hearing of the motion; the party is deemed to have abandoned the motion unless the court orders otherwise.

M.R. 25/90

Costs on abandoned motions

37.12(4) Where a motion is abandoned by a Notice of Abandonment of Motion under subrule (2) or is deemed to be abandoned under subrule (3), a party on whom the Notice of Motion is served is entitled to the costs of the motion, unless the court orders otherwise.

M.R. 25/90

désistement est fait par dépôt d'un avis de désistement de motion (formule 37B) ainsi que d'un affidavit attestant que l'avis de motion n'a pas été signifié.

R.M. 25/90

Désistement — motion signifiée

37.12(2) Une partie peut se désister d'une motion qu'elle a présentée par voie de dépôt et de signification d'un avis de motion conformément à la présente règle :

a) en signifiant un avis de désistement de motion aux parties qui ont reçu signification de l'avis de motion;

b) en déposant l'avis de désistement de motion ainsi qu'une preuve de la signification de l'avis de désistement de motion.

R.M. 25/90

Désistement réputé

37.12(3) Une partie est réputée s'être désistée d'une motion, à moins d'ordonnance contraire du tribunal, si, selon le cas :

a) elle ne dépose pas l'avis de motion dans un délai raisonnable après l'avoir signifié à une autre partie;

b) elle dépose et signifie l'avis de motion, mais ne comparait pas à l'audience portant sur la motion.

R.M. 25/90

Dépens pour motions faisant l'objet d'un désistement

37.12(4) À moins d'ordonnance contraire du tribunal, une partie à qui a été signifié un avis de motion a droit de recevoir des dépens si la motion fait l'objet d'un désistement par voie de l'avis de désistement de motion visé au paragraphe (2) ou est réputée faire l'objet d'un désistement conformément au paragraphe (3).

R.M. 25/90

TAB 3



MANITOBA

THE COURT OF KING'S BENCH ACT

C.C.S.M. c. C280

LOI SUR LA COUR DU BANC DU ROI

c. C280 de la *C.P.L.M.*

Minister responsible:

Minister of Justice

Ministre responsable :

Ministre de la Justice

As of 13 May 2026, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 13 mai 2026. Son contenu était à jour pendant la période indiquée en bas de page.

Execution by order of the court

37(2) The court may, on such terms and conditions as may be just, order or nominate a person to execute a document or endorse a negotiable instrument and the execution or endorsement by the person has the same force and effect as if executed or endorsed by a person originally entitled to do so.

Stay of proceedings

38 The court, on its own initiative or on motion by a person, whether or not a party, may stay a proceeding on such terms as are considered just.

Relief against acceleration

39(1) Where

(a) a failure to pay money due and payable on a date prescribed in a mortgage or an agreement relating to the sale of land causes an additional amount that is payable at a later date to become immediately due and payable;

(b) a proceeding claiming the full amount payable under the mortgage or agreement under clause (a) is initiated;

(c) the defendant pays into court

(i) the amount originally due and payable under the mortgage or agreement under clause (a),

(ii) the costs of the proceeding under clause (b), and

(iii) an amount which the court deems sufficient to cover damages resulting from the failure to make payment on the prescribed date and to perform other acts required under the mortgage or agreement under clause (a); and

(d) the defendant performs all other acts required under the mortgage or agreement under clause (a);

Signature en vertu d'une ordonnance

37(2) Le tribunal peut, selon les termes et les conditions qu'il estime justes, ordonner à une personne de signer un document ou d'endosser un effet négociable ou nommer une personne à cette fin. Le document ou l'effet négociable ainsi signé ou endossé a la même force et produit les mêmes effets que s'il avait été signé ou endossé par la personne qui avait initialement le droit de le faire.

Suspension de l'instance

38 Le tribunal peut suspendre une instance selon les conditions qu'il estime justes, de son propre chef ou à la suite d'une motion présentée par une personne qui est partie ou non à l'instance.

Clause d'exigibilité anticipée

39(1) Lorsque le cas suivant se présente :

a) un défaut de paiement d'une somme d'argent exigible à une date prescrite dans un acte d'hypothèque ou dans une convention exécutoire de vente d'un bien-fonds entraîne le paiement immédiat d'un montant supplémentaire qui était payable à une date ultérieure;

b) une instance est introduite en vue du recouvrement du plein montant payable aux termes de l'acte d'hypothèque ou de la convention visé à l'alinéa a);

c) le défendeur consigne au tribunal les montants suivants :

(i) le montant exigible initialement aux termes de l'acte d'hypothèque ou de la convention visé à l'alinéa a),

(ii) les dépens de l'instance visée à l'alinéa b),

(iii) un montant que le tribunal juge suffisant en vue du paiement des dommages-intérêts résultant du défaut de paiement à la date prescrite et de l'absence d'exécution des autres actes devant être accomplis aux termes de l'acte d'hypothèque ou de la convention visé à l'alinéa a);

TAB 4

2015 BCSC 1376
British Columbia Supreme Court

North American Tungsten Corp., Re

2015 CarswellBC 2232, 2015 BCSC 1376, [2015] B.C.W.L.D. 6686, [2015] B.C.W.L.D. 6687, 256 A.C.W.S. (3d) 767

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended

In the Matter of North American Tungsten Corporation Ltd. Petitioner

Butler J., In Chambers

Heard: July 8, 2015

Judgment: July 9, 2015

Docket: Vancouver S154746

Counsel: John R. Sandrelli, Jordan D. Schultz, for Petitioner
Kibben M. Jackson, for Monitor, Alvarex & Marsal Canada Inc.
William E.J. Skelly, for Callidus Capital Corporation
Mary Buttery, H. Lance Williams, for Government of Northwest Territories
Jonathan McLean, Angela L. Crimeni, for Wolfram Bergbau and Hütten AG, Global Tungsten & Powders Corp.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.a Grant and length of stay

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.5 Interim financing

Headnote

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under Companies' Creditors Arrangement Act — At time of initial order, debtor had significant cash flow problems — Debtor applied for extension of stay of proceedings granted in initial order, and for approval of interim financing — Applications granted — Extension of stay was appropriate.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Debtor company was involved in exploration, development, mining and processing of tungsten and other minerals — World market for tungsten was depressed — Debtor sought protection under Companies' Creditors Arrangement Act — At time of initial order, petitioner had significant cash flow problems — Debtor had extensive discussions with monitor and stakeholders to put in place potential Sale and Investment Solicitation Process (SISP), and arrived at agreement for interim financing which would be secured by debtor's property and take priority over all secured creditors — Debtor applied for extension of stay of proceedings, and for approval of interim financing — Applications granted — Interim financing approved — Operating plan debtor had implemented responded to cash flow problems and was intended to put debtor in position to enhance prospects of

viable restructuring and/or future SISP — Interim financing would allow debtor to satisfy obligations along with its ongoing revenues from operations through to November 2015 — By that time SISP should be well underway and perhaps concluded.

Table of Authorities

Cases considered by *Butler J., In Chambers*:

Anvil Range Mining Corp., Re (2001), 2001 CarswellOnt 1325, 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

Azure Dynamics Corp., Re (2012), 2012 BCSC 781, 2012 CarswellBC 1545, 91 C.B.R. (5th) 310 (B.C. S.C. [In Chambers]) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — followed

Pacific Shores Resort & Spa Ltd., Re (2011), 2011 BCSC 1775, 2011 CarswellBC 3500, 75 C.B.R. (5th) 248 (B.C. S.C. [In Chambers]) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(2) [en. 2005, c. 47, s. 128] — considered

s. 11.02(3) [en. 2005, c. 47, s. 128] — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4) [en. 2005, c. 47, s. 128] — considered

s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered

s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered

APPLICATIONS by debtor company for extension of stay of proceedings, and for approval of interim financing.

***Butler J., In Chambers*:**

THE COURT: This is my ruling on the applications I heard yesterday. The petitioner, North American Tungsten Corporation Ltd. (the "Company"), applies for an extension of the stay of proceedings which was granted in the initial order in this matter on June 9, 2015 (the "Initial Order"), and seeks approval for interim financing pursuant to s. 11.2 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 I will set out the background to this matter and the parties' positions. For the reasons that follow, I am approving the Company's application to extend the stay and approving the interim financing facility on the terms proposed as those were modified during the course of argument yesterday. As always, if a transcript of this ruling is ordered, I reserve the right to amend it, but only as to form, not substance.

Background

3 The Company is involved in the exploration, development, mining and processing of tungsten and other minerals. The main capital assets of the Company are the Cantung Mine located in the Northwest Territories and the Mactung property, an undeveloped exploration property located on the border of the Yukon Territory and the Northwest Territories. The Mactung property is one of the largest deposits of tungsten in the world. It has received approvals from the federal and Yukon governments to proceed to the next stage of development, but a very large capital investment will be required to construct a mine.

4 The Company sought protection under the *CCAA* as a result of circumstances mostly beyond its control, including a severely depressed world market for tungsten. At the reduced price the Company has been receiving for its tungsten, the Cantung Mine was generating sufficient cash flow to pay the majority of its operational and administrative costs but was unable to meet its financing costs. At the time of the Initial Order, the Company was experiencing significant cash flow problems.

5 Alvarez & Marsal Canada Inc. was appointed Monitor under the Initial Order. A summary of the amounts claimed as owing by secured creditors and their respective security interests as at July 7, 2015 is set out in the Monitor's Fourth report. I will refer to that summary because an understanding of the security interests held by the principal creditors is necessary to consider the issues raised on this application.

6 Callidus Capital Corporation is owed approximately \$13.33 million. This is secured by all present and after-acquired property not related to Mactung. That includes more than 200 pieces of mining equipment used at the Cantung Mine. The Monitor has opined that there is sufficient value in the equipment to satisfy that debt.

7 The Government of Northwest Territories ("GNWT") is owed \$24.67 million. This is secured by all present and after-acquired property related to Mactung. While there is some issue and ongoing negotiation about the actual amount of debt which arises from the Company's reclamation obligations, it is significant.

8 Global Tungsten & Powders Corp. ("GTP") and Wolfram Bergbau and Hütten AG ("WBH") are the Company's only two customers for all of the tungsten produced from the Cantung Mine. The total indebtedness to the customers is approximately \$8.16 million. They also hold security over all present and after-acquired property related to Mactung.

9 Debenture holders are owed \$13.58 million, which is secured by all present and after-acquired property of the Company.

10 Queenwood Capital Partners II LLC ("Queenwood II") is owed approximately \$18.51 million, secured by all present and after-acquired property of the Company. The principals of Queenwood II are related to Company insiders.

11 The total amount of the secured debt is in the range of \$80 million. There is also approximately \$14 million in unsecured liabilities. The reported book value of the assets at the time of the Initial Order was approximately \$64 million, which included a value of \$20 million for the Mactung property. The fair market value or realizable value has not been determined by the Monitor.

12 The somewhat unique situation here is that Callidus does not have security over the Mactung property and the GNWT and the customers do not have security over the Cantung property.

13 The stay granted by the Initial Order expired yesterday, but I extended it until July 10, 2015 to allow me to consider the arguments advanced on this application. Since the Initial Order, management of the Company has been working in good faith to develop a plan of arrangement. Management has developed an operating plan to manage cash flow through the next several months. I will not refer to the projected cash flow except to say that it anticipates receipt of the interim financing and continued revenues of more than \$22 million from operations.

14 The Company has been involved in extensive discussions with the Monitor and stakeholders to put in place a potential Sale and Investment Solicitation Process ("SISP"). To date the plan has involved re-focusing on surface mining and milling ore stockpiles rather than underground mining. Employees have been terminated. If the interim financing is obtained, the Company plans to continue operations at the mine until the end of October 2015, including management of environmental care. It plans to conduct an orderly wind down of underground mining activities, including a staged sale of equipment used in the underground work. It plans to reconfigure the mill facilities to facilitate tailings reprocessing so that it can use existing tailings stores as well as the surface extraction as a revenue source. It also plans to undertake limited expenditures on Cantung reclamation and Mactung environmental work with a view to increasing asset values. It hopes to seek court approval of a SISP in the next couple of weeks.

15 As a result of difficulties arising from timing of receipt of payments from GTP, one of the customers, the cash flow problems for the Company became critical within the last ten days. The Company sought interim financing and received an offer from a third party. Callidus was opposed to that offer of financing and the Company eventually obtained a \$500,000 loan from Callidus on June 29, 2015 on a short-term basis (the "Gap Advance"). They continued to negotiate and arrived at an agreement for interim financing (the "Interim Facility") and a forbearance agreement (the "Forbearance Agreement"). These form the basis for the application before this court. Terms of these agreements which are relevant to the application include:

- a) the \$500,000 Gap Advance would be deemed to be an advance under the Interim Facility;
- b) Callidus will advance an additional \$2.5 million, which along with the Gap Advance would be secured over all of the property of the Company and have priority over the secured creditors; and
- c) the Company will have to make repayments to Callidus by certain dates and those payments include payments of interest and principal on the existing loan facility (the "Post-Filing Payments").

16 At the hearing of the application, one of the more contentious issues was the Company's request that the court make the order in relation to the Gap Advance *nunc pro tunc*. This term was sought because s. 11.2(1) of the *CCAA* allows a court to make an order for interim financing but "The security or charge may not secure an obligation that exists before the order is made."

17 Of course the Gap Advance was an obligation which existed before the making of any order for interim financing. During the course of argument yesterday, the Company withdrew the application for a *nunc pro tunc* order in relation to the Gap Advance. This occurred because Callidus agreed to modify the terms of the Interim Facility such that the Gap Advance will be treated as an advance under its existing facility. In other words, the proposed Interim Facility is now for a \$2.5 million loan facility and not \$3.0 million, as set out in the application.

Position of the Company

18 The Company says that in all of the circumstances, proceeding with the Forbearance Agreement and the Interim Facility is better for the petitioner's restructuring efforts and necessary given the urgent need for funding. It stresses that without access to the interim financing, it will be unable to meet its ongoing payroll obligations or its negotiated payment terms for the post-filing obligations. It will be unable to continue restructuring and will likely face liquidation by its secured creditors. It also says there is greater value for all stakeholders if the Company is permitted to continue operating as a going concern. It says there would likely be no recovery for creditors other than the senior secured creditors without access to the Interim Facility. The local community of Watson Lake and local businesses would suffer significantly, as 100 employees would be out of work. Further, the Company says there is little prejudice to the secured creditors. In addition, it says if the mine site is abandoned,

there would be a larger reclamation obligation, which would be to the detriment of the GNWT and other creditors with claims against an interest in the Mactung property.

Position of the Customers

19 The customers oppose the Interim Facility and the extension of the stay. They argue that the financing of \$2.5 million at interest rates of 21% will not help the Company emerge from this process with a workable plan. They argue that putting the Cantung Mine into care and maintenance as of November and hoping that tungsten prices rise in the future is not a workable plan.

20 The customers say the result of approval of the Interim Facility is that the security interests of WBH and GTP would be prejudiced because those interests would be subordinated to Callidus as well as the GNWT. Finally, they argue that the bankruptcy of the Company and sale of its assets is inevitable no matter what happens.

Position of the GNWT

21 The GNWT does not oppose the extension of the stay nor the granting of the Interim Facility. However, it opposes the Forbearance Agreement which would grant the Interim Facility priority over the GNWT Mactung security, which it holds to secure the environmental and reclamation obligations of the Company. It says that it would be prejudiced as a result of the granting of that priority and that in the circumstances here there is no reason to do so. It says that Callidus would effectively receive approximately \$1.5 million in Post-Filing Payments in very short order, which essentially allows it an unfair priority.

The Monitor

22 The Monitor provided detailed comments supporting the Company's application for interim financing as well as the stay. In doing so it made the following observations:

- Without the interim financing, the Company would have no choice but to immediately cease operations. This would negatively impact the progress of reclamation of the mine and tailings ponds and may have a negative impact on the near term market value of the Mactung property.
- The key senior management of the Company remain in place and are committed to pursuing restructuring solutions or transactions that will see an orderly transition of ownership and stewardship of the assets.
- The Interim Facility is supported by Queenwood II and the debenture holders, the creditors who potentially have the most to lose.
- Based on the confidential appraisal, it appears that the equipment values in aggregate exceed the amounts due to Callidus, which may eliminate or at least mitigate the potential prejudice to creditors having security over Mactung.
- The terms of the Interim Facility including interest rates and fees are consistent with market terms for interim financings in the context of distressed companies and are commercially reasonable in these circumstances when compared to the terms of other court approved interim financing facilities.

23 The Monitor concludes its comments in its Fourth Report by stating that "the interim financing contemplated by the Interim Lending Facility and the Forbearance Agreement will enhance the prospects of a viable restructuring and/or a future SISF being undertaken by the Company. Overall... the Monitor is of the view that, balancing the relative prejudices to the stakeholders, the terms of the Forbearance Agreement and Interim Lending Facility are reasonable in the circumstances and the Monitor supports the Company's application..."

Extension of the Stay

24 I turn now to the reasons for granting the extension of the stay. Subsection 11.02(2) of the *CCAA* provides that the Company may apply for an extension of the stay of proceedings for a period that the court considers necessary on any terms that the court may impose. Subsection 11.02(3) provides:

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

25 A number of decisions have considered whether "circumstances exist that make the order appropriate". In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), the Court emphasized that the underlying purpose of the legislation must be considered when construing the provisions in the *CCAA*. Justice Deschamps stated at para. 70:

... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs.

26 When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]).

27 It is also appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern. While the main focus of the legislation is the reorganization of insolvent companies, a sales and investment solicitation process (SISP) may be the most efficient way to maximize the value of stakeholders' interests and minimize the harm which stems from liquidation: *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]).

28 When *CCAA* proceedings are in their early stages, it is appropriate for courts to give deference when considering extensions of the stay, provided the requirements of s. 11.02(3) have been met. See, for example, *Pacific Shores Resort & Spa Ltd., Re*, 2011 BCSC 1775 (B.C. S.C. [In Chambers]).

29 The good faith and due diligence requirement of s. 11.02(3) includes observance of reasonable commercial standards of fair dealings in the proceedings, the absence of an intent to defraud and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process.

30 I am satisfied that it is appropriate to grant the extension of the stay as sought by the Company. I reject the position of the customers that the Company has failed to put forward any kind of plan. The operating plan which the Company has begun to put in place responds to the existing cash flow problems and is intended to put the Company in a position to enhance the prospects of a viable restructuring and/or a future SISP.

31 It is more than a kernel of a plan. It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the Company. None of the parties suggested that the Company is acting with an absence of either good faith or due diligence, and I am satisfied from the evidence of Mr. Lindahl and the comments of the Monitor that the Company is indeed proceeding in a fashion which fulfills its obligations of good faith and due diligence.

The Interim Facility

32 I turn to my reasons for approving the interim financing. Subsection 11.2(4) of the *CCAA* sets out factors which the court must consider in determining whether to grant a priority charge to an interim lender. The factors in that section which are most relevant to this application are:

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- ...
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report... if any.

33 While the factors listed in that section should be considered, the court may also consider additional factors, which may include the following as set out in *Timminco Ltd., Re*, 2012 ONCA 552 (Ont. C.A.) at para. 6, and I am paraphrasing:

- a) without interim financing would the petitioner be forced to stop operating;
- b) whether bankruptcy would be in the interests of the stakeholders; and
- c) would the interim lender have provided financing without a super priority charge...

34 In *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) at paras. 58 and 59, the Court approved of the following factors which had been considered by the chambers judge:

- a) the applicants needed additional financing to support operations during the period of the going concern restructuring;
- b) there was no other alternative available and in particular no suggestion that the interim financing would have been available without the super priority charge;
- c) the balancing of prejudice weighed in favour of approval of the interim loan facility.

35 When I consider all of these factors, I am satisfied that it is appropriate to approve the Interim Facility. My reasons for doing so include the following:

- The cash flow projections show that the \$2.5 million from the Interim Facility will be sufficient to allow the Company to satisfy obligations along with its ongoing revenues from operations through to November 2015. By that time the SISP should be well underway and perhaps concluded.
- I accept the Monitor's comments regarding the Interim Facility and Forbearance Agreement. In other words, I accept that the Company would not be able to find other interim financing on more favourable terms and that without such financing, the Company would have no choice but to immediately cease operations.
- I further accept the Monitor's comment that cessation of the operations would negatively impact the reclamation of the Cantung Mine and tailings ponds and may have a negative impact on the market value of the Mactung property.

- The Interim Facility enhances the Company's prospects of carrying out a successful SISP and presenting a viable plan to its creditors. If it is forced to shut down its operations, the Company will likely not be able to continue these proceedings and could not continue with the SISP.
- Bankruptcy and a forced liquidation of the assets is not in the best interests of any stakeholder.
- It is unlikely that any creditor will be materially prejudiced by the priority financing. There are two significant reasons for this. First, I accept the Monitor's view that the equipment security is likely to be sufficient to satisfy the existing debt to Callidus. Second, to the extent that the payments to Callidus under the Interim Facility cover Post-Filing Payments, those will likely be offset by the fact that the ongoing operations will result in the conversion of substantial inventories of unprocessed ore. That ore is Cantung property and so it is currently subject to the existing Callidus security. Under the operating plan, revenue from that asset will be used for ongoing operations.
- I further accept the comments of the Monitor and the submissions of the Company that keeping the Cantung Mine operating will likely assist the Company in managing its environmental obligations and thus limit the risk that the GNWT will be faced with a significant reclamation project. As counsel for the Monitor indicated, abandonment of the mine is likely to result in greater costs. The situation would undoubtedly be somewhat chaotic.
- Finally, I conclude that the Interim Facility will further the policy objectives underlying the *CCAA* by mitigating the effects of an immediate cessation of the mining operations which would result in the loss of employment for the Cantung Mine workers and negatively impact the surrounding community.

36 Before concluding, I will make one final comment regarding the requirements of the Forbearance Agreement that the Company make the Post-Filing Payments to Callidus. The Initial Order permits such payments to Callidus. Further, there is nothing in the *CCAA* which prohibits these payments. In the circumstances I have already outlined above, the use of the inventories of unprocessed ore to fund ongoing operations would only be possible with the approval of the Interim Facility. In other words the Post-Filing Payments may be offset by the revenues earned from that asset, which would be a benefit to all creditors.

37 In summary, I am granting the extension of the stay. I believe the request was to July 17, 2015. I will hear from counsel on that issue if there is some other date that is preferred. Further, I approve the Forbearance Agreement and the Interim Facility in the amount of \$2.5 million, and as previously indicated, the Gap Advance is not included in that.

38 What about the date for an extension of the stay?

39

MR. SCHULTZ: Yes, My Lord. So that'll turn a little bit on your availability actually, as was indicated by Mr. Sandrelli, the Company anticipates bringing an application to coincide with the end of the stay for a further extension and approval of a SISP. The Company is also hopeful that an application to approve as was alluded to some further financing from Callidus in respect to the GTP receivable. So I guess I am in your hands a little bit as to whether you might be available on the 17th for an hour to hear those.

40

THE COURT: I can be available, but it would have to be by telephone. I am in Williams Lake next week.

41

MR. SCHULTZ: Okay.

42

THE COURT: So I think that we should proceed with that because the next couple weeks after that I am probably not available.

43

MR. SCHULTZ: Okay. In that case then the 17th is probably the best day, and that would be the day we will be seeking the extension to for now.

44

THE COURT: All right. The stay is extended to July 17, 2015.

Applications granted.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 5

Century Services Inc. *Appellant*

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

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

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("CCAA"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("ETA") created a deemed trust over unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("BIA"). However, s. 18.3(1) of the CCAA provided that any statutory deemed trusts in favour of the Crown did not operate under the CCAA, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the CCAA chambers judge, a payment not exceeding \$5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the BIA. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the ETA to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the CCAA to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the ETA and s. 18.3(1) of the CCAA can be resolved through an interpretation that properly recognizes the history of the CCAA, its function amidst the body of insolvency legislation enacted by

La compagnie débitrice a déposé une requête sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« LACC ») et obtenu la suspension des procédures dans le but de réorganiser ses finances. Parmi les dettes de la compagnie débitrice au début de la réorganisation figurait une somme due à la Couronne, mais non versée encore, au titre de la taxe sur les produits et services (« TPS »). Le paragraphe 222(3) de la *Loi sur la taxe d'accise* (« LTA ») crée une fiducie réputée visant les sommes de TPS non versées. Cette fiducie s'applique malgré tout autre texte législatif du Canada sauf la *Loi sur la faillite et l'insolvabilité* (« LFI »). Toutefois, le par. 18.3(1) de la LACC prévoyait que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, les fiducies réputées établies par la loi en faveur de la Couronne ne s'appliquaient pas sous son régime.

Le juge siégeant en son cabinet chargé d'appliquer la LACC a approuvé par ordonnance le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars. Toutefois, il a également ordonné à la compagnie débitrice de retenir un montant égal aux sommes de TPS non versées et de le déposer séparément dans le compte en fiducie du contrôleur jusqu'à l'issue de la réorganisation. Ayant conclu que la réorganisation n'était pas possible, la compagnie débitrice a demandé au tribunal de lever partiellement la suspension des procédures pour lui permettre de faire cession de ses biens en vertu de la LFI. La Couronne a demandé par requête le paiement immédiat au receveur général des sommes de TPS non versées. Le juge siégeant en son cabinet a rejeté la requête de la Couronne et autorisé la cession des biens. La Cour d'appel a accueilli l'appel pour deux raisons. Premièrement, elle a conclu que, après que la tentative de réorganisation eut échoué, le juge siégeant en son cabinet était tenu, en raison de la priorité établie par la LTA, d'autoriser le paiement à la Couronne des sommes qui lui étaient dues au titre de la TPS, et que l'art. 11 de la LACC ne lui conférait pas le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne. Deuxièmement, la Cour d'appel a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur, le juge siégeant en son cabinet avait créé une fiducie expresse en faveur de la Couronne.

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell : Il est possible de résoudre le conflit apparent entre le par. 222(3) de la LTA et le par. 18.3(1) de la LACC en les interprétant d'une manière qui tienne compte adéquatement de l'historique de la LACC, de la fonction de cette loi parmi

Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event,

l'ensemble des textes adoptés par le législateur fédéral en matière d'insolvabilité et des principes d'interprétation de la *LACC* reconnus dans la jurisprudence. L'historique de la *LACC* permet de distinguer celle-ci de la *LFI* en ce sens que, bien que ces lois aient pour objet d'éviter les coûts sociaux et économiques liés à la liquidation de l'actif d'un débiteur, la *LACC* offre plus de souplesse et accorde aux tribunaux un plus grand pouvoir discrétionnaire que le mécanisme fondé sur des règles de la *LFI*, ce qui rend la première mieux adaptée aux réorganisations complexes. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence permettant aux créanciers de savoir s'ils ont la priorité dans l'éventualité d'une faillite. Le travail de réforme législative contemporain a principalement visé à harmoniser les aspects communs à la *LACC* et à la *LFI*, et l'une des caractéristiques importantes de cette réforme est la réduction des priorités dont jouit la Couronne. Par conséquent, la *LACC* et la *LFI* contiennent toutes deux des dispositions neutralisant les fiducies réputées établies en vertu d'un texte législatif en faveur de la Couronne, et toutes deux comportent des exceptions expresses à la règle générale qui concernent les fiducies réputées établies à l'égard des retenues à la source. Par ailleurs, ces deux lois considèrent les autres créances de la Couronne comme des créances non garanties. Ces lois ne comportent pas de dispositions claires et expresses établissant une exception pour les créances relatives à la TPS.

Les tribunaux appelés à résoudre le conflit apparent entre le par. 222(3) de la *LTA* et le par. 18.3(1) de la *LACC* ont été enclins à appliquer l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* et à trancher en faveur de la *LTA*. Il ne convient pas de suivre cet arrêt. C'est plutôt la *LACC* qui énonce la règle applicable. Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Il semble découler de la logique interne de la *LACC* que la fiducie réputée établie à l'égard de la TPS est visée par la renonciation du législateur à sa priorité. Il y aurait une étrange asymétrie si l'on concluait que la *LACC* ne traite pas les fiducies réputées à l'égard de la TPS de la même manière que la *LFI*, car cela encouragerait les créanciers à recourir à la loi la plus favorable, minerait les objectifs réparateurs de la *LACC* et risquerait de favoriser les maux sociaux que l'édition de ce texte législatif visait justement à

recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

prévenir. Le paragraphe 222(3) de la *LTA*, une disposition plus récente et générale que le par. 18.3(1) de la *LACC*, n'exige pas l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. En tout état de cause, par suite des modifications apportées récemment à la *LACC* en 2005, l'art. 18.3 a été reformulé et renuméroté, ce qui en fait la disposition postérieure. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS. Le conflit entre la *LTA* et la *LACC* est plus apparent que réel.

L'exercice par les tribunaux de leurs pouvoirs discrétionnaires a fait en sorte que la *LACC* a évolué et s'est adaptée aux besoins commerciaux et sociaux contemporains. Comme les réorganisations deviennent très complexes, les tribunaux chargés d'appliquer la *LACC* ont été appelés à innover. Les tribunaux doivent d'abord interpréter les dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour établir leur pouvoir de prendre des mesures dans le cadre d'une procédure fondée sur la *LACC*. À cet égard, il faut souligner que le texte de la *LACC* peut être interprété très largement. La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. L'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Il s'agit de savoir si l'ordonnance contribuera utilement à la réalisation de l'objectif d'éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. Ce critère s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. En l'espèce, l'ordonnance du juge siégeant en son cabinet qui a suspendu l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS contribuait à la réalisation des objectifs de la *LACC*, parce qu'elle avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et favorisait une transition harmonieuse entre la *LACC* et la *LFI*, répondant ainsi à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*, mais il n'existe aucun hiatus entre ces lois étant donné qu'elles s'appliquent de concert et que, dans les deux cas, les créanciers examinent le régime de distribution prévu par la *LFI* pour connaître la situation qui serait la leur en cas d'échec de la réorganisation. L'ampleur du pouvoir discrétionnaire conféré au tribunal par la *LACC* suffit pour établir une passerelle vers une liquidation opérée sous le régime de la *LFI*. Le juge siégeant en son cabinet pouvait donc rendre l'ordonnance qu'il a prononcée.

No express trust was created by the chambers judge's order in this case because there is no certainty of object inferable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

L'ordonnance du juge siégeant en son cabinet n'a pas créé de fiducie expresse en l'espèce, car aucune certitude d'objet ne peut être inférée de cette ordonnance. La création d'une fiducie expresse exige la présence de certitudes quant à l'intention, à la matière et à l'objet. Lorsque le juge siégeant en son cabinet a accepté la proposition que les sommes soient détenues séparément dans le compte en fiducie du contrôleur, il n'existait aucune certitude que la Couronne serait le bénéficiaire ou l'objet de la fiducie, car il y avait un doute quant à la question de savoir qui au juste pourrait toucher l'argent en fin de compte. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à l'argent, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question.

Le juge Fish : Les sommes perçues par la débitrice au titre de la TPS ne font l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité, mais il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il s'agit d'un exercice délibéré du pouvoir discrétionnaire de légiférer. Par contre, en maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, les tribunaux ont protégé indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. Dans le contexte du régime canadien d'insolvabilité, il existe une fiducie réputée uniquement lorsqu'une disposition législative crée la fiducie et qu'une disposition de la *LACC* ou de la *LFI* confirme explicitement l'existence de la fiducie. La *Loi de l'impôt sur le revenu*, le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* renferment toutes des dispositions relatives aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*, mais le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions est confirmé à l'art. 37 de la *LACC* et au par. 67(3) de la *LFI* en termes clairs et explicites. La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne confirme pas l'existence de la fiducie dans la *LFI* ou la *LACC*, ce qui témoigne de son intention de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA*. This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(f) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

La juge Abella (dissidente) : Le paragraphe 222(3) de la *LTA* donne préséance, dans le cadre d'une procédure relevant de la *LACC*, à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Cette disposition définit sans équivoque sa portée dans des termes on ne peut plus clairs et n'exclut que la *LFI* de son champ d'application. Les termes employés révèlent l'intention claire du législateur que le par. 222(3) l'emporte en cas de conflit avec toute autre loi sauf la *LFI*. Cette opinion est confortée par le fait que des modifications ont été apportées à la *LACC* après l'édition du par. 222(3) et que, malgré les demandes répétées de divers groupes, le par. 18.3(1) n'a pas été modifié pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. Cela indique que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

Cette conclusion est renforcée par l'application d'autres principes d'interprétation. Une disposition spécifique antérieure peut être supplantée par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale. Le paragraphe 222(3) accomplit cela de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3). Selon l'alinéa 44f) de la *Loi d'interprétation*, le fait que le par. 18.3(1) soit devenu le par. 37(1) à la suite de l'édition du par. 222(3) de la *LTA* n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure ». Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi autre que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1), ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent, il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and

Jurisprudence

Citée par la juge Deschamps

Arrêt renversé : *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinction d'avec l'arrêt :** *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; **arrêts mentionnés :** *Reference re Companies' Creditors Arrangement Act*, [1934] R.C.S. 659; *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII); *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *First Vancouver Finance c. M.N.R.*, 2002 CSC 49, [2002] 2 R.C.S. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4th) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

Citée par le juge Fish

Arrêt mentionné : *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

Citée par la juge Abella (dissidente)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Société Télé-Mobile Co. c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305; *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862; *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663.

Lois et règlements cités

Loi d'interprétation, L.R.C. 1985, ch. I-21, art. 2 « texte », 44f).

- the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47, ss. 69, 128, 131.
- Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].
- Canada Pension Plan*, R.S.C. 1985, c. C-8, s. 23.
- Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [ad. *idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].
- Companies' Creditors Arrangement Act, 1933*, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].
- Employment Insurance Act*, S.C. 1996, c. 23, ss. 86(2), (2.1).
- Excise Tax Act*, R.S.C. 1985, c. E-15, s. 222.
- Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 227(4), (4.1).
- Interpretation Act*, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(f).
- Winding-up Act*, R.S.C. 1985, c. W-11.
- Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.), art. 227(4), (4.1).
- Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47, art. 69, 128, 131.
- Loi sur l'assurance-emploi*, L.C. 1996, ch. 23, art. 86(2), (2.1).
- Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3, art. 67, 81.1, 81.2, 86 [mod. 1992, ch. 27, art. 39; 1997, ch. 12, art. 73; 2000, ch. 30, art. 148; 2005, ch. 47, art. 69; 2009, ch. 33, art. 25].
- Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15, art. 222.
- Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36, art. 11 [mod. 2005, ch. 47, art. 128], 11.02 [aj. *idem*], 11.09 [aj. *idem*], 11.4 [mod. *idem*], 18.3 [aj. 1997, ch. 12, art. 125; abr. 2005, ch. 47, art. 131], 18.4 [ad. *idem*], 20 [mod. 2005, ch. 47, art. 131], 21 [aj. 1997, ch. 12, art. 126; mod. 2005, ch. 47, art. 131], 37 [aj. 2005, ch. 47, art. 131].
- Loi sur les arrangements avec les créanciers des compagnies*, S.C. 1932-33, ch. 36 [mod. 1952-53, ch. 3].
- Loi sur les liquidations*, L.R.C. 1985, ch. W-11.
- Régime de pensions du Canada*, L.R.C. 1985, ch. C-8, art. 23.

Authors Cited

- Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.
- Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, 15:15.
- Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.
- Canada. Senate. *Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, p. 2147.
- Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.
- Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of*

Doctrine citée

- Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n^o 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15.
- Canada. Comité consultatif en matière de faillite et d'insolvabilité. *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*. Ottawa : Ministre des Approvisionnements et Services Canada, 1986.
- Canada. Comité d'étude sur la législation en matière de faillite et d'insolvabilité. *Faillite et Insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité*. Ottawa : Information Canada, 1970.
- Canada. Industrie Canada. Direction générale des politiques-cadres du marché. *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*. Ottawa : Direction des politiques du droit corporatif et de l'insolvabilité, 2002.
- Canada. Sénat. Comité sénatorial permanent des banques et du commerce. *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrange-*

- the Study Committee on Bankruptcy and Insolvency Legislation*. Ottawa: Information Canada, 1970.
- Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.
- Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4^e éd. Montréal: Thémis, 2009.
- Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: <http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php>).
- Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).
- Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.
- Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.
- Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).
- Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.
- Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.
- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.
- Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.
- Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.
- ments avec les créanciers des compagnies*. Ottawa : 2003.
- Canada. Sénat. *Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147.
- Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont. : Carswell, 2000.
- Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4^e éd. Montréal : Thémis, 2009.
- Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.
- Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (en ligne : <http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php>).
- Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).
- Jackson, Georgina R. and Janis Sarra. « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto : Thomson Carswell, 2008, 41.
- Jones, Richard B. « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto : Thomson Carswell, 2006, 481.
- Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto : Carswell, 1996 (loose-leaf updated 2010, release 1).
- Morgan, Barbara K. « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461.
- Sarra, Janis. *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations*. Toronto : University of Toronto Press, 2003.
- Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto : Thomson Carswell, 2007.
- Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.
- Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.
- Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto : Irwin Law, 2009.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith J.J.A.), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, reversing a judgment of Brenner C.J.S.C., 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Mary I. A. Buttery, Owen J. James and Matthew J. G. Curtis, for the appellant.

Gordon Bourgard, David Jacyk and Michael J. Lema, for the respondent.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell J.J. was delivered by

[1] DESCHAMPS J. — For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency*

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Tysoe et Smith), 2009 BCCA 205, 98 B.C.L.R. (4th) 242, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, [2009] G.S.T.C. 79, [2009] B.C.J. No. 918 (QL), 2009 CarswellBC 1195, qui a infirmé une décision du juge en chef Brenner, 2008 BCSC 1805, [2008] G.S.T.C. 221, [2008] B.C.J. No. 2611 (QL), 2008 CarswellBC 2895, qui a rejeté la demande de la Couronne sollicitant le paiement de la TPS. Pourvoi accueilli, la juge Abella est dissidente.

Mary I. A. Buttery, Owen J. James et Matthew J. G. Curtis, pour l'appelante.

Gordon Bourgard, David Jacyk et Michael J. Lema, pour l'intimé.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, LeBel, Deschamps, Charron, Rothstein et Cromwell rendu par

[1] LA JUGE DESCHAMPS — C'est la première fois que la Cour est appelée à interpréter directement les dispositions de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »). À cet égard, deux questions sont soulevées. La première requiert la conciliation d'une disposition de la LACC et d'une disposition de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« LTA »), qui, selon des juridictions inférieures, sont en conflit l'une avec l'autre. La deuxième concerne la portée du pouvoir discrétionnaire du tribunal qui surveille une réorganisation. Les dispositions législatives pertinentes sont reproduites en annexe. Pour ce qui est de la première question, après avoir examiné l'évolution des priorités de la Couronne en matière d'insolvabilité et le libellé des diverses lois qui établissent ces priorités, j'arrive à la conclusion que c'est la LACC, et non la LTA, qui énonce la règle applicable. Pour ce qui est de la seconde question, je conclus qu'il faut interpréter les larges pouvoirs discrétionnaires conférés au juge en tenant compte de la nature réparatrice de la LACC et de la législation sur l'insolvabilité en général. Par conséquent, le tribunal avait le pouvoir

Act, R.S.C. 1985, c. B-3 (“*BIA*”). I would allow the appeal.

1. Facts and Decisions of the Courts Below

[2] Ted LeRoy Trucking Ltd. (“LeRoy Trucking”) commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

[3] Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax (“GST”) collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

discretionnaire de lever partiellement la suspension des procédures pour permettre au débiteur de faire cession de ses biens en vertu de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »). Je suis d’avis d’accueillir le pourvoi.

1. Faits et décisions des juridictions inférieures

[2] Le 13 décembre 2007, Ted LeRoy Trucking Ltd. (« LeRoy Trucking ») a déposé une requête sous le régime de la *LACC* devant la Cour suprême de la Colombie-Britannique et obtenu la suspension des procédures dans le but de réorganiser ses finances. L’entreprise a vendu certains éléments d’actif excédentaires, comme l’y autorisait l’ordonnance.

[3] Parmi les dettes de LeRoy Trucking figurait une somme perçue par celle-ci au titre de la taxe sur les produits et services (« TPS ») mais non versée à la Couronne. La *LTA* crée en faveur de la Couronne une fiducie réputée visant les sommes perçues au titre de la TPS. Cette fiducie réputée s’applique à tout bien ou toute recette détenue par la personne qui perçoit la TPS et à tout bien de cette personne détenu par un créancier garanti, et le produit découlant de ces biens doit être payé à la Couronne par priorité sur tout droit en garantie. Aux termes de la *LTA*, la fiducie réputée s’applique malgré tout autre texte législatif du Canada sauf la *LFI*. Cependant, la *LACC* prévoit également que, sous réserve de certaines exceptions, dont aucune ne concerne la TPS, ne s’appliquent pas sous son régime les fiducies réputées qui existent en faveur de la Couronne. Par conséquent, pour ce qui est de la TPS, la Couronne est un créancier non garanti dans le cadre de cette loi. Néanmoins, à l’époque où LeRoy Trucking a débuté ses procédures en vertu de la *LACC*, la jurisprudence dominante indiquait que la *LTA* l’emportait sur la *LACC*, la Couronne jouissant ainsi d’un droit prioritaire à l’égard des créances relatives à la TPS dans le cadre de la *LACC*, malgré le fait qu’elle aurait perdu cette priorité en vertu de la *LFI*. La *LACC* a fait l’objet de modifications substantielles en 2005, et certaines des dispositions en cause dans le présent pourvoi ont alors été renumérotées et reformulées (L.C. 2005, ch. 47). Mais ces modifications ne sont entrées en vigueur que le 18 septembre 2009. Je ne me reporterai aux dispositions modifiées que lorsqu’il sera utile de le faire.

[4] On April 29, 2008, Brenner C.J.S.C., in the context of the CCAA proceedings, approved a payment not exceeding \$5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of \$305,202.30 be held by the Monitor in its trust account.

[5] On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, 270 B.C.A.C. 167). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

[7] First, the court's authority under s. 11 of the CCAA was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and

[4] Le 29 avril 2008, le juge en chef Brenner de la Cour suprême de la Colombie-Britannique, dans le contexte des procédures intentées en vertu de la *LACC*, a approuvé le paiement à Century Services, le principal créancier garanti du débiteur, d'une somme d'au plus cinq millions de dollars, soit le produit de la vente d'éléments d'actif excédentaires. LeRoy Trucking a proposé de retenir un montant égal aux sommes perçues au titre de la TPS mais non versées à la Couronne et de le déposer dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Afin de maintenir le statu quo, en raison du succès incertain de la réorganisation, le juge en chef Brenner a accepté la proposition et ordonné qu'une somme de 305 202,30 \$ soit détenue par le contrôleur dans son compte en fiducie.

[5] Le 3 septembre 2008, ayant conclu que la réorganisation n'était pas possible, LeRoy Trucking a demandé à la Cour suprême de la Colombie-Britannique l'autorisation de faire cession de ses biens en vertu de la *LFI*. Pour sa part, la Couronne a demandé au tribunal d'ordonner le paiement au receveur général du Canada de la somme détenue par le contrôleur au titre de la TPS. Le juge en chef Brenner a rejeté cette dernière demande. Selon lui, comme la détention des fonds dans le compte en fiducie du contrôleur visait à [TRADUCTION] « faciliter le paiement final des sommes de TPS qui étaient dues avant que l'entreprise ne débute les procédures, mais seulement si un plan viable était proposé », l'impossibilité de procéder à une telle réorganisation, suivie d'une cession de biens, signifiait que la Couronne perdrait sa priorité sous le régime de la *LFI* (2008 BCSC 1805, [2008] G.S.T.C. 221).

[6] La Cour d'appel de la Colombie-Britannique a accueilli l'appel interjeté par la Couronne (2009 BCCA 205, 270 B.C.A.C. 167). Rédigeant l'arrêt unanime de la cour, le juge Tysoe a invoqué deux raisons distinctes pour y faire droit.

[7] Premièrement, le juge d'appel Tysoe a conclu que le pouvoir conféré au tribunal par l'art. 11 de la *LACC* n'autorisait pas ce dernier à rejeter la demande de la Couronne sollicitant le paiement immédiat des sommes de TPS faisant l'objet de la fiducie réputée,

that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the CCAA and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the CCAA.

[8] Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

[9] This appeal raises three broad issues which are addressed in turn:

- (1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the CCAA and give priority to the Crown's *ETA* deemed trust during CCAA proceedings as held in *Ottawa Senators*?
- (2) Did the court exceed its CCAA authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?
- (3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

après qu'il fut devenu clair que la tentative de réorganisation avait échoué et que la faillite était inévitable. Comme la restructuration n'était plus une possibilité, il ne servait plus à rien, dans le cadre de la LACC, de suspendre le paiement à la Couronne des sommes de TPS et le tribunal était tenu, en raison de la priorité établie par la *LTA*, d'en autoriser le versement à la Couronne. Ce faisant, le juge Tysoe a adopté le raisonnement énoncé dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), suivant lequel la fiducie réputée que crée la *LTA* à l'égard des sommes dues au titre de la TPS établissait la priorité de la Couronne sur les créanciers garantis dans le cadre de la LACC.

[8] Deuxièmement, le juge Tysoe a conclu que, en ordonnant la ségrégation des sommes de TPS dans le compte en fiducie du contrôleur le 29 avril 2008, le tribunal avait créé une fiducie expresse en faveur de la Couronne, et que les sommes visées ne pouvaient être utilisées à quelque autre fin que ce soit. En conséquence, la Cour d'appel a ordonné que les sommes détenues par le contrôleur en fiducie pour la Couronne soient versées au receveur général.

2. Questions en litige

[9] Le pourvoi soulève trois grandes questions que j'examinerai à tour de rôle :

- (1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la LACC et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la LACC, comme il a été décidé dans l'arrêt *Ottawa Senators*?
- (2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la LACC en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?
- (3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

[10] The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor “[d]espite . . . any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)” (s. 222(3)), while the *CCAA* stated at the relevant time that “notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded” (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

[11] In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining Tysoe J.A.’s conclusion that an express trust in favour of the Crown was created by the court’s order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

[12] Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors’ enforcement actions and attempt to obtain

3. Analyse

[10] La première question porte sur les priorités de la Couronne dans le contexte de l’insolvabilité. Comme nous le verrons, la *LTA* crée en faveur de la Couronne une fiducie réputée à l’égard de la TPS due par un débiteur « [m]algré [. . .] tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) » (par. 222(3)), alors que selon la disposition de la *LACC* en vigueur à l’époque, « par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme [tel] » (par. 18.3(1)). Il est difficile d’imaginer deux dispositions législatives plus contradictoires en apparence. Cependant, comme c’est souvent le cas, le conflit apparent peut être résolu au moyen des principes d’interprétation législative.

[11] Pour interpréter correctement ces dispositions, il faut examiner l’historique de la *LACC*, la fonction de cette loi parmi l’ensemble des textes adoptés par le législateur fédéral en matière d’insolvabilité et les principes reconnus dans la jurisprudence. Nous verrons que les priorités de la Couronne en matière d’insolvabilité ont été restreintes de façon appréciable. La réponse à la deuxième question repose aussi sur le contexte de la *LACC*, mais l’objectif de cette loi et l’interprétation qu’en a donnée la jurisprudence jouent également un rôle essentiel. Après avoir examiné les deux premières questions soulevées en l’espèce, j’aborderai la conclusion du juge Tysoe selon laquelle l’ordonnance rendue par le tribunal le 29 avril 2008 a eu pour effet de créer une fiducie expresse en faveur de la Couronne.

3.1 *Objectif et portée du droit relatif à l’insolvabilité*

[12] L’insolvabilité est la situation de fait qui se présente quand un débiteur n’est pas en mesure de payer ses créanciers (voir, généralement, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 16). Certaines procédures judiciaires peuvent être intentées en cas d’insolvabilité. Ainsi, le débiteur peut généralement obtenir une ordonnance judiciaire

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

[20] Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the CCAA, the House of Commons committee studying the BIA's predecessor bill, C-22, seemed to accept expert testimony that the BIA's new reorganization scheme would shortly supplant the CCAA, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

[21] In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the CCAA enjoyed in contemporary practice and the advantage that a

procédures en sont peu à peu venus à reconnaître et à apprécier la caractéristique propre de la loi : l'attribution, au tribunal chargé de surveiller le processus, d'une grande latitude lui permettant de rendre les ordonnances nécessaires pour faciliter la réorganisation du débiteur et réaliser les objectifs de la LACC. Nous verrons plus loin comment les tribunaux ont utilisé de façon de plus en plus souple et créative les pouvoirs qui leur sont conférés par la LACC.

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolubles ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la LACC dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la LFI a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la LFI supplanterait rapidement la LACC, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule n° 15, 3^e sess., 34^e lég., 3 octobre 1991, 15:15-15:16).

[21] En rétrospective, cette conclusion du comité de la Chambre des communes ne correspondait pas à la réalité. Elle ne tenait pas compte de la nouvelle vitalité de la LACC dans la pratique contemporaine,

flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The “flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions” (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, “the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world” (R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

[22] While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors’ remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor’s assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing,

ni des avantages qu’offrait, en présence de réorganisations de plus en plus complexes, un processus souple de réorganisation sous surveillance judiciaire par rapport au régime plus rigide de la *LFI*, fondé sur des règles préétablies. La « souplesse de la *LACC* [était considérée comme offrant] de grands avantages car elle permet de prendre des décisions créatives et efficaces » (Industrie Canada, Direction générale des politiques-cadres du marché, *Rapport sur la mise en application de la Loi sur la faillite et l’insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies* (2002), p. 50). Au cours des trois dernières décennies, la résurrection de la *LACC* a donc été le moteur d’un processus grâce auquel, selon un auteur, [TRADUCTION] « le régime juridique canadien de restructuration en cas d’insolvabilité — qui était au départ un instrument plutôt rudimentaire — a évolué pour devenir un des systèmes les plus sophistiqués du monde développé » (R. B. Jones, « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2005* (2006), 481, p. 481).

[22] Si les instances en matière d’insolvabilité peuvent être régies par des régimes législatifs différents, elles n’en présentent pas moins certains points communs, dont le plus frappant réside dans le modèle de la procédure unique. Le professeur Wood a décrit ainsi la nature et l’objectif de ce modèle dans *Bankruptcy and Insolvency Law* :

[TRADUCTION] Elles prévoient toutes une procédure collective qui remplace la procédure civile habituelle dont peuvent se prévaloir les créanciers pour faire valoir leurs droits. Les recours des créanciers sont collectivisés afin d’éviter l’anarchie qui régnerait si ceux-ci pouvaient exercer leurs recours individuellement. En l’absence d’un processus collectif, chaque créancier sait que faute d’agir de façon rapide et déterminée pour saisir les biens du débiteur, il sera devancé par les autres créanciers. [p. 2-3]

Le modèle de la procédure unique vise à faire échec à l’inefficacité et au chaos qui résulteraient de l’insolvabilité si chaque créancier engageait sa propre procédure dans le but de recouvrer sa créance. La réunion — en une seule instance relevant d’un même tribunal — de toutes les actions possibles contre le débiteur a pour effet de faciliter la négociation avec

rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

[23] Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenu) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

[24] With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

[25] Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

les créanciers en les mettant tous sur le même pied. Cela évite le risque de voir un créancier plus combatif obtenir le paiement de ses créances sur l'actif limité du débiteur pendant que les autres créanciers tentent d'arriver à une transaction. La *LACC* et la *LFI* autorisent toutes deux pour cette raison le tribunal à ordonner la suspension de toutes les actions intentées contre le débiteur pendant qu'on cherche à conclure une transaction.

[23] Un autre point de convergence entre la *LACC* et la *LFI* concerne les priorités. Comme la *LACC* ne précise pas ce qui arrive en cas d'échec de la réorganisation, la *LFI* fournit la norme de référence pour ce qui se produira dans une telle situation. De plus, l'une des caractéristiques importantes de la réforme dont ces deux lois ont fait l'objet depuis 1992 est la réduction des priorités de la Couronne (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73 et 125; L.C. 2000, ch. 30, art. 148; L.C. 2005, ch. 47, art. 69 et 131; L.C. 2009, ch. 33, art. 25; voir aussi *Québec (Revenu) c. Caisse populaire Desjardins de Montmagny*, 2009 CSC 49, [2009] 3 R.C.S. 286; *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35; *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*).

[24] Comme les régimes de restructuration parallèles de la *LACC* et de la *LFI* constituent désormais une caractéristique reconnue dans le domaine du droit de l'insolvabilité, le travail de réforme législative contemporain a principalement visé à harmoniser, dans la mesure du possible, les aspects communs aux deux régimes et à privilégier la réorganisation plutôt que la liquidation (voir la *Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence*, L.C. 2005, ch. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta L.R. (4th) 192, par. 19).

[25] Ayant à l'esprit le contexte historique de la *LACC* et de la *LFI*, je vais maintenant aborder la première question en litige.

3.2 GST Deemed Trust Under the CCAA

[26] The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

[27] The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

[28] The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims

3.2 Fiducie réputée se rapportant à la TPS dans le cadre de la LACC

[26] La Cour d'appel a estimé que la *LTA* empêchait le tribunal de suspendre les mesures prises par la Couronne pour bénéficier de la fiducie réputée se rapportant à la TPS, lorsqu'il a partiellement levé la suspension des procédures engagées contre le débiteur afin de permettre à celui-ci de faire cession de ses biens. Ce faisant, la cour a adopté un raisonnement qui s'insère dans un courant jurisprudentiel dominé par l'arrêt *Ottawa Senators*, suivant lequel il demeure possible de demander le bénéfice d'une fiducie réputée établie par la *LTA* pendant une réorganisation opérée en vertu de la *LACC*, et ce, malgré les dispositions de la *LACC* qui semblent dire le contraire.

[27] S'appuyant largement sur l'arrêt *Ottawa Senators* de la Cour d'appel de l'Ontario, la Couronne plaide que la disposition postérieure de la *LTA* créant la fiducie réputée visant la TPS l'emporte sur la disposition de la *LACC* censée neutraliser la plupart des fiducies réputées qui sont créées par des dispositions législatives. Si la Cour d'appel a accepté ce raisonnement dans la présente affaire, les tribunaux provinciaux ne l'ont pas tous adopté (voir, p. ex., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), autorisation d'appel accordée, 2010 QCCA 183 (CanLII)). Dans ses observations écrites adressées à la Cour, Century Services s'est fondée sur l'argument suivant lequel le tribunal pouvait, en vertu de la *LACC*, maintenir la suspension de la demande de la Couronne visant le paiement de la TPS non versée. Au cours des plaidoiries, la question de savoir si l'arrêt *Ottawa Senators* était bien fondé a néanmoins été soulevée. Après l'audience, la Cour a demandé aux parties de présenter des observations écrites supplémentaires à ce sujet. Comme il ressort clairement des motifs de ma collègue la juge Abella, cette question a pris une grande importance devant notre Cour. Dans ces circonstances, la Cour doit statuer sur le bien-fondé du raisonnement adopté dans l'arrêt *Ottawa Senators*.

[28] Le contexte général dans lequel s'inscrit cette question concerne l'évolution considérable, signalée plus haut, de la priorité dont jouit la Couronne en tant que créancier en cas d'insolvabilité. Avant les

largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the CCAA was binding at all upon the Crown. Amendments to the CCAA in 1997 confirmed that it did indeed bind the Crown (see CCAA, s. 21, as added by S.C. 1997, c. 12, s. 126).

[29] Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, “Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy” (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance (“EI”) and Canada Pension Plan (“CPP”) premiums, but ranks as an ordinary unsecured creditor for most other claims.

[30] Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at §2).

[31] With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property

années 1990, les créances de la Couronne bénéficiaient dans une large mesure d’une priorité en cas d’insolvabilité. Cette situation avantageuse suscitait une grande controverse. Les propositions de réforme du droit de l’insolvabilité de 1970 et de 1986 en témoignent — elles recommandaient que les créances de la Couronne ne fassent l’objet d’aucun traitement préférentiel. Une question connexe se posait : celle de savoir si la Couronne était même assujettie à la *LACC*. Les modifications apportées à la *LACC* en 1997 ont confirmé qu’elle l’était bel et bien (voir *LACC*, art. 21, ajouté par L.C. 1997, ch. 12, art. 126).

[29] Les revendications de priorité par l’État en cas d’insolvabilité sont abordées de différentes façons selon les pays. Par exemple, en Allemagne et en Australie, l’État ne bénéficie d’aucune priorité, alors qu’aux États-Unis et en France il jouit au contraire d’une large priorité (voir B. K. Morgan, « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461, p. 500). Le Canada a choisi une voie intermédiaire dans le cadre d’une réforme législative amorcée en 1992 : la Couronne a conservé sa priorité pour les sommes retenues à la source au titre de l’impôt sur le revenu et des cotisations à l’assurance-emploi (« AE ») et au Régime de pensions du Canada (« RPC »), mais elle est un créancier ordinaire non garanti pour la plupart des autres sommes qui lui sont dues.

[30] Le législateur a fréquemment adopté des mécanismes visant à protéger les créances de la Couronne et à permettre leur exécution. Les deux plus courants sont les fiducies présumées et les pouvoirs de saisie-arrêt (voir F. L. Lamer, *Priority of Crown Claims in Insolvency* (feuilles mobiles), §2).

[31] Pour ce qui est des sommes de TPS perçues, le législateur a établi une fiducie réputée. La *LTA* précise que la personne qui perçoit une somme au titre de la TPS est réputée la détenir en fiducie pour la Couronne (par. 222(1)). La fiducie réputée s’applique aux autres biens de la personne qui perçoit la taxe, pour une valeur égale à la somme réputée détenue en fiducie, si la somme en question n’a pas été versée en conformité avec la *LTA*. La fiducie réputée vise

held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

[32] Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“*ITA*”), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as “source deductions”.

[33] In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 (“*PPSA*”). As then worded, an *ITA* deemed trust over the debtor’s property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the “*Sparrow Electric* amendment”).

également les biens détenus par un créancier garanti qui, si ce n’était de la sûreté, seraient les biens de la personne qui perçoit la taxe (par. 222(3)).

[32] Utilisant pratiquement les mêmes termes, le législateur a créé de semblables fiducies réputées à l’égard des retenues à la source relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC (voir par. 227(4) de la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), par. 86(2) et (2.1) de la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23, et par. 23(3) et (4) du *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8). J’emploierai ci-après le terme « retenues à la source » pour désigner les retenues relatives à l’impôt sur le revenu et aux cotisations à l’AE et au RPC.

[33] Dans *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411, la Cour était saisie d’un litige portant sur la priorité de rang entre, d’une part, une fiducie réputée établie en vertu de la *LIR* à l’égard des retenues à la source, et, d’autre part, des sûretés constituées en vertu de la *Loi sur les banques*, L.C. 1991, ch. 46, et de la loi de l’Alberta intitulée *Personal Property Security Act*, S.A. 1988, ch. P-4.05 (« *PPSA* »). D’après les dispositions alors en vigueur, une fiducie réputée — établie en vertu de la *LIR* à l’égard des biens du débiteur pour une valeur égale à la somme due au titre de l’impôt sur le revenu — commençait à s’appliquer au moment de la liquidation, de la mise sous séquestre ou de la cession de biens. Dans *Sparrow Electric*, la Cour a conclu que la fiducie réputée de la *LIR* ne pouvait pas l’emporter sur les sûretés, au motif que, comme celles-ci constituaient des privilèges fixes grevant les biens dès que le débiteur acquérait des droits sur eux, il n’existait pas de biens susceptibles d’être visés par la fiducie réputée de la *LIR* lorsqu’elle prenait naissance par la suite. Ultérieurement, dans *First Vancouver Finance c. M.R.N.*, 2002 CSC 49, [2002] 2 R.C.S. 720, la Cour a souligné que le législateur était intervenu pour renforcer la fiducie réputée de la *LIR* en précisant qu’elle est réputée s’appliquer dès le moment où les retenues ne sont pas versées à la Couronne conformément aux exigences de la *LIR*, et en donnant à la Couronne la priorité sur toute autre garantie (par. 27-29) (la « modification découlant de l’arrêt *Sparrow Electric* »).

[34] The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

222. . . .

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

[35] The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

[36] The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

[37] Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have,

[34] Selon le texte modifié du par. 227(4.1) de la *LIR* et celui des fiducies réputées correspondantes établies dans le *Régime de pensions du Canada* et la *Loi sur l'assurance-emploi* à l'égard des retenues à la source, la fiducie réputée s'applique malgré tout autre texte législatif fédéral sauf les art. 81.1 et 81.2 de la *LFI*. La fiducie réputée de la *LTA* qui est en cause en l'espèce est formulée en des termes semblables sauf que la limite à son application vise la *LFI* dans son entier. Voici le texte de la disposition pertinente :

222. . . .

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés

[35] La Couronne soutient que la modification découlant de l'arrêt *Sparrow Electric*, qui a été ajoutée à la *LTA* par le législateur en 2000, visait à maintenir la priorité de Sa Majesté sous le régime de la *LACC* à l'égard du montant de TPS perçu, tout en reléguant celle-ci au rang de créancier non garanti à l'égard de ce montant sous le régime de la *LFI* uniquement. De l'avis de la Couronne, il en est ainsi parce que, selon la *LTA*, la fiducie réputée visant la TPS demeure en vigueur « malgré » tout autre texte législatif sauf la *LFI*.

[36] Les termes utilisés dans la *LTA* pour établir la fiducie réputée à l'égard de la TPS créent un conflit apparent avec la *LACC*, laquelle précise que, sous réserve de certaines exceptions, les biens qui sont réputés selon un texte législatif être détenus en fiducie pour la Couronne ne doivent pas être considérés comme tels.

[37] Par une modification apportée à la *LACC* en 1997 (L.C. 1997, ch. 12, art. 125), le législateur

subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

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

[38] An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

18.3 . . .

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

semble, sous réserve d'exceptions spécifiques, avoir neutralisé les fiducies réputées créées en faveur de la Couronne lorsque des procédures de réorganisation sont engagées sous le régime de cette loi. La disposition pertinente, à l'époque le par. 18.3(1), était libellée ainsi :

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

Cette neutralisation des fiducies réputées a été maintenue dans des modifications apportées à la *LACC* en 2005 (L.C. 2005, ch. 47), où le par. 18.3(1) a été reformulé et renuméroté, devenant le par. 37(1) :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d'une telle disposition.

[38] La *LFI* comporte une disposition analogue, qui — sous réserve des mêmes exceptions spécifiques — neutralise les fiducies réputées établies en vertu d'un texte législatif et fait en sorte que les biens du failli qui autrement seraient visés par une telle fiducie font partie de l'actif du débiteur et sont à la disposition des créanciers (L.C. 1992, ch. 27, art. 39; L.C. 1997, ch. 12, art. 73; *LFI*, par. 67(2)). Il convient de souligner que, tant dans la *LACC* que dans la *LFI*, les exceptions visent les retenues à la source (*LACC*, par. 18.3(2); *LFI*, par. 67(3)). Voici la disposition pertinente de la *LACC* :

18.3 . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi*

Par conséquent, la fiducie réputée établie en faveur de la Couronne et la priorité dont celle-ci jouit de ce fait sur les retenues à la source continuent de s'appliquer autant pendant la réorganisation que pendant la faillite.

[39] Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

18.4 . . .

(3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution . . .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

[40] The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize

[39] Par ailleurs, les autres créances de la Couronne sont considérées par la *LACC* et la *LFI* comme des créances non garanties (*LACC*, par. 18.4(1); *LFI*, par. 86(1)). Ces dispositions faisant de la Couronne un créancier non garanti comportent une exception expresse concernant les fiducies réputées établies par un texte législatif à l'égard des retenues à la source (*LACC*, par. 18.4(3); *LFI*, par. 86(3)). Voici la disposition de la *LACC* :

18.4 . . .

(3) Le paragraphe (1) [suivant lequel la Couronne a le rang de créancier non garanti] n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation . . .

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

[41] A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (Alta. Q.B.); *Gauntlet*).

[42] The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[43] Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, and found them to be “identical” (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 (“*C.C.Q.*”), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy,

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l’égard de la *TPS* dans le cadre de la *LACC*. Dans l’arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d’appel de l’Ontario a invoqué la doctrine de l’abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir pré-séance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d’appel de l’Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu’en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

[TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d’appel de l’Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s’estimait donc tenue de suivre l’arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu’une disposition d’une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d’abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

[44] Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

[45] I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrerait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

[47] Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édicton visait justement à prévenir.

[48] Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

[49] Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at “ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer” (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament’s express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[48] Peut-être l’effet de l’arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l’on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L’anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d’un projet de loi d’exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n’indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l’égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l’assurance-emploi et au Régime de pensions du Canada qu’un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l’employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l’égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l’égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

[50] It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

[51] Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

[52] I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from “identical” to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

[53] A noteworthy indicator of Parliament’s overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament’s intent with respect to GST deemed trusts is to be found in the *CCAA*.

[54] I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l’historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d’être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l’historique législatif. On ne peut donc pas dire que l’arrêt *Doré* commande l’application automatique d’une règle d’abrogation implicite.

[53] Un bon indice de l’intention générale du législateur peut être tiré du fait qu’il n’a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D’ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l’art. 18.3 a, comme nous l’avons vu plus tôt, été reprise sous une formulation différente à l’art. 37. Par conséquent, dans la mesure où l’interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d’abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l’engagement de procédures fondées sur la *LACC*, c’est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c’est dans la *LACC* qu’est exprimée l’intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d’accord avec ma collègue la juge Abella pour dire que l’al. 44f) de la *Loi d’interprétation*, L.R.C. 1985, ch. I-21, permet d’interpréter les modifications de 2005 comme n’ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l’objet d’un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l’approche de la *LFI* et celle de la *LACC* à l’égard de l’insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

[55] In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

[56] My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

[57] Courts frequently observe that “[t]he CCAA is skeletal in nature” and does not “contain a comprehensive code that lays out all that is permitted or barred” (*Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, “[t]he history of CCAA law has been an evolution of judicial interpretation” (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

[58] CCAA decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as “the hothouse of real-time litigation” has been the primary method by which the CCAA has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

[59] Judicial discretion must of course be exercised in furtherance of the CCAA’s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a LACC est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalf & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]’histoire du droit relatif à la LACC correspond à l’évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la LACC découlent souvent de l’exercice discrétionnaire de certains pouvoirs. C’est principalement au fil de l’exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la LACC a évolué de façon graduelle et s’est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L’exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la LACC. Le caractère réparateur dont j’ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l’un des premiers exemples :

[TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu’elle fournit un moyen d’éviter les effets dévastateurs, — tant sur le plan social qu’économique — de la faillite ou de l’arrêt des activités d’une entreprise, à l’initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la LACC comporte plusieurs aspects. Le tribunal doit d’abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

[61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la LACC ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la LACC. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la LACC, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

[62] Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, aff'g (1999), 12 C.B.R. (4th) 144 (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

[63] Judicial innovation during CCAA proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during CCAA proceedings? (2) What are the limits of this authority?

[64] The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[62] L'utilisation la plus créative des pouvoirs conférés par la LACC est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La LACC a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la LACC, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la LACC n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la LACC? (2) Quelles sont les limites de ces pouvoirs?

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la LACC et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la LACC, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

[65] I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the CCAA text before turning to inherent or equitable jurisdiction to anchor measures taken in a CCAA proceeding (see G. R. Jackson and J. Sarra, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the CCAA will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

[66] Having examined the pertinent parts of the CCAA and the recent history of the legislation, I accept that in most instances the issuance of an order during CCAA proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

[67] The initial grant of authority under the CCAA empowered a court “where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d’appel ont déconseillé aux tribunaux d’invoquer leur compétence inhérente, concluant qu’il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu’interpréter les pouvoirs se trouvant dans la LACC elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d’accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdent d’abord à une interprétation des dispositions de la LACC avant d’invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d’une procédure fondée sur la LACC (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu’on lui donne l’interprétation téléologique et large qui s’impose, la LACC permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L’examen des parties pertinentes de la LACC et de l’évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la LACC relève de l’interprétation législative. D’ailleurs, à cet égard, il faut souligner d’une façon particulière que le texte de loi dont il est question en l’espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la LACC, le tribunal pouvait, « chaque fois qu’une demande [était] faite sous le régime de la présente loi à l’égard d’une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section” (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

[68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, “subject to the restrictions set out in this Act, . . . make any order that it considers appropriate in the circumstances” (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

[69] The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

d’un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l’ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l’espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l’art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu’il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l’interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d’une demande initiale que d’une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu’elle est indiquée et qu’il a agi et continue d’agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n’a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l’opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l’esprit lorsqu’il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l’opportunité de l’ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s’agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l’objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d’une compagnie insolvable. J’ajouterais que le critère de l’opportunité s’applique non seulement à l’objectif de l’ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (see *Chef Ready*, at p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*’s purposes, the ability to make it is within the discretion of a *CCAA* court.

[72] The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

[73] In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown’s enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

doivent se rappeler que les chances de succès d’une réorganisation sont meilleures lorsque les participants arrivent à s’entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu’il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l’échec » (voir *Chef Ready*, p. 88; *Philip’s Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l’ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l’habilite à rendre à cette ordonnance.

[72] L’analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l’encontre de la Couronne, une fois qu’il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d’appel, le juge Tysoe a conclu que la *LACC* n’habilitait pas le tribunal à maintenir la suspension des mesures d’exécution de la Couronne à l’égard de la fiducie réputée visant la TPS après l’arrêt des efforts de réorganisation. Selon l’appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l’objectif fondamental de la *LACC* et n’a pas donné à ce texte l’interprétation téléologique et large qu’il convient de lui donner et qui autorise le prononcé d’une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d’autre choix que d’autoriser les mesures d’exécution à l’endroit de la fiducie réputée visant la TPS lorsqu’il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J’ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l’ordonnance était autorisée par la *LACC*.

[74] It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

[75] The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

[76] There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament . . . that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

[77] The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [I]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

[79] The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

[81] I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

[82] The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

[83] Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

[84] Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Fiducie expresse*

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3^e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

[85] At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

[86] The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

[87] Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

[88] I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

[89] For these reasons, I would allow the appeal and declare that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. —

I

[90] I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 \$ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] I nonetheless feel bound to add brief reasons of my own regarding the interaction between the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“ETA”).

[93] In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

[94] Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

[95] Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the CCAA and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudenciel.

[94] Le juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

[96] In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a CCAA or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) provision *confirming* — or explicitly preserving — its effective operation.

[97] This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

[98] The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (“ITA”), where s. 227(4) *creates* a deemed trust:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

[99] In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d’insolvabilité, on conclut à l’existence d’une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l’existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l’art. 222 de la *LTA*.

[98] La première est la *Loi de l’impôt sur le revenu*, L.R.C. 1985, ch. 1 (5^e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l’absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l’effet contraire n’a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l’insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d’un montant qu’une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d’une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the CCAA:

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la LACC :

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

18.3(1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act . . .

(2) Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la Loi de l'impôt sur le revenu, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la Loi sur l'assurance-emploi . . .

[101] The operation of the ITA deemed trust is also confirmed in s. 67 of the BIA:

[101] L'application de la fiducie réputée prévue par la LIR est également confirmée par l'art. 67 de la LFI :

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

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

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act . . .

(3) Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la Loi de l'impôt sur le revenu, des paragraphes 23(3) ou (4) du Régime de pensions du Canada ou des paragraphes 86(2) ou (2.1) de la Loi sur l'assurance-emploi . . .

[102] Thus, Parliament has first *created* and then *confirmed the continued operation* of the Crown's ITA deemed trust under *both* the CCAA and the BIA regimes.

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la LIR en faveur de Sa Majesté *tant* sous le régime de la LACC *que* sous celui de la LFI.

[103] The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (“*CPP*”). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 (“*EIA*”), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

[104] As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament’s intent to enforce the Crown’s deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

[105] The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament’s intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

[106] The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l’on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l’article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu’elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l’assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l’avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d’insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu’il prétende maintenir cette fiducie en vigueur malgré les dispositions à l’effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l’existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j’ai mentionnés fait donc défaut, ce qui témoigne de l’intention du législateur de laisser la fiducie réputée devenir caduque au moment de l’introduction de la procédure d’insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la personne, jusqu’à ce qu’il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, . . .

. . . and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[107] Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

[108] In short, Parliament has imposed *two* explicit conditions, or “building blocks”, for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it “inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception” (2009 *BCCA* 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 *BCCA*

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

[110] Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

[111] Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

[112] Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à *l'exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 \$ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

[114] ABELLA J. (dissenting) — The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (“ETA”), and specifically s. 222(3), gives priority during *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”), proceedings to the Crown’s deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court’s discretion under s. 11 of the CCAA is circumscribed accordingly.

[115] Section 11¹ of the CCAA stated:

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court’s discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

¹ Section 11 was amended, effective September 18, 2009, and now states:

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

au titre de la TPS mais n’a pas encore été versée au receveur général du Canada — ne fasse l’objet d’aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l’art. 222 de la *Loi sur la taxe d’accise*, L.R.C. 1985, ch. E-15 (« LTA »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d’une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« LACC »), à la fiducie réputée qui est établie en faveur de la Couronne à l’égard de la TPS non versée. À l’instar du juge Tysoe de la Cour d’appel, j’estime que tel est le cas. Il s’ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l’art. 11 de la LACC est circonscrit en conséquence.

[115] L’article 11¹ de la LACC disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l’insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu’une demande est faite sous le régime de la présente loi à l’égard d’une compagnie, le tribunal, sur demande d’un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l’ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l’art. 11, il est nécessaire de trancher d’abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l’espèce, prévoit ce qui suit :

¹ L’article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

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

(3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

[116] Century Services argued that the CCAA's general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during CCAA proceedings. Section 18.3(1) states:

18.3 (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the CCAA (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

(3) Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

18.3 (1) ... [P]ar dérogation à toute disposition législative fédérale ou provinciale avant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[118] By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with “any other enactment of Canada (except the *Bankruptcy and Insolvency Act*”, s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

[119] MacPherson J.A.’s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d’interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c’est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s’applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l’insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d’application du par. 222(3) et en déclarant de façon non équivoque qu’il s’applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d’appel MacPherson dans l’arrêt *Ottawa Senators* :

[TRADUCTION] L’intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l’insolvabilité*) », c’est le par. 222(3) qui l’emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l’emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l’insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d’exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L’opinion du juge d’appel MacPherson suivant laquelle le fait que la *LACC* n’ait pas été soustraite à l’application de la *LTA* témoigne d’une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l’édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n’a pas été modifié.

[120] L’absence de modification du par. 18.3(1) vaut d’être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the CCAA consistent with those in the BIA. In 2002, for example, when Industry Canada conducted a review of the BIA and the CCAA, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the BIA be extended to the CCAA (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

[121] Yet the BIA remains the only exempted statute under s. 222(3) of the ETA. Even after the 2005 decision in *Ottawa Senators* which confirmed that the ETA took precedence over the CCAA, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la LACC sur celui de la LFI. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la LFI et de la LACC, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la LFI en matière de priorité soient étendues à la LACC (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

[121] La LFI demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la LTA. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

[122] All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the CCAA.

[123] Nor do I see any “policy” justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the CCAA and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the CCAA as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the CCAA, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

[124] Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is “later in time” prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalalia specialibus non derogant*).

[122] Tout ce qui précède permet clairement d’inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l’application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d’aller à l’encontre, par voie d’interprétation législative, de l’intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l’a fait le juge d’appel Tysoe les raisons pour lesquelles l’argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l’espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

[TRADUCTION] Je ne conteste pas qu’il existe des raisons de politique générale valables qui justifient d’inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n’a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu’il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l’arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu’il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d’avis que la clarté des termes employés au par. 222(3) tranche la question, j’estime également que cette conclusion est même renforcée par l’application d’autres principes d’interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l’emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalalia specialibus non derogant*).

[125] The “later in time” principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

[126] The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that “[a] more recent, general provision will not be construed as affecting an earlier, special provision” (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be “overruled” by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, [1997] 2 S.C.R. 862).

[127] The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ... :

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu’il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5^e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3^e éd. 2000), p. 358).

[126] L’exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n’est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu’il a employés, a exprimé l’intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d’interprétation visent principalement à faciliter la détermination de l’intention du législateur, comme l’a confirmé le juge d’appel MacPherson dans l’arrêt *Ottawa Senators*, au par. 42 :

[TRADUCTION] ... en matière d’interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l’intention du législateur lorsqu’il a adopté la loi. Cette règle fondamentale l’emporte sur toutes les maximes, outils ou canons d’interprétation législative, y compris la maxime suivant laquelle le particulier l’emporte sur le général (*generalia specialibus non derogant*). Comme l’a expliqué le juge Hudson dans l’arrêt *Canada c. Williams*, [1944] R.C.S. 226, [...] à la p. 239 ... :

On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n’est pas une règle de droit mais un principe d’interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

[128] I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCA* is thereby rendered inoperative for purposes of s. 222(3).

[129] It is true that when the *CCA* was amended in 2005,² s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663, dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as

² The amendments did not come into force until September 18, 2009.

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4^e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » sauf la *LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005², le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44f) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

² Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

“new law” unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an “enactment” as “an Act or regulation or any portion of an Act or regulation”.

[130] Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

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

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

[131] The application of s. 44(f) of the *Interpretation Act* simply confirms the government’s clearly expressed intent, found in Industry Canada’s clause-by-clause review of Bill C-55, where s. 37(1) was identified as “a technical amendment to re-order the provisions of this Act”. During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the

la disposition qui a précédé l’al. 44f)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d’abrogation et de remplacement, les règles suivantes s’appliquent :

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n’est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l’art. 2 de la *Loi d’interprétation* : « Tout ou partie d’une loi ou d’un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

37. (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

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

[131] L’application de l’al. 44f) de la *Loi d’interprétation* vient tout simplement confirmer l’intention clairement exprimée par le législateur, qu’a indiquée Industrie Canada dans l’analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d’ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

(*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

[132] Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

[133] This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

[134] While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la *LACC*, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la *LACC*.

(*Débats du Sénat*, vol. 142, 1^{re} sess., 38^e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujéti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the CCAA proceedings.

[135] Given this conclusion, it is unnecessary to consider whether there was an express trust.

[136] I would dismiss the appeal.

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejeterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

- (i) the expiration of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or arrangement,

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

- (i) à l'expiration de l'ordonnance rendue en application de l'article 11,
- (ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,
- (iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

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

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

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

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee’s premium, or employer’s premium,

(iv) au moment de tout défaut d’exécution de la transaction ou de l’arrangement,

(v) au moment de l’exécution intégrale de la transaction ou de l’arrangement;

b) la suspension de l’exercice par Sa Majesté du chef d’une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l’égard d’une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L’ordonnance cesse d’être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n’ont pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d’une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

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

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

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

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

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

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

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

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii),

in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

11.02 (1) [Stays, etc. — initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. — other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

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

11.02 (1) [Suspension : demande initiale] Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(2) [Suspension : demandes autres qu'initiales] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.09 (1) [Stay — Her Majesty] An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

(3) [Preuve] Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas a)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l’égard d’une compagnie qui est un débiteur visé par la loi provinciale, s’il s’agit d’une disposition dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d’effet] Les passages de l’ordonnance qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b) cessent d’avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l’égard de toute somme qui devient due à Sa Majesté après le prononcé de l’ordonnance et qui pourrait faire l’objet d’une demande aux termes d’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a “province providing a comprehensive pension plan” as defined in subsection

perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l’exercice des droits que lui confère l’une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(B) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a “provincial pension plan” as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

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

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

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

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L’ordonnance prévue à l’article 11.02, à l’exception des passages de celle-ci qui suspendent l’exercice des droits de Sa Majesté visés aux alinéas (1)a) ou b), n’a pas pour effet de porter atteinte à l’application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l’impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l’assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* et qui prévoit la perception d’une cotisation, au sens du *Régime de pensions du Canada*, ou d’une cotisation ouvrière ou d’une cotisation patronale, au sens de la *Loi sur l’assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l’objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d’une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d’un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l’impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l’impôt sur le revenu*,

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a “federal provision”), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

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

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

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

Excise Tax Act, R.S.C. 1985, c. E-15 (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

37. (1) [Fiducies présumées] Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens de la compagnie débitrice ne peut être considéré comme tel par le seul effet d’une telle disposition.

(2) [Exceptions] Le paragraphe (1) ne s’applique pas à l’égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l’impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l’assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l’égard des sommes réputées détenues en fiducie aux termes de toute loi d’une province créant une fiducie présumée dans le seul but d’assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d’une loi de cette province, si, dans ce dernier cas, se réalise l’une des conditions suivantes :

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

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

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

Loi sur la taxe d’accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l’absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

(3) [Non-versement ou non-retrait] Malgré les autres dispositions de la présente loi (sauf le paragraphe (4) du présent article), tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*), tout texte législatif provincial ou toute autre règle de droit, lorsqu'un montant qu'une personne est réputée par le paragraphe (1) détenir en fiducie pour Sa Majesté du chef du Canada n'est pas versé au receveur général ni retiré selon les modalités et dans le délai prévus par la présente partie, les biens de la personne — y compris les biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ses biens — d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

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

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

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

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

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

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

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

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

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

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas a) et b),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

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

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

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

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

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

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

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a “workers' compensation body”, rank as unsecured claims.

(3) [Exceptions] Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

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

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

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

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

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

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

a) les paragraphes 224(1.2) et (1.3) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. dissenting.

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

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

(ii) soit est de même nature qu’une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l’application de l’alinéa c), la disposition législative provinciale en question est réputée avoir, à l’encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l’impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA est dissidente.

Procureurs de l’appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l’intimé : Procureur général du Canada, Vancouver.

TAB 6

2014 ONSC 5274
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2014 CarswellOnt 11369, 2014 ONSC 5274, 244 A.C.W.S. (3d) 10

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Newbould J.

Heard: July 25, 2014
Judgment: September 11, 2014
Docket: 09-CL-7950

Counsel: Benjamin Zarnett, Graham Smith, for Monitor and Canadian Debtors
Ken Rosenberg, for Canadian Creditors' Committee
Michael Barrack, D.J. Miller, Michael Shakra, for UK Pension Claimants
Tracy Wynne, for EMEA Debtors
Kenneth Kraft, for Wilmington Trust, National Association
Richard Swan, Gavin Finlayson, Kevin Zych, for Ad Hoc Group of Bondholders
Shayne Kukulowicz, for US Unsecured Creditors' Committee
John D. Marshall, for Law Debenture Trust Company of New York
Brett Harrison, for Bank of New York Mellon
Andrew Gray, Scott Bomhof, for US Debtors

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.1 Application of Act

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Application of Act — Relationship between Act and Bankruptcy and Insolvency Act

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby

threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Miscellaneous

Canadian debtor and its US affiliates (collectively N Co.) issued unsecured pari passu notes under three separate bond indentures — All notes were payable by entities of N Co. in both Canada and US, either as maker or guarantor — Canadian debtor filed for and was granted protection under Companies' Creditors Arrangement Act (CCAA) — Proceedings were "liquidating CCAA" proceedings in that debtor was for all intents and purposes liquidated — Bondholders brought claim against debtor for principal and pre-filing interest under terms of bonds — Bondholders also brought claim for post-filing interest — Aside from bondholders, main claimants against debtor were pensioners who, unlike bondholders, had no contractual right to interest — Claim for post-filing interest dismissed — There was no provision in CCAA that would not permit application of common law "interest stops rule" in CCAA proceedings, and there were policy reasons in favour of applying it — To permit some creditors' claims to grow disproportionately to others during stay would not maintain status quo — Moreover, this would encourage creditors whose interests were being disadvantaged to immediately initiate bankruptcy proceedings, thereby threatening objectives of CCAA — Bankruptcy and Insolvency Act (BIA) and CCAA are parts of integrated insolvency scheme, and courts will avoid interpretations of such acts that give creditors incentives to prefer BIA processes.

Table of Authorities

Cases considered by Newbould J.:

- Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), [1992] 4 W.W.R. 309, 125 A.R. 45, 14 W.A.C. 45, 1 Alta. L.R. (3d) 257, 89 D.L.R. (4th) 84, 11 C.B.R. (3d) 193, 1992 CarswellAlta 281 (Alta. C.A.) — considered
- AbitibiBowater Inc., Re* (2009), 2009 CarswellQue 14224, 2009 QCCS 6461 (C.S. Que.) — considered
- Canada (Attorney General) v. Confederation Life Insurance Co.* (2001), [2001] O.T.C. 486, 2001 CarswellOnt 2299 (Ont. S.C.J. [Commercial List]) — considered
- Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.) — considered
- Indalex Ltd., Re* (2009), 2009 CarswellOnt 4465, 55 C.B.R. (5th) 64, 79 C.C.P.B. 104 (Ont. S.C.J. [Commercial List]) — referred to
- Indalex Ltd., Re* (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 354 D.L.R. (4th) 581, 2 C.C.P.B. (2nd) 1, 96 C.B.R. (5th) 171, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, D.T.E. 2013T-97, 301 O.A.C. 1, 8 B.L.R. (5th) 1 (S.C.C.) — followed
- Ivaco Inc., Re* (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to
- Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered
- NAV Canada c. Wilmington Trust Co.* (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.*) 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re*) 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re*) [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re*) 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re*) 269 D.L.R. (4th) 79 (S.C.C.) — followed
- Nortel Networks Corp., Re* (2012), 88 C.B.R. (5th) 111, 2012 CarswellOnt 3153, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310 (Ont. S.C.J. [Commercial List]) — considered
- Savin, Re* (1872), 7 Ch. App. 760 (Eng. Ch. Div.) — considered
- Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652, 2005 CarswellOnt 1071, (sub nom. *Shoppers Trust Co. (Liquidation), Re*) 195 O.A.C. 331, 10 C.B.R. (5th) 93, 251 D.L.R. (4th) 315 (Ont. C.A.) — followed
- Stelco Inc., Re* (2007), 2007 ONCA 483, 2007 CarswellOnt 4108, 35 C.B.R. (5th) 174, 32 B.L.R. (4th) 77, 226 O.A.C. 72 (Ont. C.A.) — distinguished
- Ted Leroy Trucking Ltd., Re* (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC

3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Thibodeau v. Thibodeau (2011), 87 C.C.P.B. 1, 73 C.B.R. (5th) 173, 331 D.L.R. (4th) 606, 2011 CarswellOnt 686, 2011 ONCA 110, 104 O.R. (3d) 161, 277 O.A.C. 359, 5 R.F.L. (7th) 16 (Ont. C.A.) — referred to

Timminco Ltd., Re (2014), 14 C.B.R. (6th) 113, 2014 ONSC 3393, 2014 CarswellOnt 9328 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — referred to

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

Generally — referred to

s. 11(1) — considered

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

Generally — referred to

Winding-up Act, R.S.C. 1970, c. W-10

Generally — referred to

CLAIM by bondholders for post-filing interest against an insolvent estate under *Companies' Creditors Arrangement Act*.

Newbould J.:

1 Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

2 Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US\$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US\$1.6 billion.

3 The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US\$7.3 billion, and thus the post-filing bond interest claims of now more than US\$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US\$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

4 The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

5 By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

6 The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

7 The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the US Unsecured Creditors' Committee, Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

8 For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

9 In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

10 The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

11 The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodeau* (2011), 104 O.R. (3d) 161 (Ont. C.A.), at para. 43. However, the question remains as to whether their contractual rights should prevail.

12 It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (Ont. C.A.) at para. 25, per Blair J.A. and *Indalex Ltd., Re* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.J. [Commercial List]), at para. 16 per Morawetz J. This common law principle has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 (Ont. S.C.J. [Commercial List]), Blair J. (as he then was) stated the following:

20 One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:

I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

13 This rule is "judge-made" law. See *Humber Ironworks & Shipbuilding Co., Re* (1869), 4 Ch. App. 643 (Eng. Ch. Div.), at 647, per Sir G. M. Giffard, L.J.

14 In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks, supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

15 The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust*, Blair J.A. stated:

26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

16 In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Savin, Re* [(1872), 7 Ch. App. 760 (Eng. Ch. Div.)], quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

19. ... I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

17 In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

22 This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view....

23 Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

18 Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

19 When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US\$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US\$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

20 The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

21 In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US\$4.5 billion. In *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

22 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company ... provided the same is proposed in the best interests of the creditors generally.

23 It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

Can the interest stops rule apply in a CCAA proceeding?

24 There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

25 The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

26 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 77:

The CCAA creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

27 If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

28 It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing with the property of insolvent companies. See *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62 and 64, per Laskin J.A.

29 Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

30 In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

31 In her analysis, Deschamps J. made a number of statements, including

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)

With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation. (para. 24)

Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. (para. 47)

Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes... (para. 54)

The CCAA and BIA are related and no gap exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy. (para. 78)

32 In *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.), a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in *Century Services* in para 23 referred to above. She then stated:

In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

33 Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

34 There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

35 In my view, there is no need for there to be a "liquidating" CCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

36 The bondholders contend, however, that *Stelco Inc., Re*, 2007 ONCA 483, 32 B.L.R. (4th) 77 (Ont. C.A.) is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

37 The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

38 Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair J.J.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

39 In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24, [2006] 1 S.C.R. 865 (S.C.C.), [*NAV Canada*]. A number of comments can be made.

40 First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada*.

41 In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

42 Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

43 In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

44 At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

96 Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a CCAA filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

45 The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

46 There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

47 In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US\$1.6 billion out of a total world-wide asset base of US\$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA plan

48 The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US\$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

49 One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

50 However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

51 In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

52 It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

53 I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

54 A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

55 I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the *CCAA* to do so.

56 In *AbitibiBowater Inc., Re*, 2009 QCCS 6461 (C.S. Que.), Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

56 The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

57 Justice Gascon did not accept this argument. He stated:

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

58 Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

59 There is a comment by Laskin J.A. in *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a *CCAA* process, in that case to pension plan administrators for funding deficiencies. He stated:

[I]n my view, absent an agreement, I doubt that the *CCAA* even authorized the motions judge to order this payment. Once restructuring was not possible and the *CCAA* proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

60 This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon, distribution orders without a plan are common in Canada.

61 While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

62 I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US\$4.092 billion).

63 Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

Claim dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 7

2007 NSSC 347
Nova Scotia Supreme Court

Federal Gypsum Co., Re

2007 CarswellINS 629, 2007 NSSC 347, 163 A.C.W.S. (3d) 689, 261 N.S.R. (2d) 299, 40 C.B.R. (5th) 80, 835 A.P.R. 299

**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 Applicant, Federal Gypsum Company

A.D. MacAdam J.

Heard: November 5, 2007
Oral reasons: November 5, 2007
Written reasons: January 29, 2008
Docket: S.H. 285667

Counsel: Maurice P. Chaisson, Graham Lindfield for Federal Gypsum Company
Carl Holm, Q.C. for BDO Dunwoody Goodman Rosen Inc.
Thomas Boyne, Q.C. for Royal Bank of Canada
Robert Sampson, Robert Risk for Enterprise Cape Breton Corporation, Cape Breton Growth Fund Corporation
Michael Pugsley for Her Majesty in Right of the Province of Nova Scotia (Nova Scotia Economic Development), Nova Scotia Business Incorporated
Michael Ryan, Q.C., Michael Schweiger for Black & McDonald Limited

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.a Grant and length of stay

Headnote

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Debtor was granted stay of proceedings for 30 days pursuant to s. 11 of Companies' Creditors Arrangement Act ("CCAA") — Debtor wished to arrange debtor in possession ("DIP") financing, which was essentially new financing that required existing secured creditors to subordinate their interests — Bank was sole secured creditor that objected to DIP financing — Debtor was granted approval to arrange DIP financing to extent of \$350,000 — Debtor was subsequently granted extension of time for filing plan of arrangement along with extension of stay termination date — Debtor wished to increase DIP financing with view to paying off bank — Debtor brought application for permission to increase DIP financing to \$1,500,000 and for further extension of stay termination date — Application granted in part — Stay termination date was extended but increase in DIP financing was to be limited to \$475,000 with no priority to be given to paying off bank — While debtor's net sales had declined, debtor had also incurred lower expenses and used less of authorized DIP financing than had been projected — Debtor's failure to meet projected sales was concern but information and evidence on file offered positive indications — Debtor was not shown to be in its death throes — Prejudice to creditors was evident but perhaps not so fatal as certain demise of company in absence of further DIP financing and extension of time — Bank's secured position had apparently not deteriorated substantially thus far — Extension of time and additional DIP financing would enable debtor to continue in operation while plan of arrangement was considered and voted on by creditors — Favouring bank was not justified as success of restructuring was not dependent on permitting repayment of this single creditor.

Table of Authorities

Cases considered by A.D. MacAdam J.:

- Calpine Canada Energy Ltd., Re* (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 33 B.L.R. (4th) 68 (Alta. Q.B.) — considered
- Cansugar Inc., Re* (2004), 2004 CarswellNB 9, 2004 NBQB 7 (N.B. Q.B.) — considered
- Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered
- Hunters Trailer & Marine Ltd., Re* (2000), 2000 ABQB 952, 2000 CarswellAlta 1776, 5 C.B.R. (5th) 64 (Alta. Q.B.) — considered
- Hunters Trailer & Marine Ltd., Re* (2001), 2001 CarswellAlta 964, 94 Alta. L.R. (3d) 389, 27 C.B.R. (4th) 236, [2001] 9 W.W.R. 299, 2001 ABQB 546, 295 A.R. 113 (Alta. Q.B.) — considered
- Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) — considered
- Juniper Lumber Co., Re* (2000), 2000 CarswellNB 130, 226 N.B.R. (2d) 115, 579 A.P.R. 115 (N.B. C.A.) — considered
- Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to
- Manderley Corp., Re* (2005), 2005 CarswellOnt 1082, 10 C.B.R. (5th) 48 (Ont. S.C.J.) — considered
- San Francisco Gifts Ltd., Re* (2005), 2005 ABQB 91, 2005 CarswellAlta 174, 10 C.B.R. (5th) 275, 42 Alta. L.R. (4th) 377, 378 A.R. 361 (Alta. Q.B.) — considered
- Simpson's Island Salmon Ltd., Re* (2006), 2006 CarswellNB 420, 2006 NBQB 244, 24 C.B.R. (5th) 13, 300 N.B.R. (2d) 165, 782 A.P.R. 165 (N.B. Q.B.) — considered
- Simpson's Island Salmon Ltd., Re* (2006), 302 N.B.R. (2d) 10, 784 A.P.R. 10, 24 C.B.R. (5th) 17, 2006 CarswellNB 453, 2006 NBQB 279 (N.B. Q.B.) — considered

Statutes considered:

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

Generally — referred to

- s. 11 — considered
- s. 11(3) — considered
- s. 11(4) — considered
- s. 11(6) — considered
- s. 11(6)(a) — considered

APPLICATION by debtor for permission to increase debtor in possession financing to \$1.5 million and for extension of stay termination date.

A.D. MacAdam J.:

1 Federal Gypsum Company, (herein "the Company" or "the Applicant"), having been granted a stay of proceedings pursuant to S. 11 of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-25 (herein "CCAA"), and, subsequently approval of arrangements for debtor in possession (herein "DIP") financing and an Order providing for extension of the Stay Termination Date set out in the initial Order, now applies for approval of arrangements for additional DIP financing.

2 The initial Stay Order provided for a 30-day Stay of Proceedings pursuant to s. 11(3) of the *CCAA*. The initial DIP financing application authorized DIP financing in the principal sum of \$350,000.00. The time for filing the Plan of Arrangement under the *CCAA* and the Stay Termination Date were extended to November 29, 2007 at 4:00 p.m, by Order dated October 23, 2007. The Order also provided that "the Company shall file an Application before this Honourable Court relating to the consideration of further debtor in possession financing for a hearing on November 5, 2007 at 9:30 a.m." The Order also stipulated that the extension of the Stay Termination Date to November 29, 2007 was "subject to the right of the creditors of the Company to request a review and reconsideration" of the October 23 Order on the application for further DIP financing.

3 The Company now seeks an increase in the DIP financing from the original authorized \$350,000.00 to \$1,500,000.00.

4 Appearing on the Company's application were a number of secured creditors, including the Royal Bank of Canada, (herein "Royal Bank"), Cape Breton Growth Corporation, (herein "CBGC"), and Enterprise Cape Breton Corporation, (herein "ECBC"), (herein collectively referred to as the "Federal Crown Corporations"); Nova Scotia Business Inc. (herein "NSBI") and Nova Scotia — Office of Economic Development (herein "NSOED") (herein collectively referred to as the "Nova Scotia Crown Corporations"), each of whom hold, or purport to hold, first secured charges on some of the assets of the Company, as do the Federal Crown Corporations; and Black & McDonald Limited, (herein "BML") who purport to hold a subordinate secured charge on assets of the Company.

The CCAA

5 The relevant provisions of Section 11 of the CCAA are as follows:

11. (1) **Powers of court** — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

(2) **Initial Application** — An application made for the first time under this section in respect of a company, in this section referred to as an 'initial application' shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

(3) **Initial application court orders** — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) **Other than initial application court orders** — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(5) **Notice of orders** — Except as otherwise ordered by the court, the monitor appointed under section 11.7 shall send a copy of any order made under subsection (3), within ten days after the order is made, to every known creditor who has a claim against the company of more than two hundred and fifty dollars.

(6) **Burden of proof on application** — The court shall not make an order under subsection (3) or (4) unless

- (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
- (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The Law

6 The purpose of the CCAA was commented on by Justice Turnbull of the New Brunswick Court of Appeal in *Juniper Lumber Co., Re*, [2000] N.B.J. No. 144 (N.B. C.A.), at para. 1:

The principal purpose of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the 'CCAA'), 'is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business ... When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.' See *Arrangements Under the Companies' Creditors Arrangement Act* by Goldman, Baird and Weinszok (1991), 1 C.B.R. (3d) 135 at p. 201 where the authors cite Thackray; J. approvingly quoting Gibbs, J.A. from the cases cited on that page. In New Brunswick, the Court of Queen's Bench is defined by the CCAA as the Court to play the 'kind of supervisory role.' The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion. See pages 137-138 in the article previously cited. More often than not time is critical. And, in order to maintain a status quo while attempts are made to determine if a successful compromise or arrangement can be reached, the courts are granted certain powers in s. 11 to hold creditors at bay.

7 Justice Glennie of the New Brunswick Court of Queen's Bench in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 279 (N.B. Q.B.), at para. 20, after referencing *Juniper Lumber Co.*, referred to *Lehndorff General Partner Ltd., Re*, [1993] O.J. No. 14 (Ont. Gen. Div. [Commercial List]), at paras. 5 and 6, where Farley, J. said:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has a great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. ...

Background

(A) The Initial Application

8 On the initial application, the Court having been satisfied the company met the requirements for the filing under the CCAA, in that it was, on the evidence tendered, "insolvent" and had total claims exceeding \$5,000,000.00, and being further satisfied that the burden stipulated in s. 11(6) had been met, an Order providing for a Stay of Proceedings was issued.

(B) The Initial DIP Financing

9 Shortly after the Stay Order was issued, the Company filed the application for the initial DIP financing in the sum of \$350,000.00. Counsel for the company acknowledged the omission in the CCAA of any specific authorization sanctioning DIP

financing and granting "super-priority" over existing secured, as well as unsecured, debt. Counsel referenced the legal principles cited by Justice C. Campbell in *Manderley Corp., Re* (2005), 10 C.B.R. (5th) 48 (Ont. S.C.J.), at para 18 where he observes:

The operative legal principles are set out in the following quotations from Houlden & Morawetz' *Bankruptcy & Insolvency Analysis* (Carswell, 2004), section N16 — Stay of Proceedings[sic] — CCAA — at page 18:

Although the C.C.A.A. makes no provision for DIP financing, it seems to be well established that, under its inherent powers, the court may give a priority for such financing and for professional fees incurred in connection with the working out of a C.C.A.A. plan.

For the court to authorize DIP financing, there must be cogent evidence that the benefit of the financing clearly outweighs the prejudice to the lenders whose security is being subordinated to the financing: ...

The court can create a priority for the fees and expenses of a court-appointed monitor ranking ahead of secured creditors so long as they are reasonably incurred in connection with the restructuring of the debtor corporation and there is a reasonable prospect of a successful restructuring: ...

10 At para 19 Justice Campbell continues:

In *Skydome Corp., Re*, 1998 CarswellOnt 5922, 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with the issue of 'super-priority' financing in the context of the specific use to be made of the funds where he was satisfied that the priority accorded the DIP financing would not prejudice the secured creditors. At paragraph 13 he said:

I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors — in the exercise of balancing the prejudices between the parties which is inherent in these situations — have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C.S.C.) are examples of the flexibility which courts bring to situations such as this. ...

11 To similar effect Wachowich J. in *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Alta. Q.B.), noted, at para. 32, the necessity to balance the benefit of such financing with the potential prejudice to the existing secured creditors. Justice Glennie in *Simpson's Island Salmon Ltd., Re, supra*, at paras. 16-19 held:

In order for DIP financing with super-priority status to be authorized pursuant to CCAA, there must be cogent evidence that the benefit of such financing clearly outweighs the potential prejudice to secured creditors whose security is being eroded. See *United Used Auto & Truck Parts Ltd., Re*, [1999] B.C.J. No. 2754(B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409 (B.C. C.A.)

DIP financing ought to be restricted to what is reasonably necessary to meet the debtors urgent needs while a plan of arrangement or compromise is being developed.

I am satisfied on the evidence before me that Simpson's Island and Tidal Run have a viable basis for restructuring. The amount of the DIP facility has been restricted to what is necessary to meet short-term needs until harvest.

A Court should not authorize DIP financing pursuant to the CCAA unless there is a reasonable prospect that the debtor will be able to make an arrangement with its creditors and rehabilitate itself. In this case the Monitor has advised the Court that there is a reasonable prospect that Simpson's Island and Tidal Run will be able to make such arrangements with their creditors.

12 In his written submission counsel for the company, in reference to the three issues for review outlined by Justice Glennie, commented that "[e]ssentially, the court must engage in the balancing act that is the hallmark of DIP financing, as declared by C. Campbell, J. in *Manderley* at para. 27, weighing the benefit and prejudice referred to by Glennie, J."

13 The secured creditors, with the exception of the Royal Bank, neither consented nor strenuously objected to the initial DIP financing sought by the Company. The Royal Bank, on the other hand, objected, on the basis that the funding of the ongoing operations of the company could very well be at the expense of its security on the receivables and inventory. Nevertheless, having balanced prejudice to the secured creditors, in this instance particularly to the Royal Bank, and the benefit of providing financing to enable the Company to pursue a Plan of Arrangement, and on being satisfied the sought-for DIP financing and resulting super-priority were reasonably necessary to meet the Company's immediate needs and there was a reasonable prospect the Company would be able to make arrangements with its creditors and thereby rehabilitate itself, this Court allowed the application.

(C) The First Extension

14 At the expiration of the initial Stay Termination date, the Company applied for an extension, which application was generally opposed by the secured creditors. The Application included a further Affidavit by one of the Directors and Officers of the Company, as well as a further report from the Monitor. In para. 4.7, the Monitor reported:

Having met with Federal and its legal counsel, and having had preliminary discussions with them as to the general principles and format of a Plan of Arrangement, and having considered the progress made in financing and sales opportunities, and having had initial discussions with senior secured creditors, the Monitor concludes that Federal has acted, and continues to act, in good faith and with due diligence and, if given sufficient time by This Honorable (sic) Court, should be able to file a Plan of Arrangement under CCAA that will have a significant chance of being successful.

15 Included among the Monitor's recommendations was the observation that the Company "... must make an application for an increase in the DIP financing level and such other matters as may relate thereto".

16 In *Cansugar Inc., Re*, 2004 NBQB 7 (N.B. Q.B.), at paras 8 and 9, Justice Glennie in respect to applications for extension of stay termination dates, after referencing ss. 11(4) and (6) of the CCAA, stated:

In *The 2004 Annotated Bankruptcy & Insolvency Act*, Houlden & Morawetz state at page 1126:

To obtain an extension, the application must establish three preconditions:

- (a) the 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.

In my opinion, the requirements of section 11(6) of the C.C.A.A. have been satisfied in this case. The continuation of the stay is supported by the overriding purpose of the C.C.A.A., which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the Court, and to prevent maneuvers for positioning among creditors in the interim.

17 In support of the application for the extension, counsel referenced para. 17 of the Affidavit of Mr. Simpson, where he states that:

An extension of the Stay of Termination Date would allow the Company to accomplish the following:

- (a) continue with its recent efforts to improve sales, which are expected to yield positive results;

- (b) provide for additional debtor-in-possession financing to service the Company's cash flow needs in the short and medium term until the Plan is presented to the Company's stakeholders;
- (c) complete the appraisal of the assets of the Company;
- (d) complete cash flow forecasts and income statement and balance sheet projections for the 2008, 2009 and 2010 years; and
- (e) finalize the elements of the Plan.

18 At para 18 Mr. Simpson continues:

I believe that if the Stay Termination Date is not extended, some of the creditors of the Company will commence proceedings against the Company in relation to the enforcement of their security. Such proceedings would be highly prejudicial to the interests of the Company and would significantly impair the Company's ability to complete a successful restructuring.

19 Mr. Simpson's Affidavit, in outlining the present circumstances and the efforts of the company since the date of the initial order, also states that the Company "... is presently formulating a plan to present to its various stakeholders- including its creditors". Counsel notes the Company is arranging for an appraisal of its assets and negotiating with a lender to provide additional financing during the "near and medium term". Counsel suggests these factors demonstrate that:

... the Company has been proceeding diligently and in good faith since the Initial Order to assemble the elements of a plan to be presented to its stakeholders. There will be several elements to this plan and the Company requires additional time to bring these elements together. The Company's majority shareholder is motivated by the single goal of putting together a plan which will ensure the survival of the Company and, in so doing, protect, to the fullest extent possible, the interests of the stakeholders as a whole.

20 Counsel references *San Francisco Gifts Ltd., Re*, 2005 ABQB 91 (Alta. Q.B.), where, at para. 28, Topolniski. J. comments on the supervisory role of the Court on such an application:

The court's role during the stay period has been described as a supervisory one, meant to: '*... preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.*' That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

21 The application for an extension of the Stay Termination Date was opposed on the basis that the performance by the Company did not generate confidence it had turned the corner and was likely to survive. The objecting creditors viewed the performance of the Company as further prejudicing their position in respect to the secured positions they held on the various assets of the company. They took this view, notwithstanding the Monitor's assessment that the Company, by its actions, appeared to be acting in good faith and with due diligence and moving forward towards the preparation of a Plan of Arrangement, and that the actual net cashflow of the Company was not adverse to the cashflow plan as presented on the initial Order. On the Application for the Stay Extension, counsel for the Nova Scotia Crown Corporations did not object to the extended Stay, but expressed a concern about the proposed increase in the DIP financing.

22 Considering the position of the creditors and the representations on behalf of the Company, the Stay Termination Date was extended to November 29, 2007 with the proviso that on the Application for further DIP financing the creditors could request a review and reconsideration of the extension.

Issue

23 At issue is whether the Company's application for approval of Arrangements for additional DIP financing should be approved, including the proposed payout of the Royal Bank operating loan, and whether the Court should reconsider the extension of the Stay Termination Date to November 29, 2007.

The Present Applications

Reconsidering the Extension of the Stay Termination Date

24 In respect to the Company's application to extend the Stay Termination Date, counsel on behalf of the Royal Bank had indicated the Bank's opposition both in writing and in oral submission. Counsel noted the burden of proof was on the Applicant. Counsel for the Company suggested circumstances existed that made it appropriate to extend the initial Order, in that the Applicant had acted, and continued to act in good faith and with due diligence. In this respect counsel refers to *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), where Farley, J. observed :

The good faith and due diligence of the Applicant are not questioned.

25 On the reconsideration application, counsel for the Royal Bank acknowledged that neither the good faith nor due diligence of the Applicant were questioned, but said the Company had failed to show circumstances that made it appropriate to extend the initial Order. Counsel suggested that to cover the losses for the first seven months of 2007 the Company would have to increase its net sales by over 65%, and if one were to include all expenses and only the repayment of \$1,000,000.00 per year on the total liabilities of more than \$32,000,000.00, the Applicant would have to increase its net sales by 92%. Counsel noted the difficulties the Company has had in marketing its products and that in fact there has been a "decrease in sales from expected levels with a resulting decrease in accounts receivables". Counsel added that in the Monitor's second report he indicated sales were over \$150,000.00 less than budget and expressed concern about the trend in sales. Counsel submitted that there is no evidence of a plan, referring again to reasons of Justice Farley in *Inducon Development Corp., supra*, where he stated:

[W]hile it is desirable to have a formalized plan when applying, it must be recognized as a practical matter that there may be many instances where only an outline is possible. I think it inappropriate, absent most unusual and rare circumstances, not to have a plan outline at a minimum, in which case then I would think that there would be a requisite for the germ of a plan.

26 Counsel for the Royal Bank suggested it is inappropriate to continue CCAA protection where the Company does not have, "at the least, a minimum outline of a plan".

27 In response to the Company's suggestion that the creditors "will not be materially prejudiced as the company continues to operate", Counsel said there is real prejudice, including:

- (a) interference with the rights of secured creditors to deal with their security and to maximize their recovery;
- (b) changing market conditions and the loss of potential purchasers of the assets;
- (c) deterioration in the value of assets through on-going use;
- (d) in the case of Royal Bank of Canada, the eroding of and loss of its security interest through the collection and use of accounts receivable [sic] to fund the operations of the Applicant during the Stay;
- (e) costs of professionals in maintaining these proceedings, which in the case of the Applicant are recognized to be as great as \$300,000;
- (f) professionals costs to the creditors; and

(g) delay with regard to unsecured creditors in recognizing losses and the decisions that they must make in dealing with their own creditors on a go forward basis.

28 Counsel notes as unique the reality that the Company has never been profitable, whereas in many of the cases where CCAA orders are granted, the Companies have been in business for some period of time and, through circumstances, have suffered adversity which may be overcome through forgiveness and restructuring of debt obligations and the injection of equity to enable them to return to a state of profitability. The Company, counsel suggests, has never generated enough sales to even meet its operating expenses. Counsel adds that no evidence has been presented to the Court to indicate such a level of sales can be reached. As a result, counsel concludes, the Company has no reasonable expectation of reaching the required level of sales.

29 Notwithstanding the forceful submission of counsel for the Royal Bank, it is clear that although net sales have declined, the Company has also incurred lower expenses and has used less of the authorized DIP financing than had been projected in the cashflow projections filed on the initial DIP financing application. Like with the Monitor, I am concerned with the failure of the Company to meet the projected sales. There are, however, some positive indications from the information filed in the Monitor's report and outlined in the Affidavit of Rhyne Simpson, Jr., President and a Director of the Applicant. I am not satisfied the Company has reached the stage of "the last gasp of a dying company" or is in its "death throes", although clearly any Plan of Arrangement will require compromise and cooperation between the Company and its stakeholders. During the course of submissions, counsel for the Company acknowledged that if additional DIP financing was not obtained the inevitable consequence would be the demise of the Company. The effect on the Company of terminating the extension of the Termination Date, as it relates to the opportunity for the preparation and presentation of a Plan of Arrangement, is evident. The prejudice to the creditors, although evident, is perhaps not so fatal. Although not necessarily indicative of the position of the Royal Bank, should, in due course, the Company fail, nevertheless on the financial information filed by the Monitor from information obtained from the Company's officers, it would not appear that there has been a substantial deterioration in the Royal Bank's secured position to date.

30 As a consequence I am prepared to grant the Order continuing the Stay Termination Date until November 29th, 2007, provided the Company is successful on the application for additional DIP financing.

The Additional DIP Financing

31 On the Application to extend the Stay Termination Date and to set the date for filing the Plan of Arrangement, counsel for the Company acknowledged that if the Company was unsuccessful in obtaining approval of arrangements for additional DIP financing, notwithstanding the extension, the Company would not be able to continue in operation while preparing and presenting to its creditors its proposed Plan of Arrangement. On the Application for the \$1,500,000.00 DIP financing, the Monitor appointed on the initial application, in his third report to the Court, indicated the purpose was to replace the previous DIP lender, pay out the Royal Bank working capital loan, and provide additional DIP funds to allow the Company to continue operations and provide time to finalize and file a Plan of Arrangement for consideration by the creditors. The Monitor reported that its weekly cashflow projections, as prepared by the Company, indicated the requirement for DIP financing for the week of November 26, 2007 would be approximately \$83,000.00 in excess of the present DIP financing approval limit. The report further indicated that beyond the Stay Termination Date of November 29, 2007 the requirement for DIP financing would increase significantly in the month of December 2007.

32 With the sole exception of the Royal Bank, the secured creditors oppose the application for additional DIP financing. The Royal Bank, in view of the stipulated intention to use the additional DIP financing to pay down its working capital loan, leaving only a second loan secured on certain leases, does not oppose the additional DIP financing. Absent the provision for repayment of its working capital loan, it is clear from the representations of counsel, both on this and earlier applications, that the Royal Bank would not consent to nor support the request for additional DIP financing.

33 On the application, counsel for the Company advised that the proposed DIP lender had stipulated certain changes in the terms of the proposed financing to require the first DIP lender to advance the remainder of the amounts authorized under

the initial DIP Order and that the full amount of \$350,000.00 be subordinated to its charge. There were changes relating to the "borrowing base" for the loans and a requirement that the priority of the "Administration Charge", which priority was provided for in the initial Order, was not to exceed the sum of \$75,000.00. During the course of the application counsel also advised that other changes had been approved by the DIP lender, including verification of the amount upon which the lender was entitled to charge fees over and above the interest provided for in the offer of financing.

34 Counsel for the applicant, referencing the comment by C. Campbell, J. in *Manderley Corp., Re, supra*, at para 27, acknowledged the Court must engage in "the balancing act that is the hallmark of DIP financing". He notes Justice Glennie applied this balancing in considering the approval of super-priority funds, beyond those initially requested, when, in *Simpson's Island Salmon Ltd., Re*, 2006 NBQB 244 (N.B. Q.B.), at para 9, he declared:

As stated by MacKenzie J.A. in *United Used Auto & Truck Parts Ltd., Re* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.):

[12] ... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

[28] The object of the CCAA is more than the preservation and realization of assets for the benefits of creditors, as several courts have underlined. In *Chef Ready Foods*, Giggs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed 'to monitor the business and financial affairs of the company' for the court.

35 Justice Glennie was concerned with an application for an increase in the "Administrative Charge", for which priority was granted, to the advisors retained to formulate and present the restructuring plan. He determined that failure to grant the increase would result in the applicants no longer being able to continue their attempts at restructuring. He referred to the decision of Justice Wachowich, also in respect to an administrative charge, in *Hunters Trailer & Marine Ltd., supra*, denying an increase in the amount of DIP financing. He found the applicant had not met the onus under s. 11(6) (a) of the CCAA to establish that a stay would be appropriate in the circumstances. At para 10 he observed:

In my view, the evidence provided by Hunters does not show that the benefits of DIP financing will clearly outweigh potential prejudice to the Objecting Creditors. While DIP financing is the only means for Hunters to continue operating, it is impossible to conclude that this short-term benefit will culminate in Hunters' financial recovery, due to a number of deficiencies in the evidence.

36 Justice Wachowich continued by identifying particular deficiencies such as the absence of appraisals, the absence of current financial information on the Company, the absence of verification of the Company's cashflow projections by the Monitor and uncertainty as to the value of one of the major assets. Counsel suggests that in the present instance these deficiencies do not exist, in that an appraisal has been obtained, the current financial information is available on an ongoing basis, and the Monitor is being provided with continuing opportunities to verify the Company's cashflow projections and has done so. Counsel also suggests the other deficiency noted by Justice Wachowich, the uncertainty as to the value of a major asset, is not an issue in the current circumstance.

37 Counsel for the Company, suggesting that DIP financing "is merely prolonging the inevitable", cites para. 13 of *Hunters Trailer & Marine Ltd., Re*, 2000 ABQB 952 (Alta. Q.B.):

Another consideration in assessing the benefit of DIP financing is that even if Hunters' projected cashflows are accurate, they show a continuing net deficit, suggesting that the benefit of DIP financing is merely prolonging the inevitable. Even as of September 2001, following the months when the volume of Recreational Vehicle ("RV") sales is highest, Hunters expects a cash flow deficit. After September, the RV sales will slow down significantly as Hunters enters the low season, so cash flow is not likely to increase after September. Hunters can expect continuing difficulties in meeting operating expenses well into the foreseeable future. The sources of Hunters' cash flow problems, as identified by Blair Bondar, the

company president, will likely continue to exist. Mr. Bondar states that RV sales have decreased as a result of, in part, increasing gas prices, a weak Canadian dollar, and increased competition. Hunters has no control over these systemic problems, and there is no evidence or reason to believe that they will be resolved in the foreseeable future. As a result, I am not convinced that the cash flow projections themselves are accurate. The Monitor does not verify the accuracy or reasonableness of the projections. Therefore, it is impossible to conclude that the DIP financing will benefit Hunters and its creditors in the long run.

38 Counsel says the current circumstance can be distinguished for a number of reasons, including that the projected cashflow statements "do not disclose uninterrupted deficits, and those deficits that exist for the most part are minimal." Counsel's submission continues:

... The sources of the Company's cash flow problems are not expected to continue to exist, or at least to have as severe an effect as they did during the month of October, as noted at paragraph 25 of the Additional DIP Affidavit. Finally, as noted above, the Monitor has verified the reasonableness of the Company's cash flow projections. All of the above circumstances suggest, contrary to those facing Wachowich J. in *Hunters* (2000) (*supra*), that additional DIP financing will benefit the Company and its creditors in the long run, as those funds will allow the Company to take advantage of the opportunities presented, and thereby ultimately bolster its efforts to finalize and present a viable restructuring plan. It is submitted that none of the myriad reasons by Wachowich J. for denying further DIP financing are present in the current situation.

39 Counsel suggests the additional DIP financing is a necessary cost of ensuring there can be a meaningful discussion between the stakeholders about the restructuring plan. Counsel recognizes that any protection afforded by the CCAA, with its attended super-priority, will necessarily have a prejudicial effect on the Company's creditors. As counsel suggests, what must be examined is whether such prejudice is more than outweighed by the prejudice to the Company and its stakeholders should the requested DIP financing be denied, given that, as counsel suggests, "it would most likely have to cease operations in that instance." Counsel suggests the Affidavit filed in support of the Application "provides clear evidence of improving prospects for the Company, as well as considerable effort on its part to build a sustainable business, the ultimate goal of the CCAA restructuring process". Having considered the Monitor's reports and filed documents, including affidavits, together with the representations of Counsel, I am satisfied it is appropriate to continue CCAA protection to enable the Company to finalize preparation of the Plan and its presentation to the creditors. In view of the need for additional DIP financing to enable the Company to continue in operation, while the Plan is considered and voted upon by the creditors, the Company is granted approval for additional DIP financing.

Payout of the Royal Bank

40 Counsel for the Company's submission recognized the possibility that some of the secured creditors would object to the application and, in particular, to the proposed buy-out of the Royal Bank's operating line of credit. Counsel referenced the comments of Farley, J. in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), to the effect that the mere fact a significant secured creditor objects to such financing should in no way preclude the Court's ability to approve DIP financing. Counsel then references *Hunters Trailer & Marine Ltd., Re* (2001), 295 A.R. 113 (Alta. Q.B.), at para 32, where the Court stated that "if super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases."

41 Counsel's submission continues:

... the specific issue of the Court's ability to approve an agreement between a CCAA debtor and one or more, though less than all, of its creditors was recently reviewed by the Alberta Court of Appeal in *Re. Calpine Canada Energy Ltd.* 2007 ABCA 266. As C. O'Brien J.A. noted,

The power to approve such transactions during the stay is not spelled out in the CCAA. As has often been observed, the statute is skeletal. The approval power in such instances is usually said to be found either in the broad powers under section 11(4) to make orders other than on an initial application to effectuate the stay, or in the court's inherent

jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of the debtor until it can present a plan: *Re Dylex Ltd.*, (1995), 31 C.B.R. (3d) 106 at para 8 (Ont. Gen. Div.)

In the result the Court of Appeal upheld the ruling of B.E. Romaine J. at the Court of Queen's Bench: 2007 ABQB 504 (Alta. Q.B.). As Justice Romaine set out,

... Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor.

... It is clear from the case law that Court approval of settlements and major transactions can and often is given over the objections of one or more parties. The Court's ability to do this is a recognition of its authority to act in the greater good consistent with the purpose and spirit and with the confines of the legislation.

42 In his Affidavit filed on this application, Mr. Simpson, at para. 16, deposes:

The Company is pursuing this repayment so as to afford the best chance of success for its restructuring plan (the 'Plan') when it is presented to creditors, and thereby the best chance of a reasonable resolution. Throughout the Company's proceedings under the CCAA to this point, the Royal Bank has been consistently vocal in its opposition to the restructuring process. It is most likely that the Royal Bank's continued participation in the process will only hinder it, necessitating the use of further time and the expenditure of additional costs in order to ultimately achieve a fair restructuring, a result that will be most beneficial to the Company, and given the limited alternatives, most beneficial to the creditors as a whole. It is for these reasons that the Company considers repayment of the operating facility to be in the best interests of all stakeholders.

43 After referencing para 16 of Mr. Simpson's Affidavit, Counsel suggests that in view of the Royal Bank's opposition to the process, and in view of the serious discussions and negotiations that will occur between the Company and its creditors:

... For the attainable and beneficial goal of a successful restructuring to be achieved, it is the Company's position that the Royal Bank should likely be removed from active participation through the retirement of its operating line, and that this Court is empowered to do so either under s. 11(4) of the CCAA or by way of its inherent jurisdiction.

44 On being examined, Mr. Simpson indicated, in response to the question why provide for the payout of the Royal Bank operating line, that it would "make life easier, but is not necessary". To similar effect, counsel for the Company in his oral submission acknowledged that the rejection of the proposal to pay out the Royal Bank operating line would not appear to be fatal to the proposed restructuring. In the circumstances, it is clear that the success of the restructuring and the Plan is not dependent on permitting the repayment of this single creditor. As such, there is really no justification for favouring the Royal Bank by authorizing the repayment of its operating line from the DIP financing. The request to pay out the Royal Bank operating line is therefore denied.

Conclusion

45 The extension of the Stay to November 29, 2007 is confirmed and the Company is authorized to drawn down DIP financing in the sum of \$475,00.00. The request to pay out the Royal Bank from the DIP financing is denied.

Application granted in part.

TAB 8

2009 CarswellOnt 4699
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

2009 CarswellOnt 4699, [2009] O.J. No. 3344, 179 A.C.W.S. (3d) 517, 57 C.B.R. (5th) 128

**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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT
FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP (Applicants)

Newbould J.

Heard: August 6, 2009
Judgment: August 11, 2009
Docket: CV-09-8247-00CL

Counsel: A. Duncan Grace for GE Canada Leasing Services Company
Daniel R. Dowdall, Jane O. Dietrich for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant
U.S. Holdings GP
Sean Dunphy, Katherine Mah for Monitor, Ernst & Young Inc.
Kevin McElcheran for Toronto-Dominion Bank
Stuart Brotman for Independent Directors

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.a Approval by court

Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court —
Miscellaneous**

Applicant companies were leading manufacturer of oriented strand board — Parent company was G Inc — L was executive vice-president of G Inc — He owned no shares in G Inc — Employee retention plan ("ERP") agreement between G Inc. and L provided that if at any time before L turned 65 years of age, termination event occurred, and he was to be paid three times his then base salary — Agreement provided that obligation was to be secured by letter of credit and that if company made application under Companies' Creditors Arrangement Act, it would seek order creating charge on assets of company with priority satisfactory to L — In initial order, ERP agreement was approved and ERP charge on all of property of applicants as security for amounts that could be owing to L under ERP agreement was granted to L, ranking after administrative charge and investment offering advisory charge — Initial order was made without prejudice to G Co. to move to oppose ERP provisions — G Co. brought motion for order to delete ERP provisions in initial order on basis that provisions had effect of preferring interest of L over interest of other creditors, including G Co. — Motion dismissed — ERP agreement and charge contained in initial order were appropriate and were to be maintained — To require key employee to have already received offer of employment from someone else before ERP agreement could be justified would not be something that is necessary or desirable — ERP agreement and charge were approved by board of directors of G Inc., including approval by independent directors — Once could not assume without more that these people did not have experience in these matters or know what was reasonable —

Three-year severance payment was not so large on face of it to be unreasonable or unfair to other stakeholders — Though ERP agreement did not provide that payment should not be made before restructuring was complete, that was clearly its present intent, which was sufficient.

Table of Authorities

Cases considered by Newbould J.:

MEI Computer Technology Group Inc., Re (2005), 19 C.B.R. (5th) 257, 2005 CarswellQue 3675, [2005] R.J.Q. 1558 (C.S. Que.) — distinguished

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 1519 (Ont. S.C.J. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd. (2007), 2007 CarswellOnt 5799, 36 C.B.R. (5th) 296 (Ont. S.C.J.) — considered

Warehouse Drug Store Ltd., Re (2006), 24 C.B.R. (5th) 275, 2006 CarswellOnt 5128 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

MOTION by creditor for order to delete employee retention plan provisions in initial order.

Newbould J.:

1 KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

2 GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

3 The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

4 The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

5 Grant Forest has total funded debt obligations of approximately \$550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately \$400 million. The second lien lenders are owed approximately \$150 million.

6 Grant Forest has unsecured trade creditors of over \$4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. \$6.5 million.

7 The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately \$50 million for debt financing provided to the business.

Analysis

8 Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

9 In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

10 I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

11 The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

12 Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given

the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

13 It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.). In that case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from *Warehouse Drug Store Ltd., Re*, [2006] O.J. No. 3416 (Ont. S.C.J.), that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

14 I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Nortel Networks Corp., Re*, [2009] O.J. No. 1188 (Ont. S.C.J. [Commercial List]), Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

15 In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

16 It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

17 It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

18 A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

19 The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

20 The first lien security holders owed approximately \$400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

21 With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately \$400 million are consenting and the second lien lenders owed approximately \$150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately \$50 million, supports the KERP provisions for Mr. Lynch.

22 In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

23 In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

24 I have been referred to the case of *MEI Computer Technology Group Inc., Re* (2005), 19 C.B.R. (5th) 257 (C.S. Que.), a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do

not agree that such guidelines are necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

25 The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

Motion dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 9

KeyCite treatment

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): Re LJM Developments (Hamilton) Inc. | 2026 ONSC 2114, 2026 CarswellOnt 5699 | (Ont. S.C.J. [Commercial List], Apr 9, 2026)

2020 SCC 10, 2020 CSC 10

Supreme Court of Canada

9354-9186 Québec inc. v. Callidus Capital Corp.

2020 CarswellQue 3772, 2020 CarswellQue 3773, 2020 SCC 10, 2020 CSC 10, [2020] 1

S.C.R. 521, 1 B.L.R. (6th) 1, 317 A.C.W.S. (3d) 532, 444 D.L.R. (4th) 373, 78 C.B.R. (6th) 1

9354-9186 Québec inc. and 9354-9178 Québec inc. (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited (Appellants) and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier (Respondents) and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals (Interveners)

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

Heard: January 23, 2020

Judgment: May 8, 2020

Docket: 38594

Proceedings: reasons in full to *9354-9186 Québec inc. v. Callidus Capital Corp.* (2020), 2020 CarswellQue 237, 2020 CarswellQue 236, Abella J., Côté J., Karakatsanis J., Kasirer J., Moldaver J., Rowe J., Wagner C.J.C. (S.C.C.); reversing *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), 2019 QCCA 171, EYB 2019-306890, 2019 CarswellQue 94, Dumas J.C.A. (ad hoc), Dutil J.C.A., Schragger J.C.A. (C.A. Que.)

Counsel: Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage, Hannah Toledano, for Appellants / Interveners, 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for Appellants / Interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)

Geneviève Cloutier, Clifton P. Prophet, for Respondent, Callidus Capital Corporation

Jocelyn Perreault, Noah Zucker, François Alexandre Toupin, for Respondents, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Joseph Reynaud, Nathalie Nouvet, for Intervener, Ernst & Young Inc.

Sylvain Rigaud, Arad Mojtahedi, Saam Pousht-Mashhad, for Interveners, Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications**Bankruptcy and insolvency**

XIX Companies' Creditors Arrangement Act

XIX.3 Arrangements

XIX.3.c Miscellaneous

Headnote**Bankruptcy and insolvency -- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous**

Debtor sought protection under Companies' Creditors Arrangement Act (CCAA) — Debtor brought application seeking authorization of funding agreement and requested placement of super-priority charge in favour of lender — After its first plan of arrangement was rejected, secured creditor submitted second plan and sought authorization to vote on it — Supervising judge dismissed secured creditor's application, holding that secured creditor was acting with improper purpose — After reviewing terms of proposed financing, supervising judge found it met criteria set out by courts — Finally, supervising judge imposed super-priority charge on debtor's assets in favour of lender — Secured creditor appealed supervising judge's order — Court of Appeal allowed appeal, finding that exercise of judge's discretion was not founded in law nor on proper treatment of facts — Debtor and lender, supported by monitor, appealed to Supreme Court of Canada — Appeal allowed — By seeking authorization to vote on second version of its own plan, secured creditor was attempting to circumvent creditor democracy CCAA protects — By doing so, secured creditor acted contrary to expectation that parties act with due diligence in insolvency proceeding and was properly barred from voting on second plan — Supervising judge considered proposed financing to be fair and reasonable and correctly determined that it was not plan of arrangement — Therefore, supervising judge's order should be reinstated.

Faillite et insolvabilité -- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Divers

Débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — Débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement et a demandé l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur — Après que son premier plan d'arrangement ait été rejeté, la créancière garantie a soumis un deuxième plan et a demandé l'autorisation de voter sur ce plan — Juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie agissait dans un but illégitime — Après en avoir examiné les modalités, le juge surveillant a conclu que le financement proposé respectait le critère établi par les tribunaux — Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés d'une charge super-prioritaire en faveur du prêteur — Créancière garantie a interjeté appel de l'ordonnance du juge surveillant — Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits — Débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada — Pourvoi accueilli — En cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la créancière garantie tentait de contourner la démocratie entre les créanciers que défend la LACC — Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité et a été à juste titre empêchée de voter sur le nouveau plan — Juge surveillant a estimé que le financement proposé était juste et raisonnable et a eu raison de conclure que le financement ne constituait pas un plan d'arrangement — Par conséquent, l'ordonnance du juge surveillant devrait être rétablie.

The debtor manufactured, distributed, installed, and serviced electronic casino gaming machines. The debtor sought financing from a secured creditor, the debt being secured in part by a share pledge agreement. Over the following years, the debtor lost significant amounts of money, and the secured creditor continued to extend credit. Eventually, the debtor sought protection under the Companies' Creditors Arrangement Act (CCAA). In its petition, the debtor alleged that its liquidity issues were the result of the secured creditor taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions in order to deplete the corporation's equity value with a view to owning the debtor's business and, ultimately, selling it. The debtor's petition succeeded, and an initial order was issued. The debtor then entered into an asset purchase agreement with the secured creditor whereby the secured creditor would obtain all of the debtor's assets in exchange for extinguishing almost the entirety of its secured claim against the debtor. The agreement would also permit the debtor to retain claims for damages against the creditor arising from its alleged involvement in the debtor's financial difficulties. The asset purchase agreement was approved by the supervising judge. The debtor brought an application seeking authorization of a proposed third-party litigation funding agreement (LFA) and the placement of a super-priority charge in favour of the lender. The secured creditor submitted a plan of arrangement along with an application seeking the authorization to vote with the unsecured creditors.

The supervising judge dismissed the secured creditor's application, holding that the secured creditor should not be allowed to vote on its own plan because it was acting with an improper purpose. He noted that the secured creditor's first plan had been rejected and this attempt to vote on the new plan was an attempt to override the result of the first vote. Under the circumstances, given that the secured creditor's conduct was contrary to the requirements of appropriateness, good faith, and due diligence, allowing the secured creditor to vote would be both unfair and unreasonable. Since the new plan had no reasonable prospect of success, the supervising judge declined to submit it to a creditors' vote. The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third-party litigation funding set out by the courts. Finally, the supervising judge imposed the litigation financing charge on the debtor's assets in favour of the lender. The secured creditor appealed the supervising judge's order.

The Court of Appeal allowed the appeal, finding that the exercise of the judge's discretion was not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention was justified. In particular, the Court of Appeal identified two errors. First, the Court of Appeal was of the view that the supervising judge erred in finding that the secured creditor had an improper purpose in seeking to vote on its plan. The Court of Appeal relied heavily on the notion that creditors have a right to vote in their own self-interest. Second, the Court of Appeal concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to the debtor's commercial operations. In light of this perceived error, the Court of Appeal substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. The debtor and the lender, supported by the monitor, appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe, Kasirer JJ. concurring): Section 11 of the CCAA empowers a judge to make any order that the judge considers appropriate in the circumstances. A high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the CCAA proceedings they oversee.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the CCAA that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. One such constraint arises from s. 11 of the CCAA, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. For example, a creditor acts for an improper purpose where the creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the objectives of the CCAA. Supervising judges are best placed to determine whether the power to bar a creditor from voting should be exercised. Here, the supervising judge made no error in exercising his discretion to bar the secured creditor from voting on its plan. The supervising judge was intimately familiar with the debtor's CCAA proceedings and noted that, by seeking an authorization to vote on a second version of its own plan, the first one having been rejected, the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protects. By doing so, the secured creditor acted contrary to the expectation that parties act with due diligence in an insolvency proceeding. Hence, the secured creditor was properly barred from voting on the second plan. Interim financing is a flexible tool that may take on a range of forms, and third-party litigation funding may be one such form. Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best placed to answer. Here, there was no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context. While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the CCAA individually before reaching his conclusion, this was not itself an error. It was apparent that the supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case when he approved the LFA as interim financing. The supervising judge correctly determined that the LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The super-priority charge he granted to the lender did not convert the LFA into a plan of arrangement by subordinating creditors' rights. Therefore, he did not err in the exercise of his discretion, no intervention was justified and the supervising judge's order should be reinstated.

La débitrice fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. La débitrice a demandé du financement à la créancière garantie que la débitrice a garanti partiellement en signant une entente par laquelle elle mettait en gage ses actions. Au cours des années suivantes, la débitrice a perdu d'importantes sommes d'argent et la créancière garantie a continué de lui consentir du crédit. Finalement, la débitrice s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC). Dans sa requête, la débitrice a fait valoir que ses problèmes de liquidité découlaient du fait que la créancière garantie exerçait un contrôle de facto à l'égard de son entreprise et lui dictait un certain nombre de décisions d'affaires dans l'intention de lui nuire et de réduire la valeur de ses actions dans le but de devenir propriétaire de l'entreprise de la débitrice et ultimement de la vendre. La requête de la débitrice a été accordée et une ordonnance initiale a été émise. La débitrice a alors signé une convention d'achat d'actifs avec la créancière garantie en vertu de laquelle la créancière garantie obtiendrait l'ensemble des actifs de la débitrice en échange de l'extinction de la presque totalité de la créance garantie qu'elle détenait à l'encontre de la débitrice. Cette convention prévoyait également que la débitrice se réservait le droit de réclamer des dommages-intérêts à la créancière garantie en raison de l'implication alléguée de celle-ci dans ses difficultés financières. Le juge surveillant a approuvé la convention d'achat d'actifs. La débitrice a déposé une requête visant à obtenir l'autorisation de conclure un accord de financement du litige par un tiers (AFL) et l'autorisation de grever son actif d'une charge super-prioritaire en faveur du prêteur. La créancière garantie a soumis un plan d'arrangement et une requête visant à obtenir l'autorisation de voter avec les créanciers chirographaires.

Le juge surveillant a rejeté la demande de la créancière garantie, estimant que la créancière garantie ne devrait pas être autorisée à voter sur son propre plan puisqu'elle agissait dans un but illégitime. Il a fait remarquer que le premier plan de la créancière garantie avait été rejeté et que cette tentative de voter sur le nouveau plan était une tentative de contourner le résultat du premier vote. Dans les circonstances, étant donné que la conduite de la créancière garantie était contraire à l'opportunité, à la bonne foi et à la diligence requises, lui permettre de voter serait à la fois injuste et déraisonnable. Comme le nouveau plan n'avait aucune possibilité raisonnable de recevoir l'aval des créanciers, le juge surveillant a refusé de le soumettre au vote des créanciers. Le juge surveillant a décidé qu'il n'était pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agissait pas d'un plan d'arrangement. Après en avoir examiné les modalités, le juge surveillant a conclu que l'AFL respectait le critère d'approbation applicable en matière de financement d'un litige par un tiers établi par les tribunaux. Enfin, le juge surveillant a ordonné que les actifs de la débitrice soient grevés de la charge liée au financement du litige en faveur du prêteur. La créancière garantie a interjeté appel de l'ordonnance du juge surveillant.

La Cour d'appel a accueilli l'appel, estimant que l'exercice par le juge de son pouvoir discrétionnaire n'était pas fondé en droit, non plus qu'il ne reposât sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il était justifié d'intervenir en appel. En particulier, la Cour d'appel a relevé deux erreurs. D'une part, la Cour d'appel a conclu que le juge surveillant a commis une erreur en concluant que la créancière garantie a agi dans un but illégitime en demandant l'autorisation de voter sur son plan. La Cour d'appel s'appuyait grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. D'autre part, la Cour d'appel a conclu que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'était pas lié aux opérations commerciales de la débitrice. À la lumière de ce qu'elle percevait comme une erreur, la Cour d'appel a substitué son opinion selon laquelle l'AFL était un plan d'arrangement et que pour cette raison, il aurait dû être soumis au vote des créanciers. La débitrice et le prêteur, appuyés par le contrôleur, ont formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C., Moldaver, J. (Abella, Karakatsanis, Côté, Rowe, Kasirer, JJ., souscrivant à leur opinion) : L'article 11 de la LACC confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée dans les circonstances. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la LACC commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable. Cette norme déferente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la LACC dont il assure la supervision.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la LACC qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Une telle limite découle de l'art. 11 de la LACC, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Par exemple,

un créancier agit dans un but illégitime lorsque le créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner les objectifs de la LACC ou à aller à l'encontre de ceux-ci. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer le pouvoir d'empêcher le créancier de voter. En l'espèce, le juge surveillant n'a commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher la créancière garantie de voter sur son plan. Le juge surveillant connaissait très bien les procédures fondées sur la LACC relatives à la débitrice et a fait remarquer que, en cherchant à obtenir l'autorisation de voter sur la deuxième version de son propre plan, la première ayant été rejetée, la créancière garantie tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la LACC. Ce faisant, la créancière garantie agissait manifestement à l'encontre de l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité. Ainsi, la créancière garantie a été à juste titre empêchée de voter sur le nouveau plan.

Le financement temporaire est un outil souple qui peut revêtir différentes formes, et le financement d'un litige par un tiers peut constituer l'une de ces formes. Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le mieux placé pour répondre. En l'espèce, il n'y avait aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs, le juge surveillant a estimé que l'AFL était juste et raisonnable. Bien que le juge surveillant n'ait pas examiné à fond chacun des facteurs énoncés à l'art. 11.2(4) de la LACC de façon individuelle avant de tirer sa conclusion, cela ne constituait pas une erreur en soi. Il était manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la LACC et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Le juge surveillant a eu raison de conclure que l'AFL ne constituait pas un plan d'arrangement puisqu'il ne proposait aucune transaction visant les droits des créanciers. La charge super-prioritaire qu'il a accordée au prêteur ne convertissait pas l'AFL en plan d'arrangement en subordonnant les droits des créanciers. Par conséquent, il n'a pas commis d'erreur dans l'exercice de sa discrétion, aucune intervention n'était justifiée et l'ordonnance du juge surveillant devrait être rétablie.

Table of Authorities

Cases considered by *Wagner C.J.C., Moldaver J.*:

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — referred to

ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board) (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, [2006] 1 S.C.R. 140 (S.C.C.) — referred to

Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) (2018), 2018 QCCS 1040, 2018 CarswellQue 1923 (C.S. Que.) — referred to

BA Energy Inc., Re (2010), 2010 ABQB 507, 2010 CarswellAlta 1598, 70 C.B.R. (5th) 24 (Alta. Q.B.) — referred to

Blackburn Developments Ltd., Re (2011), 2011 BCSC 1671, 2011 CarswellBC 3291, 27 B.C.L.R. (5th) 199 (B.C. S.C.) — referred to

Boutiques San Francisco inc., Re (2003), 2003 CarswellQue 13882 (C.S. Que.) — referred to

Bridging Finance Inc. v. Béton Brunet 2001 inc. (2017), 2017 CarswellQue 328, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.) — referred to

Canada Trustco Mortgage Co. v. R. (2005), 2005 SCC 54, 2005 CarswellNat 3212, 2005 CarswellNat 3213, (sub nom. *Canada Trustco Mortgage Co. v. Canada*) 2005 D.T.C. 5523 (Eng.), (sub nom. *Hypothèques Trustco Canada v. Canada*) 2005 D.T.C. 5547 (Fr.), [2005] 5 C.T.C. 215, (sub nom. *Minister of National Revenue v. Canada Trustco Mortgage Co.*) 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601 (S.C.C.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — referred to

Caterpillar Financial Services Ltd. v. 360networks Corp. (2007), 2007 BCCA 14, 2007 CarswellBC 29, 28 E.T.R. (3d) 186, 27 C.B.R. (5th) 115, 61 B.C.L.R. (4th) 334, 10 P.P.S.A.C. (3d) 311, 235 B.C.A.C. 95, 388 W.A.C. 95, 279 D.L.R. (4th) 701 (B.C. C.A.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 258 B.C.A.C. 187, 434 W.A.C. 187 (B.C. C.A.) — referred to

Crystallex International Corp., Re (2012), 2012 ONSC 2125, 2012 CarswellOnt 4577, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — considered

Crystallex International Corp., Re (2012), 2012 ONCA 404, 2012 CarswellOnt 7329, 91 C.B.R. (5th) 207, 293 O.A.C. 102, 4 B.L.R. (5th) 1 (Ont. C.A.) — considered

Dugal v. Manulife Financial Corp. (2011), 2011 ONSC 1785, 2011 CarswellOnt 1889, 105 O.R. (3d) 364, 18 C.P.C. (7th) 105 (Ont. S.C.J.) — referred to

Edgewater Casino Inc., Re (2009), 2009 BCCA 40, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, 265 B.C.A.C. 274, 446 W.A.C. 274, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*) 308 D.L.R. (4th) 339 (B.C. C.A.) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — referred to

Fracmaster Ltd., Re (1999), 1999 CarswellAlta 461, 245 A.R. 102, 11 C.B.R. (4th) 204, 1999 ABQB 379 (Alta. Q.B.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 570, 2015 CarswellOnt 11970, 26 C.B.R. (6th) 218, 20 C.C.P.B. (2nd) 161, 387 D.L.R. (4th) 426, 9 E.T.R. (4th) 205, 2015 C.E.B. & P.G.R. 8139 (headnote only), 337 O.A.C. 237, 26 C.C.E.L. (4th) 176, 4 P.P.S.A.C. (4th) 358 (Ont. C.A.) — referred to

HSBC Bank Canada v. Bear Mountain Master Partnership (2010), 2010 BCSC 1563, 2010 CarswellBC 2962, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]) — referred to

Hayes v. Saint John (City) (2016), 2016 NBBR 125, 2016 NBQB 125, 2016 CarswellNB 253, 2016 CarswellNB 254 (N.B. Q.B.) — referred to

Houle v. St. Jude Medical Inc. (2017), 2017 ONSC 5129, 2017 CarswellOnt 13215, 9 C.P.C. (8th) 321 (Ont. S.C.J.) — referred to

Houle v. St. Jude Medical Inc. (2018), 2018 ONSC 6352, 2018 CarswellOnt 17713, 429 D.L.R. (4th) 739, 29 C.P.C. (8th) 409 (Ont. Div. Ct.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers*) [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Kitchener Frame Ltd., Re (2012), 2012 ONSC 234, 2012 CarswellOnt 1347, 86 C.B.R. (5th) 274 (Ont. S.C.J. [Commercial List]) — referred to

Langtry v. Dumoulin (1885), 7 O.R. 644 (Ont. Div. Ct.) — referred to

Laserworks Computer Services Inc., Re (1998), 1998 CarswellNS 38, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re*) 165 N.S.R. (2d) 297, (sub nom. *Laserworks Computer Services Inc. (Bankrupt), Re*) 495 A.P.R. 297, 6 C.B.R. (4th) 69, 37 B.L.R. (2d) 226, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Marcotte c. Banque de Montréal (2015), 2015 QCCS 1915, 2015 CarswellQue 4055 (C.S. Que.) — referred to

McIntyre Estate v. Ontario (Attorney General) (2002), 2002 CarswellOnt 2880, 23 C.P.C. (5th) 59, 218 D.L.R. (4th) 193, 61 O.R. (3d) 257, 164 O.A.C. 37 (Ont. C.A.) — referred to

Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp. (2013), 2013 ONSC 4974, 2013 CarswellOnt 11197, 117 O.R. (3d) 150, 55 C.P.C. (7th) 437, 6 C.C.P.B. (2nd) 82 (Ont. S.C.J.) — referred to

New Skeena Forest Products Inc., Re (2005), 2005 BCCA 192, 2005 CarswellBC 705, 7 M.P.L.R. (4th) 153, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338, [2005] 8 W.W.R. 224, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 210 B.C.A.C. 247, (sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*) 348 W.A.C. 247 (B.C. C.A.) — referred to

Nortel Networks Corp., Re (2015), 2015 ONCA 681, 2015 CarswellOnt 15461, 391 D.L.R. (4th) 283, 127 O.R. (3d) 641, 340 O.A.C. 234, 32 C.B.R. (6th) 21 (Ont. C.A.) — referred to

North American Tungsten Corp. v. Global Tungsten and Powders Corp. (2015), 2015 BCCA 390, 2015 CarswellBC 2629, 76 C.P.C. (7th) 1, 377 B.C.A.C. 6, 648 W.A.C. 6, 32 C.B.R. (6th) 175 (B.C. C.A.) — referred to

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Pole Lite Itée c. Banque Nationale du Canada (2006), 2006 CarswellQue 3438, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), 1999 CarswellAlta 539, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93, 11 C.B.R. (4th) 230, 1999 ABCA 178 (Alta. C.A.) — referred to

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 625, 6 C.B.R. (4th) 314, 96 O.T.C. 272 (Ont. Gen. Div. [Commercial List]) — referred to

Schenk v. Valeant Pharmaceuticals International Inc. (2015), 2015 ONSC 3215, 2015 CarswellOnt 8651, 74 C.P.C. (7th) 332 (Ont. S.C.J.) — referred to

Stanway v. Wyeth Canada Inc. (2013), 2013 BCSC 1585, 2013 CarswellBC 2630, 41 C.P.C. (7th) 209, [2014] 3 W.W.R. 808, 56 B.C.L.R. (5th) 192 (B.C. S.C.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re*) 503 W.A.C. 1 (S.C.C.) — followed

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

1078385 Ontario Ltd., Re (2004), 2004 CarswellOnt 8034, 16 C.B.R. (5th) 152, (sub nom. *1078385 Ontario Ltd. (Receivership), Re*) 206 O.A.C. 17 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 4.2 [en. 2019, c. 29, s. 133] — referred to

s. 43(7) — referred to

s. 50(1) — referred to

s. 54(3) — considered

s. 108(3) — referred to

s. 187(9) — considered

Champerty, Act respecting, R.S.O. 1897, c. 327

Generally — referred to

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

Generally — referred to

s. 2(1) "debtor company" — referred to

- s. 3(1) — referred to
- s. 4 — referred to
- s. 5 — referred to
- s. 6 — referred to
- s. 6(1) — considered
- s. 11 — considered
- s. 11.2 [en. 1997, c. 12, s. 124] — considered
- s. 11.2(1) [en. 2005, c. 47, s. 128] — considered
- s. 11.2(2) [en. 2005, c. 47, s. 128] — considered
- s. 11.2(4) [en. 2005, c. 47, s. 128] — considered
- s. 11.2(4)(a) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(b) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(c) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(d) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(e) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(f) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(4)(g) [en. 2007, c. 36, s. 65] — considered
- s. 11.2(5) [en. 2005, c. 47, s. 128] — considered
- s. 11.7 [en. 1997, c. 12, s. 124] — referred to
- s. 11.8 [en. 1997, c. 12, s. 124] — referred to
- s. 18.6 [en. 1997, c. 12, s. 125] — considered
- s. 22(1) — referred to
- s. 22(2) — referred to
- s. 22(3) — considered
- s. 23(1)(d) — referred to
- s. 23(1)(i) — referred to
- ss. 23-25 — referred to
- s. 36 — considered

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally — referred to

s. 6(1) — referred to

APPEAL by debtor from judgment reported at *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), finding that debtor's scheme amounted to plan of arrangement and that funding request should be submitted to creditors for approval.

POURVOI formé par la débitrice à l'encontre d'une décision publiée à *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (2019), EYB 2019-306890, 2019 CarswellQue 94, 2019 QCCA 171 (C.A. Que.), ayant conclu que la proposition de la débitrice constituait un plan d'arrangement et que la demande de financement devrait être soumise aux créanciers pour approbation.

Wagner C.J.C., Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring):

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately \$24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately \$86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of *CCAA* Proceedings and Initial Sale of Assets

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number

of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately \$135.7 million. Callidus would maintain an undischarged secured claim of \$3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").¹ Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over \$200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's \$3 million claim.

B. The Initial Competing Plans of Arrangement

12 On September 11, 2017, Bluberi filed an application seeking the approval of a \$2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a \$2.5 million (later increased to \$2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than \$3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded \$20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing \$3,450,882 of debt) voted in favour, and 8 voted against (representing \$2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did

not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a \$20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.²

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by \$250,000 (from \$2.63 million to \$2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its \$3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court (2018 QCCS 1040 (C.S. Que.)) (Michaud J.)

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) [hereinafter *Century Services*], at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the \$20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Crystallex International Corp., Re*, 2012 ONCA 404, 293 O.A.C. 102 (Ont. C.A.), at para. 92 ("*Crystallex*"). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2013 ONSC 4974, 117 O.R. (3d) 150 (Ont. S.C.J.), at para. 41, and *Hayes v. Saint John (City)*, 2016 NBQB 125 (N.B. Q.B.), at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332 (Ont. S.C.J.), at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal (2019 QCCA 171 (C.A. Que.)) (Dutil and Schragger J.J.A. and Dumas J. (ad hoc))

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Blackburn Developments Ltd., Re*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199 (B.C. S.C.), at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of \$5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving

and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has 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" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1 (Ont. C.A.), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating *CCAAs*", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 (Ont. C.A.), at para. 70).

43 Liquidating *CCAAs* take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating *CCAAs*: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating *CCAAs* are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Target Canada Co., Re*, 2015 ONSC 303, 22 C.B.R. (6th) 323 (Ont. S.C.J.), at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.), at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204 (Alta. Q.B.), at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating *CCAAs*. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.³ Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed,

in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.), at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) *The Role of a Supervising Judge in CCAA Proceedings*

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 (B.C. C.A.), at paras. 21-23; *BA Energy Inc., Re*, 2010 ABQB 507, 70 C.B.R. (5th) 24 (Alta. Q.B.); *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (4th) 276 (B.C. S.C. [In Chambers]), at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 (B.C. C.A.), at paras. 51-52, in which the courts seized on a party's failure to act diligently).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). 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 (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426 (Ont. C.A.), at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175 (C.A. Que.), at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 (B.C. C.A.), at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Edgewater Casino Inc., Re*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (B.C. C.A.) ("*Re Edgewater Casino Inc.*"), at para. 20, are apt:

... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 296 D.L.R. (4th) 135 (Ont. C.A.), at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.), at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross; 1078385 Ontario Ltd., Re* (2004), 206 O.A.C. 17 (Ont. C.A.)). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.), at para. 59; see also *Third Eye Capital Corporation*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording

of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of *debtor companies* to organize a restructuring plan that confers additional benefits to *related parties*" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an

absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc., Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296 (N.S. C.A.). In *Laserworks Computer Services Inc.*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with *greater* judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283 (Ont. C.A.), at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd., Re*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks Computer Services Inc.* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it to do so⁴. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of \$250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the *CCAA*, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of \$200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its

New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the CCAA

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div. [Commercial List]), at paras. 7, 9 and 24; *Boutiques San Francisco inc., Re* [2003 CarswellQue 13882 (C.S. Que.)], 2003 CanLII 36955, at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.⁵ It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

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

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

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

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364 (Ont. S.C.J.); *Musicians' Pension Fund of Canada (Trustee of)*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.⁶ The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1885), 7 O.R. 644 (Ont. Div. Ct.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915 (C.S. Que.), at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321 (Ont. S.C.J.), at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Ont. Div. Ct.); see also *Stamway v. Wyeth Canada Inc.*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192 (B.C. S.C.), at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. *Crystallex* eventually became insolvent and (similar to *Bluberi*) was left with only a single significant asset: a US\$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, *Crystallex* sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim

financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the *CCAA*. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between *Crystallex* and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the *CCAA*, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Crystallex International Corp., Re*, 2012 ONSC 2125, 91 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]), at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) *The Supervising Judge Did Not Err in Approving the LFA*

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Musicians' Pension Fund of Canada (Trustee of)*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);
- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, *the only potential recovery* lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We

cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 (B.C. C.A.)).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

.....

... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this

interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

- 1 Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040 (C.S. Que.), at para. 10 (CanLII)).
- 2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.
- 3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the CCAA as opposed to requiring the parties to proceed to liquidation under a receivership or the BIA regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.
- 4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.
- 5 A further exception has been codified in the 2019 amendments to the CCAA, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.
- 6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Pole Lite Itée c. Banque Nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 (C.A. Que.); G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

TAB 10

2020 BCSC 2037
British Columbia Supreme Court

Mountain Equipment Co-Operative (Re)

2020 CarswellBC 3324, 2020 BCSC 2037, 326 A.C.W.S. (3d) 368, 86 C.B.R. (6th) 140

**In the Matter of the COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C. C-36, as amended**

In the Matter of 1077 HOLDINGS CO-OPERATIVE and 1314625 ONTARIO LIMITED (Petitioners)

Fitzpatrick J.

Heard: November 24, 27, 2020

Judgment: December 21, 2020

Docket: Vancouver S209201

Counsel: H. Gorman, Q.C., S. Boucher, for Petitioners, 1077 Holdings Co-Operative and 1314625 Ontario Limited
M.I.A. Buttery, Q.C., H.L. Williams, for Monitor, Alvarez & Marsal Canada Inc.
C. Gusikowski, for Lorne Hoover, himself and former MEC employees

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XVII Practice and procedure in courts

XVII.6 Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Moving party was former employee of bankrupt company — Company filed for bankruptcy, with sale of assets made to purchaser — Employee had been terminated just before sale of assets were made — Employee was one of group of former employees, who intended to advance claim against company — This claim would be under Companies' Creditors Arrangement Act (CCAA) — Employee claimed that law firm should be appointed as representative counsel for CCAA claim — Employee also sought court-ordered charge in amount of \$85,000 against assets of company — Employee moved for above-noted relief — Motion dismissed — Request for representative counsel was premature, at best — Claims process was not underway — It was unknown how former employees would respond, so that any common issues would arise — Interests of former employees had to be balanced with those of stakeholders — Interests could be balanced by monitor, without need for representative counsel at this time — Charge against property was unnecessary, given that representative counsel was not required — Even had counsel been appointed, charge against property was unnecessary.

Table of Authorities

Cases considered by Fitzpatrick J.:

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 222, 2010 CarswellOnt 212, 63 C.B.R. (5th) 115 (Ont. S.C.J. [Commercial List]) — followed

Canwest Publishing Inc. / Publications Canwest Inc., Re (2010), 2010 ONSC 1328, 2010 CarswellOnt 1344, 65 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — followed

Ernst & Young Inc. v. Essar Global Fund Limited (2017), 2017 ONCA 1014, 2017 CarswellOnt 20162, 54 C.B.R. (6th) 173, 139 O.R. (3d) 1, 420 D.L.R. (4th) 23, 76 B.L.R. (5th) 171 (Ont. C.A.) — considered

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]) — referred to

Fraser Papers Inc., Re (2009), 2009 CarswellOnt 7125 (Ont. S.C.J. [Commercial List]) — considered

Homburg Invest Inc., Re (2014), 2014 QCCS 980, 2014 CarswellQue 2155 (Que. Bkcty.) — referred to

League Assets Corp., Re (2013), 2013 BCSC 2043, 2013 CarswellBC 3408, 7 C.B.R. (6th) 74 (B.C. S.C.) — followed
Mountain Equipment Co-Operative (Re) (2020), 2020 BCSC 1586, 2020 CarswellBC 2639, 83 C.B.R. (6th) 272 (B.C. S.C.) — considered
Nortel Networks Corp., Re (2009), 2009 CarswellOnt 3028, 53 C.B.R. (5th) 196, 75 C.C.P.B. 206 (Ont. S.C.J. [Commercial List]) — considered
Quadriga Fintech Solutions Corp. (Re) (2019), 2019 NSSC 65, 2019 CarswellNS 101, 67 C.B.R. (6th) 272 (N.S. S.C.) — considered
Rasanen v. Lisle-Metrix Ltd. (2002), 2002 CarswellOnt 214, 17 C.C.E.L. (3d) 134 (Ont. S.C.J.) — considered
Rasanen v. Lisle-Metrix Ltd. (2004), 2004 CarswellOnt 2030, 33 C.C.E.L. (3d) 47, 187 O.A.C. 65, 2004 C.L.L.C. 210-046 (Ont. C.A.) — referred to
TBS Acquireco Inc., Re (2013), 2013 ONSC 4663, 2013 CarswellOnt 9481, 3 C.B.R. (6th) 261 (Ont. S.C.J. [Commercial List]) — considered
Target Canada Co., Re (2015), 2015 ONSC 303, 2015 CarswellOnt 620, 22 C.B.R. (6th) 323 (Ont. S.C.J.) — referred to
Target Canada Co., Re (2015), 2015 ONSC 1028, 2015 CarswellOnt 3274, 23 C.B.R. (6th) 303 (Ont. S.C.J.) — considered
Urbancorp Toronto Management Inc., Re (2016), 2016 ONSC 5426, 2016 CarswellOnt 13839, 40 C.B.R. (6th) 93 (Ont. S.C.J. [Commercial List]) — referred to
Walter Energy Canada Holdings, Inc., Re (2016), 2016 BCSC 107, 2016 CarswellBC 158, 23 C.C.P.B. (2nd) 201, 33 C.B.R. (6th) 60 (B.C. S.C.) — followed
1057863 B.C. Ltd. (Re) (2020), 2020 BCSC 1359, 2020 CarswellBC 2275, 82 C.B.R. (6th) 253 (B.C. S.C.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — considered

s. 11.52(1)(c) [en. 2007, c. 36, s. 66] — considered

s. 11.52(2) [en. 2007, c. 36, s. 66] — considered

MOTION by former employee of bankrupt company, seeking to have representative counsel appointed and to place charge against property of company.

Fitzpatrick J.:

INTRODUCTION

1 Lorne Hoover is a former employee of the petitioner, Mountain Equipment Co-operative ("MEC"). MEC has since changed its name to 1077 Holdings Co-operative.

2 Mr. Hoover seeks an order appointing Victory Square Law Office ("VSLO") as representative counsel for all of MEC's former employees in relation to claims that will be advanced by them in this *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceeding.

3 In addition, Mr. Hoover seeks a court ordered charge in the amount of \$85,000 against MEC's assets to secure that representation, with priority over all claims, save for certain court ordered charges that have already been court approved (such as the Administrative Charge, the D&O Charge and the KERP).

4 MEC opposes this relief as unnecessary and unwarranted. The Monitor has raised similar concerns, also stating that the relief may be redundant and unnecessary in the circumstances.

BACKGROUND FACTS

5 On October 2, 2020, I granted the Sale Approval and Vesting Order (SAVO) by which the Court approved a sale of substantially all of MEC's assets: *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586 (B.C. S.C.).

6 On October 30, 2020, the sale transaction closed. Fortunately, the purchaser took over more retail locations than initially forecast, such that 21 of the 22 retail stores are to continue. In addition, the purchaser retained over 90% of MEC's active employees who worked in those locations across Canada.

7 MEC received net sale proceeds of approximately \$22.9 million. Further amounts (approximately \$7.5 million) remain held in escrow pending final accounting adjustments to be completed under the sale.

8 In November 2020, Mr. Hoover's application was filed. His application was heard with MEC's own applications toward addressing the next steps in this proceeding.

9 On November 27, 2020, I granted a Claims Process Order (the "CPO") and a further order to enhance the Monitor's powers in relation to these proceedings (the "Enhanced Powers Order"). The Enhanced Powers Order was necessary because of steps taken by MEC following the sale. MEC terminated all of its management personnel effective November 30, 2020. In addition, MEC's board of directors intended to resign and those resignations were to become effective immediately after the granting of this order.

10 The Enhanced Powers Order allows the Monitor to assume responsibility for the administration of the remainder of MEC's assets and importantly, the administration of a Claims Process.

THE CLAIMS PROCESS

11 Under the Enhanced Powers Order, the Monitor was authorized to initiate and administer the Claims Process. The Monitor anticipates that the Claims Process will involve a determination of a variety of claims, including the substantial claims of landlords whose leases were disclaimed and employees' claims arising from their termination.

12 The features of the Claims Process, as established by the CPO, are:

- a) Claims affected by the CPO will be all Pre-filing Claims, Restructuring Period Claims, Employee Claims and D&O Claims. The Claims Process will not affect certain claims not relevant to this application;
- b) By December 11, 2020, the Monitor will deliver Claims Packages and Employee Claims Packages to all known Claimants and Employee Claimants, respectively;
- c) The Employee Claims Packages will include MEC's calculations of each Employee Claim and, if available in MEC's records, any relevant employment contract. A negative process will be in place such that an affected employee will only be required to file any materials if they dispute MEC's proposed assessment of their claim;
- d) In the usual fashion, the Claims Process will be widely advertised in national papers and on the Monitor's Website;
- e) Claimants with Pre-filing Claims and D&O Claims, and Employee Claimants who dispute their assessed Employee Claims, will have until February 10, 2021 (the "Claims Bar Date") to file Proofs of Claim or D&O Proofs of Claim with the Monitor;
- f) Claimants with Restructuring Period Claims will have until the later of (i) 45 days after the date on which the Monitor sends a Claims Package with respect to a Restructuring Period Claim and (ii) the Claims Bar Date;
- g) The Monitor shall review all Proofs of Claim and D&O Claims in consultation with MEC and the Directors and Officers named in respect of any D&O Claim, and shall accept, revise or reject each Claim;

- h) If the Monitor intends to revise or reject a Claim, the Monitor shall send a Notice of Revision or Disallowance (NORD) to the Claimant or Employee Claimant by no later than March 22, 2021, unless otherwise ordered by this Court on application by the Monitor;
- i) Any Claimant or Employee Claimant who intends to dispute a NORD shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor within 30 days of receiving the NORD;
- j) The Monitor may refer any Claims to Herman Van Ommen, Q.C., the Claims Officer, or the Court, for adjudication at its election by sending written notice to the Claimant or Employee Claimant; and
- k) For any Claims adjudicated by a Claims Officer, the Claimant, Employee Claimant, Monitor or Petitioners may file a notice of appeal of the Claims Officer's determination within ten days of receiving notice of the same. Appeals will be conducted as true appeals and not as hearings *de novo*.

13 Approximately 210 of MEC's employees were terminated after the commencement of these *CCAA* proceedings. This group included 103 head office staff and 107 retail staff, all of whom received outstanding wages, vacation pay and benefits to the date of termination. Certain former MEC employees were terminated prior to the commencement of these *CCAA* proceedings but were on salary continuance. MEC and the Monitor expect that most of these employees will have claims for unpaid severance.

14 In its Fourth Report dated November 23, 2020 (the "Fourth Report"), the Monitor indicates that MEC's management has already undertaken significant efforts to prepare a preliminary calculation of the severance and termination amounts owing to former employees, with oversight and input from the Monitor. This would include an assessment of the applicable provincial statutory requirements (including those arising from any group terminations), which the Monitor states would apply to the majority of these employees. The Monitor considers that approximately 34 employees are entitled to contractual and/or common law notice.

15 MEC's assessments of all the former employee claims will be included in the Employee Claims Packages that each of them will receive and review. As above, if any employee disputes MEC's assessment of his/her claim amount, the claim will be reviewed by the Monitor and, if necessary, determined by the Claims Officer or the Court.

16 Although uncertain at this point, the initial indications are that the unsecured creditors could receive between 30%-50% of their claims.

REPRESENTATIVE COUNSEL

17 Mr. Hoover was employed by MEC for just over 21 years. He was terminated on October 14, 2020. He believes that one or more contracts governed his terms of employment. He states that he is uncertain as to his contractual status.

18 Mr. Hoover's status in relation to the remainder of MEC's other terminated employees arises from a Facebook group called "Former MEC Staffers". This Facebook group is comprised of approximately 85 members who purport to be former MEC employees.

19 Mr. Hoover states that he is unaware of any other organized group of former MEC employees with claims who are involved in the *CCAA* proceedings. Mr. Hoover has been told that the Administrator of the Facebook group has advised the members of his application before the Court. Mr. Hoover has been advised that no member of the Facebook group has expressed concern about the application.

20 Mr. Gusikoski, counsel for Mr. Hoover from VSLO, has been in contact with approximately 35 former employees who are members of the Facebook group, many of whom have no written contracts. In addition, Mr. Gusikoski has reviewed the contracts of many employees. Since the filing of Mr. Hoover's application, Mr. Gusikoski has received numerous emails from former MEC employees, expressing their wish that he represent them in these proceedings.

21 Mr. Gusikoski is of the view that there is a complex array of legal and factual issues likely to arise in relation to the employee claims to be addressed in the Claims Process. Those issues include:

a) *Employment Standards*: He agrees with MEC that the provincial employment standards legislation applies to employees who have been terminated, and that group termination provisions may be applicable;

b) *Common Law Severance*: He agrees with MEC that there are former employees who will be entitled to file claims for common law severance. There is no dispute that the issue will be a determination of what is "reasonable notice" in the circumstances, as that phrase is discussed in the case authorities. It is uncontroversial that the assessment of reasonable notice will be highly fact specific in relation to each former employee;

c) *Contractual Severance Provisions*: He asserts that there are a variety of contractual terms dealing with severance. Many contractual provisions are simply to the effect that the notice period is as set out in the legislation, however, he asserts that common law severance may still be available. Other contractual provisions refer not only to the legislated minimum notice periods, but also further entitlements (i.e. Separation Payments). He similarly takes the view that this language only sets a further minimum entitlement without waiving an employee's right to pursue damages at common law; and

d) *Application of Written Contracts*: He raises other issues that may also become relevant to an employee's claim. The first issue raised is whether any contract is even in force, arising from the contention that a number of employees were not offered fresh consideration when they signed a new contract in mid-employment. The second issue relates to long-term employees and whether the changed nature of their employment over time has negated the legal effect of termination provisions in an earlier employment contract, citing *Rasanen v. Lisle-Matrix Ltd.* (2002), 17 C.C.E.L. (3d) 134 (Ont. S.C.J.) at para. 41; aff'd (2004), 33 C.C.E.L. (3d) 47 (Ont. C.A.).

Legal Principles for Appointing Representative Counsel

22 Appointment of representative counsel in CCAA proceedings is not entirely unusual. There is no dispute here that the Court has jurisdiction to appoint representative counsel under its general power set out in s. 11 of the CCAA, if such relief is appropriate in the circumstances.

23 Many case authorities discuss the factors to be considered by the courts in determining whether the appointment of representative counsel is appropriate. Generally, these cases refer to the well known non-exhaustive factors set out in *Canwest Publishing Inc. / Publications Canwest Inc., Re*, 2010 ONSC 1328 (Ont. S.C.J. [Commercial List]) at para. 21, as adopted by this Court in *League Assets Corp., Re*, 2013 BCSC 2043 (B.C. S.C.) at para. 72:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

24 For the purposes of this application, analysis of the *Canwest Publishing* factors can be addressed under three broad categories: (1) the former employee group, (2) the benefit of their representation in this proceeding, and (3) the balancing of stakeholder interests.

The Former Employee Group

25 Mr. Hoover submits that the former employees are a financially vulnerable group dispersed throughout Canada, but concentrated in western Canada. He confirms that the former employees have severance claims, only a portion of which are expected to be returned. He asserts that the former employees are disproportionately affected by MEC's *CCAA* proceedings, in that they have not only suffered immediate losses, but loss of income going forward. Mr. Hoover says that the former employees have little financial resources available to fund any "sophisticated" defence of their interests. He says that a "social benefit" will be derived from ensuring this vulnerable group of employees is represented by legal counsel.

26 MEC asserts that there is insufficient evidence to support that these former employees could not retain a law firm, either individually or as a group. However, later emails sent by many former MEC employees to VSLO mention that the termination of their employment has caused financial stress in their lives. This is not entirely surprising, whether this is a short-term or longer-term situation.

27 Certainly, the negative economic consequences of the COVID-19 pandemic have caused significant hardship to many Canadians, despite the government support available to them. For the purpose of this application, I accept that Mr. Hoover has established some evidence to the effect that, generally speaking, the former employees have been left in a vulnerable position arising from the loss of their jobs.

28 Courts have appointed representative counsel in numerous *CCAA* proceedings for current and/or former employees and retirees: see *Nortel Networks Corp., Re* (2009), 53 C.B.R. (5th) 196 (Ont. S.C.J. [Commercial List]) at paras. 10-16; *Fraser Papers Inc., Re* [2009 CarswellOnt 6169 (Ont. S.C.J. [Commercial List]), 2009 CanLII 55115 and 2009 CanLII 63589 [2009 CarswellOnt 7125 (Ont. S.C.J. [Commercial List])]; *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at para. 61. However, the circumstances in those cases were significantly different than those here. An important factor in those restructurings was that literally thousands of former and current employees or retirees sought representation in the early days of those complex *CCAA* proceedings.

29 In *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 (B.C. S.C.) at paras. 122-129, this Court appointed the union to represent hundreds of laid-off employees in the early days of the Northern Pulp restructuring.

30 In *Canwest Publishing*, a smaller number (75) of former employees and retirees sought representation. Justice Pepall (as she then was) agreed that a representation order was appropriate because, among other factors, the vulnerable employee group was facing what was to be a complex *CCAA* restructuring, particularly given the sales process that was underway.

31 The circumstances relating to MEC and this Claims Process represent a far different scenario than was addressed in the above cases. At present, what remains to be advanced is the distribution of the monies in the Monitor's hands in accordance with the Claims Process. Of particular note are the following factors in relation to the Employee Claimants:

- a) There is no reason to question the good faith efforts of MEC's management to gather the applicable facts and documents and assess what MEC considers to be the termination entitlement of each employee. This effort is subject to the involvement and oversight of the Monitor;
- b) The majority of the 210 employees will be subject to the applicable provincial legislation, where the calculation of severance entitlement, including in the event of a group termination, is fairly straightforward;
- c) With respect to the former employees who have contracts or are entitled to common law notice, their entitlement will be based on the specific facts and circumstances unique to them, indicative of a unique analysis, as opposed to common issues to be advanced on behalf of all or most of them;

d) It remains to be seen whether common issues arise with respect to the former employees that would justify joint representation on the contract or common law issues;

e) Mr. Hoover argues that "information asymmetries" between employees would lead to obvious and manifest unfairness. However, there is no evidence that the employees who are clearly not subject to the legislation could not band together to fund joint representation to present common or individual issues, whether through VSLO or another law firm: *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426 (Ont. S.C.J. [Commercial List]) at para. 16;

f) It may be that VSLO's representation of all the employees would present a conflict, since advocating for one employee may increase his or her claim to the detriment of others who will share in the same pot of monies: *Urbancorp* at para. 20;

g) Mr. Hoover argues that many employees are or may be unaware of significant legal interests they have without representation. However, Mr. Gusikoski has already been in contact with 35 employees. In addition, copies of Mr. Hoover's application materials, which identify various legal issues, can be posted on the Facebook group or other social media; and

h) Mr. Hoover also argues that some employees may not be aware of common law severance rights, which could increase their claim significantly. Again, VSLO and/or Mr. Hoover can identify the issues for the Facebook group and identify sources of legal resources for use by them, just as many self-represented parties use in other litigation before the Court.

Benefit of Representation in this Proceeding

32 Many of the above factors are brought into sharper focus in relation to whether there is some benefit in appointing representative counsel to promote the efficient administration of these proceedings for the benefit of all stakeholders.

33 This proceeding is not in its early days; rather, it is in its final days as the Claims Process begins toward determining the proportionate sharing of the remaining monies as between the creditors. The Claims Process is a comprehensive one that will lead unsecured creditors toward that final outcome. Each former employee will have a full opportunity to either accept MEC's proposed assessment of his/her claim or contest that assessment within the specific procedures set out in the CPO.

34 In that event, I agree with MEC's counsel that there seems to be little utility in appointing representative counsel even before that process is underway.

35 Mr. Hoover submits that VSLO possesses specialized expertise in labour and employment law matters and, of that, I have no doubt. Mr. Hoover also submits that VSLO can work with MEC's counsel or the Monitor to sharply consolidate issues and streamline dispute resolution processes before the Claims Officer. However, it is far from clear what issues may need to be "consolidated" and it is far from clear whether there will be need for counsel to act for employees to streamline the process to determine their claims if they dispute MEC's assessment.

36 Mr. Hoover argues that the former employees have not been involved with legal counsel in these proceedings. Furthermore, Mr. Hoover says that they have not been provided with timely advice about the CCAA proceedings which relate directly to their interests. That may be the case, but former employees have full access to the materials filed in these proceedings which have been posted online from the outset. I expect that, in large part, many of the stakeholders, including the former employees, have been awaiting the outcome of the sale process to see what amounts might be available to them as unsecured creditors.

37 Mr. Hoover cites *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 (N.S. S.C.) at paras. 9 and 16 as confirming that representative counsel can provide effective communication to stakeholders regarding the CCAA proceedings and ensure that their interests are brought to the attention of the Court.

38 As I see it, MEC and the Monitor are very much alive to the interests of the Employee Claimants and the Claims Process has been designed to specifically address their unique interests. Further, leaving aside Mr. Hoover's Facebook group, the Employee Claims Package that each of them will receive will describe in detail the stage of these proceedings and how their claims are to be addressed.

39 Mr. Gusikoski asserts that many former employees are entitled to both statutory and contractual/common law notice periods. He asserts that many of the written contracts have similar legal issues which could apply to many participants, which could be more efficiently grouped and adjudicated within the Claims Process in a manner most efficient to the resolution of all issues. As such, Mr. Hoover argues that granting a representative counsel is the *only way* in which to ensure the former employees' claims are determined in the fairest, consistent and efficient manner possible.

40 At paras. 62-63 in *Nortel Networks*, in assessing appointment of representative counsel, the court considered the "commonality of interest" test that is commonly referred to in respect of classification of creditors. Justice Morawetz (as he then was) found that the former employees had a "commonality of interest" that could benefit the proceeding by the appointment of one representative counsel.

41 Mr. Hoover refers to authorities where representative counsel were appointed in relation to claims processes. In *Target Canada Co., Re*, 2015 ONSC 1028 (Ont. S.C.J.) at paras. 32-40, the court appointed, with limited funding, counsel for certain franchisees who were facing "similar circumstances". The role of counsel in that event was with respect to several matters, one of which related to participating in the claims process. In *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]) at paras. 33-37, the court declined any appointment and funding to allow terminated employees to advance *Wage Earner Protection Program* claims.

42 I accept that there may be circumstances to justify appointing representative counsel for the purpose of pursuing claims in a claims process. Mr. Hoover's arguments may be valid at some point in the Claims Process. However, until the Claims Process is underway and the former employees respond, it is completely unknown as to which of them might dispute MEC's assessment and, if so, on what basis. In that event, it is largely premature as to whether any common issues will emerge that may support a representative counsel appointment.

43 I have no doubt that the Monitor will be attuned to any common issues as may emerge in the Claims Process and will consider the most efficient manner of adjudicating those issues. At that time, it may be the case that representative counsel makes sense to coordinate the former employees' arguments so as to avoid a multiplicity of retainers within the Claims Process.

Balancing of Stakeholder Interests

44 MEC filed a Response opposing the appointment of representative counsel and the granting of a charge in favour of representative counsel. In addition, the Monitor filed a Response indicating that it was not supportive of this relief. No other stakeholder took a position on this application.

45 The Monitor's position was addressed in more detail in the Fourth Report. At para. 11.5, the Monitor states that it views the relief sought as possibly redundant and not necessary in the circumstances. The Monitor states, in part:

d) the Monitor, as an independent officer of the Court, will be adjudicating claims and any disputed claims that are unable to be settled will be referred to the independent Claims Officer and/or the Court for resolution. Any third-party legal counsel engaged to prepare and calculate the Former Employees' claims when a negative claims process is being administered by the Court's officer is duplicative and impacts potential recoveries to the estate and affected creditors including non-former employee claimants; and

e) the Employee Claims are unsecured claims that should be treated equitably with other unsecured claims in the Claims Process, of which such claimants (primarily landlord claims in respect of disclaimed leases) have not been granted a charge for their respective legal counsel.

46 Mr. Hoover takes great umbrage at the Monitor's stated position, either in the Response or the Fourth Report, asserting that the Monitor has "entered the fray" by failing to act impartially in relation to the former employees. In addition, Mr. Hoover asserts that, in doing so, the Monitor has acted outside the scope of its duties as prescribed by this Court.

47 The comments found in *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 (Ont. C.A.) are well accepted in describing the role of a monitor in *CCAA* proceedings, in that:

[109] ... the monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose.

48 Having reviewed the Monitor's statements in context, I consider that Mr. Hoover's submissions on this point are misplaced. The Monitor has considered the particular circumstances of the former employees, but importantly, the Monitor has also considered the relief sought by them more generally in the present circumstances of this *CCAA* restructuring proceeding. To do so is entirely appropriate, since the interests of the former employees cannot be considered in isolation in terms of the balancing of interests of all stakeholders.

49 As with many issues, the Monitor is uniquely situated to comment on the overall circumstances so as to assist the Court in the balancing exercise. Indeed, the very authorities that are cited by all parties here, including the former employees, as to the applicable test in appointing representative counsel (*Carwest Publishing*), specifically sets out that one factor to be considered is the position of the Monitor.

50 The Monitor's comments and its position emphasize that the Claims Process has been put in place and is a comprehensive process for the determination of the claims to be advanced against MEC. As with other claims processes granted in *CCAA* proceedings, it is intended to afford an efficient and expeditious means of resolving claims, including those of the former employees, to allow distribution to the creditors as soon as possible.

51 With the Enhanced Powers Order, the Monitor has assumed conduct of the Claims Process and has full access to MEC's books and records as may be relevant to that task. Further, the Monitor, as a court appointed officer, can be expected to address claims in a fair manner, including those relating to former employees.

52 The Claims Process is intended to benefit all stakeholders, not just the former employees. Many other creditors will participate in the Claims Process without legal representation as they wish. The Claims Process is expected to be easily understood in terms of how the process works, and how disputes are to be raised and addressed. As noted by the court in *Urbancorp* at para. 18, it is a "normal process" for a Monitor to deal with claimants.

53 In all of the circumstances, I am not convinced that a representative counsel appointment is appropriate at this time. If certain issues emerge in the Claims Process that might support a more coordinated resolution of common issues, either the Monitor or any of the former employees have leave to reapply for such relief.

REPRESENTATIVE COUNSEL CHARGE

54 I will also address Mr. Hoover's request for a court ordered charge for representative counsel if I had acceded to his request for representative counsel and to address any future application that might arise.

55 Mr. Hoover seeks a charge of \$85,000 against MEC's property to secure what he expects will be VSLO's anticipated fees so as to allow for the former employees' "effective participation" in the Claims Process.

56 Section 11.52(1)(c) of the *CCAA* allows the court to grant a charge on a petitioner's assets to secure payment of the legal fees and disbursements for representative counsel who may be appointed:

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

...

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

...

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

57 The Court must be satisfied that the charge is necessary for the effective participation of representative counsel in the proceedings: *Urbancorp* at para. 14.

58 Factors to consider in approving an administrative charge include those set out in *Camwest Publishing Inc. / Publications Camwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) at para. 54, as adopted by this Court in *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 107 (B.C. S.C.) at para. 42:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwanted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and,
- (f) the position of the Monitor.

59 MEC's business was large and complex, but that was in the past. Having now sold the business, MEC's interests are simply to administer a sum of money for distribution to its creditors under the Claims Process, now a role assumed by the Monitor.

60 The Claims Process has been designed to provide as streamlined a process as possible for the former employees. The process is not complex or difficult.

61 Mr. Hoover argues that, while the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the former employees. I disagree and would respond that this is not a correct characterization of the Monitor's role in the Claims Process.

62 The Monitor will have an impartial and important role in that process, and it is to be expected that the Monitor will provide assistance to all claimants, as necessary and appropriate. In that sense, I am of the view that the Monitor's comments about this relief being redundant and unnecessary have some merit given present circumstances: *Homburg Invest Inc., Re*, 2014 QCCS 980 (Que. Bkcty.) at para. 100 (see factors a and b).

63 In addition, MEC argues that the proposed charge for the former employees is unnecessary and would adversely affect MEC's other stakeholders, including its landlords, suppliers and vendors, and other unsecured creditors. Just as the Monitor has in this case, the monitor in *Urbancorp* argued that the court would be wrong to allow funding that was solely in the interest of one group of stakeholders (para. 18). This argument was accepted by Justice Newbould, who noted:

[24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole....

64 No other unsecured creditor or creditor group has sought funding from MEC's estate for their participation in the Claims Process. While certainly some of them will have more substantial resources than the former employees individually, certainly some of them will not.

65 Further, it is difficult to assess the reasonableness of the quantum of the proposed charge. This is because it is difficult to say which of MEC's assessments might be contested and, if so, on what basis. For example, if only a few employees advance a dispute within the Claims Process, it will be apparent that estate resources are being spent on only a relatively small subset of stakeholders. This is arguably unreasonable, particularly since those funds would be spent to increase those few employees' slice of the pie to the detriment of others who do have the benefit of estate funded representation.

66 In my view, weighing all the above factors leads me to conclude that, even if I had appointed representative counsel, the proposed charge to secure that representation is not appropriate in the present circumstances.

CONCLUSION

67 Mr. Hoover's application is dismissed. Mr. Hoover and the Monitor have leave to bring this issue forward in the future, if further steps taken within the Claims Process dictate a further consideration of the issues.

Motion dismissed.

TAB 11

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

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

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

APPLICANTS

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

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al

**Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel
Networks Corporation and Nortel Networks Limited**

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor

**M. Starnino, for the Superintendent of Financial Services and
Administrator of PBGF**

S. Philpott, for the Former Employees

K. Zych, for Noteholders

**Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors
LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin
Patterson Opportunities Partners (Cayman) III L.P.**

David Ward, for UK Pension Protection Fund

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors

Arthur O. Jacques and Tom McRae, for Felske & Sylvain (de facto Continuing Employees' Committee)

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited

A. Kauffman, for Export Development Canada

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM

**HEARD &
DECIDED: JUNE 29, 2009**

ENDORSEMENT

INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

[2] I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[3] An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

[4] The following are my reasons for granting these orders.

[5] The hearing on June 29, 2009 (the “Joint Hearing”) was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

[6] The Sale Agreement relates to the Code Division Multiple Access (“CDMA”) business Long-Term Evolution (“LTE”) Access assets.

[7] The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel’s 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

BACKGROUND

[8] The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

[9] At the time the proceedings were commenced, Nortel’s business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

[10] The stated purpose of Nortel’s filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company’s assets and operations would have to be undertaken in consultation with various stakeholder groups.

[11] In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

[12] On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CDMA business and LTE Access assets (collectively, the “Business”) and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue “going concern” sales for Nortel’s various business units.

[13] In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel’s management considered:

- (a) the impact of the filings on Nortel’s various businesses, including deterioration in sales; and

- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

[14] Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

[16] In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

[17] The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a “stalking horse” bid pursuant to that process.

[18] The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

[19] The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

[20] The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the “UCC”) and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

[21] Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, “MatlinPatterson”) as well the UCC.

[23] The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

[24] The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

[25] The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

[26] Counsel to the Applicants submitted a detailed factum which covered both issues.

[27] Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court’s jurisdiction extends to authorizing sale of the debtor’s business, even in the absence of a plan or creditor vote.

[28] The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

[29] The CCAA has been described as “skeletal in nature”. It has also been described as a “sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest”. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. (“ATB Financial”).

[30] The jurisprudence has identified as sources of the court’s discretionary jurisdiction, *inter alia*:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order “on such terms as it may impose”; and

- (c) the inherent jurisdiction of the court to “fill in the gaps” of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

[31] However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

[32] In support of the court’s jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the “overarching policy” of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

[33] Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or “the whole economic community”:

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

[34] Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor’s stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar*

Financial Services Ltd. v. Hardrock Paving Co. (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

[36] In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

[37] Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra, at paras. 43, 45.*

[38] Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited, supra, at para. 3.*

[39] In *Re Stelco Inc., supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring – and if a restructuring of the “old company” is not

feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

[40] I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

[43] In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

[44] I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

[45] The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership* (2009) B.C.C.A. 319.

[46] At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the

Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is “not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a “restructuring”...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s fundamental purpose”. That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the “restructuring” contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a “niche” in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the “restructuring” will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The “fundamental purpose” of the Act – to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary...

[47] It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

[48] I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

[49] I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel’s proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

[51] Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

[52] The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

[54] The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

[55] Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

[56] I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the “stalking horse” bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

[57] Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

[58] In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

[59] Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

MORAWETZ J.

Heard and Decided: June 29, 2009

Reasons Released: July 23, 2009

TAB 12

KeyCite treatment

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): The Cannabist Company Holdings Inc. et al | 2026 ONSC 2063, 2026 CarswellOnt 5311 | (Ont. S.C.J. [Commercial List], Apr 2, 2026)
2018 ONSC 6980

Ontario Superior Court of Justice [Commercial List]

Aralez Pharmaceuticals Inc. (Re)

2018 CarswellOnt 19784, 2018 ONSC 6980, 299 A.C.W.S. (3d) 462, 65 C.B.R. (6th) 149

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ARALEZ
PHARMACEUTICALS INC. AND ARALEZ PHARMACEUTICALS CANADA INC. (Applicants)

S.F. Dunphy J.

Heard: November 16, 2018

Judgment: November 21, 2018

Docket: Toronto CV-18-603054-00CL

Counsel: Maria Konyukhova, Kathryn Esaw, for Applicants
Jeffrey Levine, for Official Committee of Unsecured Creditors
David Bish, for Monitor, Richter Advisory Group
Danish Afroz, for Deerfield Management Company, L.P.

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.7 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Key employee retention and incentive plans — Debtors were pharmaceutical companies that were granted protection under Act — Matter proceeded towards managed liquidation from start, and it was possible that two related secured creditors would be sole beneficiaries — Debtors proposed key employee retention plan (KERP) with respect to three employees and key employee incentive plan (KEIP) with respect to nine employees — Debtors brought motion for approval of KERP and KEIP — Motion granted — There was substantial evidence that process of negotiating and designing both plans had benefited from significant arm's length and objective oversight — Monitor had been consulted extensively, and monitor's recommendations were entitled to very significant weight — Secured creditors took no objections to plans — Design of plans demonstrated appropriate regard for criterion of necessity and were not over-broad — Inclusion of three employees in KERP was condition of purchaser under stalking-horse bid, and timing and amount of payments under KERP were well in line with precedent — This was classic case for well-designed KEIP — Targets in KEIP were realistic and appropriate and served to align interests of employees with stakeholders in appropriate manner, and incentive amounts were reasonable in all circumstances.

Table of Authorities

Cases considered by S.F. Dunphy J.:

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Cinram International Inc., Re (2012), 2012 ONSC 3767, 2012 CarswellOnt 8413, 91 C.B.R. (5th) 46 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

MOTION by debtors for order approving key employee retention plan and key employee incentive plan.

S.F. Dunphy J.:

1 This case raises for determination the always-troubling question of Key Employee Retention Plans (or "KERPs") and Key Employee Incentive Plans (or "KEIPs"). At the conclusion of the hearing, I indicated that I would be approving the proposed KERP involving three employees with reasons to follow and would take under reserve the matter of the proposed KEIP.

2 For the reasons that follow, I have determined to approve the KEIP as well. My reasons that follow apply to both programs.

Background facts

3 The applicants Aralez Pharmaceuticals Inc. and Aralez Pharmaceuticals Canada Inc. brought this application under the *Companies' Creditors Arrangement Act*, R.S.C. 1990, c. C-36 and an initial order was granted by me on August 10, 2018 with Richter Advisory Group Inc. appointed as Monitor. A number of affiliated entities in the same corporate group sought relief pursuant to Chapter 11 of the United States Bankruptcy Code on the same day. The Chapter 11 case is being managed by Justice Glenn in the United States Bankruptcy Court for the Southern District of New York. Both courts have adopted a cross-border protocol.

4 As their names suggest, the Aralez group of companies are in the pharmaceutical industry. The debtor companies have operated in an integrated manner and have 41 employees at the Canadian entities and 23 in the Chapter 11 entities.

5 In addition to being operationally integrated, Aralez has an integrated capital structure as well. The secured credit facility is secured by substantially all of the assets of the debtor companies on both sides of the border. The secured creditors — Deerfield Partners L.P. and Deerfield Private Design Fund III, L.P. — possess security on substantially all of the assets of the debtor companies on both sides of the border. The security in Canada has been subjected to independent review by the Monitor and its counsel and no issues have arisen nor have any creditors objected to their claims.

6 These cases have been targeting a managed liquidation from the start. On September 18, 2018, the Canadian and US entities entered into three stalking horse agreements and, pursuant to a court-ordered sales process order, are in the process of completing a bid process in the coming days. The three stalking horse bids place a "floor" under sale proceeds of approximately \$240 million subject to possible adjustments. This compares to the secured claim of Deerfield that is approximately \$275 million.

7 I understand that a motion may be brought in the United States to challenge some aspects of Deerfield's security in that jurisdiction (no such motion has been suggested in Canada to date). However, as things currently stand, the bid process underway would have to yield a fairly significant improvement from the existing stalking horse offers in order to result in surplus being available for junior creditor groups. The point of this analysis is merely to establish that Deerfield's input into the process of design of the KEIP and KERP programs before me is a material factor. Any funds diverted to KEIP or KERP programs have a substantial likelihood of coming out of Deerfield's pocket in the final analysis and any improvements or de-risking to either cash flow or sales proceeds will enure very substantially to Deerfield's benefit.

8 Stated differently — Deerfield has significant "skin in the game" when it comes to a KERP or KEIP.

9 Deerfield's interest acquires somewhat greater weight when one considers that one of the stalking horse bids (in the United States) is a credit bid whereas the Canadian stalking horse bid involves a sale of the assets of Aralez Pharmaceuticals Inc., resulting in the unsecured creditors of subsidiary Aralez Pharmaceuticals Canada Inc. being granted effective priority over Deerfield despite Deerfield's secured claims. Deerfield is thus very likely to be one of the only Canadian creditors substantially impacted by the KEIP or KERP.

10 This does not imply that the Court is a rubber stamp as to whatever Deerfield may have approved nor does it imply that other voices have no weight. It does imply that some comfort can be taken that this process has been subject to arm's length market discipline. Deerfield has an interest in getting as much as possible in the way of value-added effort out of the employee group and they have an interest in getting that effort at as low a cost as they can bargain for.

11 The KERP program involved only three employees, was reported upon extensively by the Monitor and was not opposed by any stakeholder. I approved it at the hearing with reasons to follow (these are those reasons). The KEIP program affects nine senior management employees whose services are provided to both the Canadian and United States debtors and was accordingly presented to both courts for approval. I am advised that Justice Glenn approved the KEIP program for purposes of the United States debtors on November 19, 2018.

12 While the KERP and KEIP programs were presented to me separately, they have many features in common. Were this not a transnational proceeding, it is quite likely that I should have had but a single combined KERP-KEIP program before me since these are not commonly differentiated in this jurisdiction. Different considerations obtain in the United States where KERP programs for some categories of employees are not allowed and KEIP programs are subject to specific rules one of which is that the predominant purpose of a KEIP must be *incentive* and not *retention*. Both are appropriate criteria in our process. In approving the KEIP program for the United States debtors, Justice Glenn indicated that he was satisfied that the KEIP program was designed primarily to incent the beneficiaries of the program.

13 The Canadian KERP impacts three employee of Aralez Pharmaceuticals Canada Inc. The KERP would provide these three with a retention bonuses of between 25% and 50% of salary. The total amount payable under the proposed program would be \$256,710 and payment is to be made on the earlier of termination without cause, death or permanent disability and the closing of a sale of the Canadian assets.

14 The KEIP impacts nine senior management employees of the Canadian debtors who provide services (in all but one case) that benefit both estates. None of the KEIP participants are expected to have on-going roles once the bankruptcy sales process is completed. The program is designed to incent participants to assist in achieving the highest possible cash flow during the bankruptcy process (thereby reducing the need to rely upon DIP financing) and to achieve the highest level of sales proceeds. Cash flow is measured relative to the DIP budget and nothing is payable until sales are completed.

15 The affected individuals are members of the senior management team that can be expected to be in a position to achieve a positive impact upon both criteria (cash flow and sales proceeds), but their roles are such that the level and value of the contributions of each towards those targets are difficult to measure with precision. Total payouts under the "super-stretch" targets could rise to as much as \$4,058,360. This figure may be compared to the stalking horse bids that establish a floor price of \$240 million.

16 Since all but one of the participants in the KEIP program are providing services for the benefit of both United States and Canadian debtors, the KEIP program has been designed such that costs will be shared by the two estates regardless of residence.

17 The design of the two programs was supervised by Alvarez & Marsal Inc, the financial advisor to the United States and Canadian debtors. The Compensation Committee of the parent company's Board was involved as was the debtor's counsel. The Monitor was consulted at every step in the process and provided significant input that was taken into account. The Board of Directors of each affected entity has approved the plans.

18 The programs were disclosed to the proposed beneficiaries at or near the outset of the bankruptcy process. At the request of the DIP Lender, court approval of these programs was not sought at that time as is relatively common. The stalking horse bids were several weeks away from being finalized and significant effort from the affected employees would be needed to but those transactions to bed. The sales process that followed also needed to be put on the rails and the all hands were needed to ensure that the business passed through the initial stages of the bankruptcy filing without undue adversity. In short, the affected employees were asked to acquiesce in the deferral of approval of these programs with the understanding that the employer would pursue their approval in good faith.

19 With only a few weeks remaining until the expected end of the sales process, it is fair to observe the employees have more than delivered on their end of the bargain. Cash flow has held up very well and the stalking horse bids have been firmed up at a favourable level.

20 The motion for approval of the KEIP (not the KERP) was opposed by the Official Committee of the Unsecured Creditors appointed pursuant to the United States Chapter 11 process. I shall not review here the nature of their standing claim — and the dispute of that claim. Their intervention has been focused, their arguments precise and the prospect of harm in the form of unnecessary delay or expense is minimal. Without prejudice to the position of everyone on the status of this committee in other contexts, I agreed to hear them and receive their written arguments. The cross-border protocol that both courts have approved affords me discretion to allow the Official Committee standing on a case-specific or *ad hoc* basis.

21 In the view of the Official Committee, the KEIP program bonuses are too high and too easily earned. I shall address both of these arguments below.

Issues to be determined

22 Ought this court to exercise its discretion to approve the KERP or KEIP programs as proposed by the applicants?

Analysis and discussion

23 KERP/KEIP programs throw up a number of thorny issues that must be grappled with because there are a number of potentially conflicting policy considerations to balance.

24 The early stages of an insolvency filing are chaotic enough without having added pressures of trying stem the hemorrhage of key employees. "Key" is of course an elastic concept. Everyone is key to someone. Employees are not hired to amuse management but to perform necessary functions. Sorting out "key" in the context of the organized chaos that is the early days of an insolvency filing requires a weathered eye to be cast in multiple directions at once:

- restructuring businesses often have inefficiencies that need identifying and resolving that may impact some otherwise "key" employees;
- with the levers of traditional shareholder oversight blunted in insolvency, the risks of management resolving conflicts in favour of self-interest are acute;
- it is easy to overstate the risk of loss of key employees if a "bunker mentality" causes management to take counsel of their fears rather than objective evidence, such evidence to be informed by a recognition that *some* degree of instability is inevitable; and
- "business as usual" is a goal, but never a perfectly achievable one and small amounts of stability acquired at high cost may be a bad investment.

25 While the risks of abuse or wasted effort are easily conjured, the legitimate use of an appropriately-calibrated incentive plan are equally obvious:

- Employees in newly-insecure positions are easy prey to competitors able to offer the prospect of more stable employment, sometimes even at lower salary levels, to people whose natural first priority is looking after their families;
- There is a risk that the most employable and valuable employees will be cherry-picked while the debtor company may find itself substantially handicapped in trying to compete for replacement employees;
- Whether by reason of internal restructuring or a court-supervised sales process, employees may often find themselves being asked to bring all of their skills and devotion to the task of putting themselves out of work; and
- Since many employers use a mix of base salary and profit-based incentives, employees of an insolvent business in restructuring may find themselves being asked to do more — sometimes covering for colleagues who have being laid off or who have left for greener pastures - while earning a fraction of their former income.

26 What is wanting to sort out these competing interests is one thing that the court — on its own at least — is singularly ill-equipped to provide. It is here that the essential role of the Monitor as the proverbial "eyes and ears of the court" comes to the fore. The court cannot shed its robe and wade into the debate in a substantive way. The Monitor on the other hand can shape the manner in which the debate is conducted and in which the decisions presented to the court for approval are made.

27 What the court is unable to supply on its own can be summed up in the phrase "business judgment". Outside of bankruptcy, the debtor company is entitled to exercise its own business judgment in designing such programs subject to the oversight of shareholders and the directors they appoint. Inside bankruptcy, the oversight of the court is required to assess the reasonableness of the exercise of the debtor company's business judgment. In my view, the court's role in assessing a request to approve a KERP or KEIP program is to assess the totality of circumstances to determine whether the process has provided a reasonable means for *objective* business judgment to be brought to bear and whether the end result is objectively reasonable.

28 Perfect objectivity, like the Holy Grail, is unattainable. However, where business judgment is applied in a process that has taken appropriate account of as many of the opposing interests as can reasonably be brought into the equation, the result will adhere most closely to that unattainable ideal.

29 My review of the limited case law on the subject of KERP (or KEIP) approvals suggests that there are no hard and fast rules that can be applied in undertaking this task. However the principles to be applied do emerge. Morawetz J. suggested a number of considerations in *Cinram International Inc., Re*, 2012 ONSC 3767 (Ont. S.C.J. [Commercial List]) (CanLII), relying on the earlier decision of Newbould J. in *Grant Forest Products Inc., Re* [2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List])], 2009 CanLII 42046¹. I reproduce here the synthesis of Morawetz J. (*Cinram*, para. 91):

- a. whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- b. whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- c. whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- d. the employees' history with and knowledge of the debtor;
- e. the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- f. whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- g. whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

h. whether the payments under the KERP are payable upon the completion of the restructuring process.

30 I have conducted my examination of the facts of this case having regard to the following three criteria which I think sweep in all of the considerations underlying *Grant* and *Cinram* and which provide a framework to consider the degree to which appropriately objective business judgment underlies the proposal:

(a) *Arm's length safeguards*: The court can justifiably repose significant confidence in the objectivity of the business judgment of parties with a legitimate interest in the matter who are independent of or at arm's length from the beneficiaries of the program. The greater the arm's length input to the design, scope and implementation, the better. Given the obvious conflicts management find themselves in, it is important that the Monitor be actively involved in all phases of the process — from assessing the need and scope to designing the targets and metrics and the rewards. Creditors who may fairly be considered to be the ones indirectly benefitting from the proposed program and indirectly paying for it also provide valuable arm's length vetting input.

(b) *Necessity*: Incentive programs, be they in the form of KERP or KEIP or some variant are by no means an automatic or matter of course evolution in an insolvency file. They need to be justified on a case-by-case basis on the basis of necessity. Necessity itself must be examined critically. Employees working to help protect their own long-term job security are already well-aligned with creditor interests and might generally be considered as being near one end of the necessity spectrum while those upon whom great responsibility lies but with little realistic chance of having an on-going role in the business are the least aligned with stakeholder interests and thus may generally be viewed as being near the other end of the necessity spectrum when it comes to incentive programs. Employees in a sector that is in demand pose a greater retention risk while employees with relatively easily replaced skills in a well-supplied market pose a lesser degree of risk and thus necessity. Overbroad programs are prone to the criticism of overreaching.

(c) *Reasonableness of Design*: Incentive programs are meant to align the interests of the beneficiaries with those of the stakeholders and not to reward counter-productive behavior nor provide an incentive to insiders to disrupt the process at the least opportune moment. The targets and incentives created must be reasonably related to the goals pursued and those goals must be of demonstrable benefit to the objects of the restructuring process. Payments made before the desired results are achieved are generally less defensible.

(a) *Arm's length safeguards*

31 In my view, there is substantial evidence that the process of negotiating and designing both programs has benefitted from significant arm's length and objective oversight in the negotiation, design and implementation phases of these two programs.

32 The process leading to both programs began prior to the insolvency filings on August 10, 2018. Aralez had engaged A&M as its financial advisor for the restructuring process and asked A&M to help formulate both the key employee incentive and retention programs. A&M worked on program design in consultation with the debtor's legal counsel and with input from the compensation committee of the Aralez Pharmaceuticals Inc. Board of Directors, none of whom are beneficiaries of either program.

33 The Monitor has been consulted extensively. The Monitor has inquired into the design and objects of the proposed plans and has verified the levels of the proposed incentives relative to the objectives of the programs and other historical data. The Monitor's input has resulted in a number of alterations to the proposals as these have evolved. As the programs have emerged from the process, the Monitor's conclusion is that the KERP is comparable to other KERP plans this court has approved and is reasonable in the circumstances. The Monitor has concluded that the KEIP addresses the concerns raised by the Monitor, protects the interest of Canadian stakeholders and these would not be materially prejudiced by approval of the KEIP. Both recommendations are entitled to very significant weight from this court.

34 The U.S. Trustee raised a number of concerns with the proposed KEIP which have also resulted in revisions.

35 Finally, Deerfield has been consulted and has indicated that they take no objection to either program as they have emerged from this process. For the reasons discussed above, Deerfield's *imprimatur* carries a particularly significant degree of weight in these circumstances in terms of establishing the arm's length and market-tested nature of the two programs before me.

36 The business judgment of Deerfield and the Board of Directors of API are entitled to significant weight. The independent and very significant input of the Monitor, A&M and the U.S. Trustee afford significant comfort that objective viewpoints have played a significant role in designing and vetting the proposals. Finally, the recommendation of the Monitor is entitled to significant weight given the unique role the Monitor plays in the Canadian restructuring process.

37 In summary, the process followed provides a high degree of comfort that a reasonable level of objective business judgment has been brought to bear. Circumstances will not allow every case the luxury of such a thorough process. However, this process was professionally designed thoroughly run. It has appropriately generated a high level of confidence in the integrity of the outcome

(b) Necessity

38 The design of the two programs demonstrates an appropriate regard for the criterion of necessity. They are not over-broad.

39 Any analysis of whether a program is over-broad must take into account the nature of the business. In some respects, Aralez may be likened to a virtual pharmaceutical company in that it out-sources many functions of a traditional pharmaceutical company such as manufacturing. It thus has relatively few employees compared to its size.

40 In designing the programs and assessing which employees to be included, an assessment was undertaken of each prospective beneficiary in terms of the ease with which they might be replaced, the degree to which they are critical to daily operations of the debtor companies or completion of the sales process and — for the KERP program at least — the perceived level of retention risk. The Monitor's input was sought at each level of the design and finalization of the programs.

41 The KERP program involves three employees in Canada and I am advised that their inclusion in the KERP is a condition of the purchaser under the stalking-horse bid. The loss of these three employees — critical to the Canadian business being sold — would endanger the stalking horse bid process at worst and disrupt the business being sold by requiring the debtor companies to deal with recruiting, transition and similar matters at a juncture where they are least able to deal with them at best. Their departure at this juncture would entail significant additional expenditures in terms of professional time at least if that event did not endanger the stalking horse bid.

42 The KEIP program involves nine members of senior management. They are employees the nature of whose function defies precise description or measurement. They are employees who act in concert with each other as part of a team for whom neither the clock nor the calendar play more than a subsidiary role in dictating their hours of labour. These employees are essential to ensuring the business remains stable and performs well during the restructuring process. They play a key role in helping ensure the sales process achieves the highest level of return. They are also employees most of whom are laboring under the near certainty that the more efficient and successful they are in their efforts, the sooner they will be out of a job.

43 At such a high level, personal reputation and professional pride remain as significant motivators to be sure. While a job well done may be its own reward, appropriate financial incentives are not without their place. This is a classic case for a well-designed incentive program.

44 I am satisfied that the design of these programs satisfies the criterion of necessity.

(c) Reasonableness of design

45 The KERP program provides for retention bonuses ranging from 25% to 50% of annual salary. The aggregate compensation available is \$256,710, a figure that may be contrasted to the stalking horse bid for the Canadian assets of \$62.5 million. Payment

is made on the earlier of termination without cause by the company, death or permanent disability and the completion of the sales transaction.

46 The timing of payments and the amount of the payments provided for, relative both to the salary of the individuals and to the value of the company, are both well in-line with precedent.

47 The KEIP program provides for incentive payments to participants based on the debtors' performance relative to target established for cash flow targets during the bankruptcy proceedings and relative to the achieved asset sale proceeds. Failure to reach targets results in no bonus, while four levels of bonus are possible (Threshold², Target, Stretch and Super Stretch).

48 The real controversy on the motion was in respect of the KEIP.

49 It is true that the cash flow performance of the debtors to date plus the projections of cash flow over the coming weeks put the KEIP participants well on track to achieving the highest "super-stretch" level of incentive. It is also true that if *no* bids are received in the sales process now underway and only the stalking horse bids are completed, the participants will be comfortably within the "target" level of incentive for asset sales. Combined, this means that that total incentives of approximately 81.25% of salary appears to be all but assured to KEIP participants. In the circumstances, the Official Committee objects that these incentives are simply too easily earned.

50 They also object to the level of incentives relative to salary as being unacceptably high.

51 The answer to both of these objections lies in the peculiar facts of this case.

52 The KERP and KEIP programs were both conceived of and designed primarily in the period leading up to the initial filings made in August 2018, although alterations have been made following the input of, among others, the United States trustee. The employees selected for inclusion in both programs have been operating in the expectation that the employer would proceed in good faith to seek court approval as soon as practicable. At the request of the DIP Lender, the process of seeking court approval was deferred to put priority on the process of securing and finalizing the stalking horse bids and getting the sales process underway. At the time these plans were first offered to employees, forecasting cash flow in bankruptcy and sales proceeds was looking through a glass darkly. It is only hindsight — and the past efforts of the employees — that has made the targets appear to be such an easy goal.

53 Of course, the employer could not promise and the employee could not expect that court approval of these plans would be a rubber stamp. That does not mean that this court should not take into account the circumstances prevailing when the plans were first offered to employees and the good faith of the employees in continuing to apply their shoulders to the wheel without causing disruption to the process when it could least afford it. It would be fundamentally unfair to penalize the affected employees for their good faith and constructive behavior in this case. It would also be counter-productive as such a precedent would not fail to alter behavior in future cases.

54 I am satisfied that the targets were realistic and appropriate at the time they were set and served to align the interests of employees with stakeholders in an appropriate manner.

55 The level of incentive is also less than meets the eye when the facts are examined more closely. While the combined cash flow plus asset sale incentives could result in incentives of up to 125% of salary, that figure is premised on base salary. In the case of the employees within the proposed KEIP program, base salary has been but one portion of their total compensation. When historical compensation is taken into account, the incentive payments recede to levels significantly below the 80% level calculated by the Official Committee to something closer to 50%.

56 I am satisfied that the incentive amounts are reasonable in all of the circumstances.

Disposition

57 In the result, I confirmed the KERP program at the hearing of the motion on December 16, 2018 and am granting the motion in respect of the KEIP program at this time. My approval extends to the requested priority charges securing the KEIP payments.

58 Order accordingly.

Motion granted.

Footnotes

1 See also Pepall J. (as she then was) in *Canwest Global Communications Corp., Re* [2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55114 at para. 49-52.

2 The threshold incentive based on cash flow was removed after discussions with the United States Trustee.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 13

KeyCite treatment

Most Negative Treatment: Reversed

Most Recent Reversed: Indalex Ltd., Re | 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, 301 O.A.C. 1, 20 P.P.S.A.C. (3d) 1, 8 B.L.R. (5th) 1, 2 C.C.P.B. (2nd) 1, 223 A.C.W.S. (3d) 1049, [2013] W.D.F.L. 1591, [2013] W.D.F.L. 1592, 96 C.B.R. (5th) 171, J.E. 2013-185, D.T.E. 2013T-97, 439 N.R. 235, [2013] 1 S.C.R. 271, 354 D.L.R. (4th) 581, [2013] S.C.J. No. 6 | (S.C.C., Feb 1, 2013)

2011 ONCA 265
Ontario Court of Appeal

Indalex Ltd., Re

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

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 Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Applicants / Respondents)

J.C. MacPherson, E.E. Gillese, R.G. Juriansz JJ.A.

Heard: November 23-24, 2010
Judgment: April 7, 2011
Docket: CA C52187, CA C52346

Proceedings: reversing *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List])

Counsel: Andrew J. Hatnay, Demetrios Yiokaris for Appellants, Former Executives
Darrell L. Brown for Appellants, United Steelworkers
Mark Bailey for Superintendent of Financial Services
Hugh O'Reilly, Adam Beatty for Intervenor, Morneau Sobeco Limited Partnership
Fred Myers, Brian Empey for Sun Indalex Finance, LLC
Ashley Taylor, Lesley Mercer for Monitor, FTI Consulting Canada ULC
Harvey Chaiton, George Benchetrit for George L. Miller, the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial; Civil Practice and Procedure; International

Related Abridgment Classifications

Bankruptcy and insolvency

I Bankruptcy and insolvency jurisdiction

I.1 Constitutional jurisdiction of federal government and provinces

Bankruptcy and insolvency

VIII Property of bankrupt

VIII.3 Trust property

Bankruptcy and insolvency

VIII Property of bankrupt

VIII.8 Miscellaneous

Bankruptcy and insolvency

X Priorities of claims

X.2 Preferred claims

Bankruptcy and insolvency

XIV Administration of estate

XIV.4 Sale of assets

Bankruptcy and insolvency

XVII Practice and procedure in courts

XVII.4 Appeals

XVII.4.b Miscellaneous

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act

XIX.2 Initial application

XIX.2.d Miscellaneous

Estates and trusts

II Trusts

II.3 Constructive trust

II.3.b Gains by fiduciaries

Pensions

I Private pension plans

I.1 Administration of pension plans

I.1.c Administrators, trustees and custodians

I.1.c.ii Fiduciary duties

I.1.c.ii.A Liabilities for breach

Pensions

I Private pension plans

I.1 Administration of pension plans

I.1.c Administrators, trustees and custodians

I.1.c.ii Fiduciary duties

I.1.c.ii.B Miscellaneous

Pensions

I Private pension plans

I.1 Administration of pension plans

I.1.c Administrators, trustees and custodians

I.1.c.v Miscellaneous

Pensions

I Private pension plans

I.1 Administration of pension plans

I.1.g Valuation and funding of plans

I.1.g.iii Deficiency

Pensions

I Private pension plans

I.2 Payment of pension

I.2.1 Bankruptcy or insolvency of employer

I.2.1.ii Registered plans

Personal property security

IV Priority of security interest

IV.6 Security interests versus other interests

IV.6.b Under provincial law

IV.6.b.iii Statutory and deemed trusts

Headnote

Bankruptcy and insolvency --- Property of bankrupt --- Trust property --- Miscellaneous

Pensions — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been wound up, executive plan had not — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — CCAA judge erred in holding that no deemed trust existed with respect to salaried plan — Debtor company owed amounts required under s. 75 of Pension Benefits Act (PBA) to rectify deficiency (deficiency amount) in salaried plan as of date of wind-up — Debtor company was deemed to hold in trust amount required to satisfy deficiency pursuant to s. 57(4) of PBA — It was unnecessary to decide whether deemed trust applied to deficiency in executive plan.

Bankruptcy and insolvency --- Property of bankrupt --- Pension funds

Trusts — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been wound up, executive plan had not — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — CCAA judge erred in holding that no deemed trust existed with respect to salaried plan — Debtor company owed amounts required under s. 75 of Pension Benefits Act (PBA) to rectify deficiency (deficiency amount) in salaried plan as of date of wind-up — Debtor company was deemed to hold in trust amount required to satisfy deficiency pursuant to s. 57(4) of PBA — It was unnecessary to decide whether deemed trust applied to deficiency in executive plan.

Pensions --- Administration of pension plans --- Administrators, trustees and custodians --- Fiduciary duties --- Miscellaneous

Whether fiduciary duties owed — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been wound up, executive plan had not — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Debtor company, as administrator of pension plans, owed fiduciary duty to plans' members and beneficiaries at common law and by virtue of s. 22(1) of Pension Benefits Act (PBA) — Beneficiaries relied on administrator to ensure plan and fund were properly administered — Subsection 22(4) of PBA prohibited administrator from knowingly permitting its interest to conflict with its duties in respect of pension fund.

Pensions --- Administration of pension plans --- Administrators, trustees and custodians --- Fiduciary duties --- Liabilities for breach

Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held certain funds in reserve

due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been wound up, executive plan had not — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Constructive trust was imposed on reserve funds in favour of pensions' beneficiaries — Debtor company breached its fiduciary obligations as administrator of pension plans during CCAA proceedings — Pensions' beneficiaries were not part of negotiations for DIP financing or sale of assets — Appropriate remedy for breach of fiduciary duty was to give pensions' deficiencies priority to reserve funds over DIP lenders — Without proprietary remedy, plans' beneficiaries had no meaningful remedy.

Pensions --- Administration of pension plans — Administrators, trustees and custodians — Miscellaneous

Conflict of interest — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Subsection 22(4) of Pension Benefits Act (PBA) prohibited administrator from knowingly permitting its interest to conflict with its duties in respect of pension fund — Debtor company's corporate duty was to act in best interests of corporation — Debtor company's duty as administrator was to act in best interests of plans' beneficiaries — Debtor company allowed its corporate interests to conflict with its administrator's duties during CCAA proceedings — Appropriate remedy for breach of s. 22(4) of PBA was to impose constructive trust on reserve funds in favour of pensions' beneficiaries.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Collateral attack doctrine — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Pension claimants' motions were not impermissible collateral attack on previous orders in CCAA proceedings — Pension claimants followed CCAA process designed to resolve their claims — Sale approval order acknowledged deemed trust issue in that it required enough proceeds to be held in reserve to satisfy deficiencies in plans — Pension claimants brought their claims promptly — There was no other effective means for pension claimants to assert claims to deemed trust other than by bringing their motions.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — "Come-back" clause

Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Pension claimants' motions were not impermissible collateral attack on previous orders in CCAA proceedings — Pension claimants followed CCAA process designed to resolve their claims — Initial CCAA order permitted any interested party to apply to

CCA court to vary initial order in come-back clause — Pension claimants relied on come-back clause to ask that super priority charge be varied so their claims could be recognized — There was no other effective means for pension claimants to assert claims to deemed trust other than by bringing their motions.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Salaried plan had been wound up, executive plan had not — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Amounts required to rectify deficiencies in both pension plans were paid from reserve fund first — Constructive trust was imposed on reserve funds in favour of executive plan's beneficiaries — Reserve funds were subject to deemed trust with respect to deficiency amount in salaried plan, pursuant to s. 57(4) of Pension Benefits Act (PBA) — Deemed trust had priority over other creditors pursuant to s. 30(7) of PBA — Constructive trust was appropriate remedy for debtor company's breach of fiduciary duty as plans' administrator — Without proprietary remedy, plans' beneficiaries had no meaningful remedy.

Personal property security --- Priority of security interest — Security interests versus other interests — Under provincial law — Statutory and deemed trusts

Companies' Creditors Arrangement Act — Debtor in possession creditor versus pension plan beneficiaries — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Constructive trust was imposed on reserve funds in favour of executive plan's beneficiaries — Reserve funds were subject to deemed trust with respect to deficiency amount in salaried plan, pursuant to s. 57(4) of Pension Benefits Act (PBA) — Deemed trust had priority over other creditors pursuant to s. 30(7) of PBA — CCAA court had authority to grant super-priority charge to DIP lenders that had effect of overriding PBA but did not do so in this case.

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

Pension plans — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held certain funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Constructive trust was imposed on reserve funds in favour of executive plan's beneficiaries — Reserve funds were subject to deemed trust with respect to deficiency amount in salaried plan, pursuant to s. 57(4) of Pension Benefits Act (PBA) — Deemed trust had priority over other creditors pursuant to s. 30(7) of PBA — CCAA court had authority to grant super-priority charge to DIP lenders that had effect of overriding PBA but did not do so in this case.

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

Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held debtor in possession lenders (DIP lenders) had priority over pension claimants — CCAA judge held neither pension was subject to deemed trust — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Constructive trust was imposed on reserve funds in favour of pension claimants — Reserve funds were subject to deemed trust with respect to deficiency amount in salaried plan, pursuant to s. 57(4) of Pension Benefits Act (PBA) — Deemed trust had priority over other creditors pursuant to s. 30(7) of PBA — CCAA court had authority to grant super-priority charge to DIP lenders to override PBA but did not do so in this case — There was no finding of paramourcy made in proceedings — Valid provincial laws, such as PBA, continued to operate — Super-priority charge did not override PBA deemed trust.

Estates and trusts --- Trusts — Constructive trust — Gains by fiduciaries

Breach of fiduciary duty — Debtor company entered protection in United States and in Canada under Companies' Creditors Arrangement Act (CCAA) — Debtor company secured debtor in possession (DIP) loans — Assets were sold — Debtor in possession lenders (DIP lenders) were paid in full by debtor company's parent company — Parent company was subrogated to rights of DIP lenders — Monitor held funds in reserve due to unresolved claims — Debtor company was administrator of pension plans for its employees — Applicant pension claimants claimed reserve funds were held in trust for beneficiaries of salaried and executive pension plans — Pension plans were underfunded — Pension claimants unsuccessfully brought motion for order that reserve fund was subject to deemed trusts in favour of pension plans' beneficiaries — CCAA judge held DIP lenders had priority over pension claimants — Pension claimants appealed orders of CCAA judge — Appeals were allowed — Pension beneficiaries had priority over DIP lenders with respect to reserve fund — Constructive trust was imposed on reserve funds in favour of plans' beneficiaries — Constructive trust was appropriate remedy for debtor company's breach of fiduciary duty — To give effect to DIP lenders' claims would be to sanction debtor company's breaches of fiduciary obligation — Parent company claiming for repayment of DIP loan was not arm's length innocent party — Without proprietary remedy, plans' beneficiaries had no meaningful remedy.

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

Deficiency in plans' funding.

Pensions --- Administration of pension plans — Valuation and funding of plans — Deficiency

Insolvency of employer.

Table of Authorities

Cases considered by E E. Gillese J.A.:

Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — considered *BCE Inc., Re* (2008), (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 383 N.R. 119, 71 C.P.R. (4th) 303, 52 B.L.R. (4th) 1, (sub nom. *Aegon Capital Management Inc. v. BCE Inc.*) 301 D.L.R. (4th) 80, 2008 SCC 69, (sub nom. *BCE Inc. v. 1976 Debentureholders*) [2008] 3 S.C.R. 560, 2008 CarswellQue 12595, 2008 CarswellQue 12596 (S.C.C.) — referred to *Bell ExpressVu Ltd. Partnership v. Rex* (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — referred to *Boucher c. Stelco Inc.* (2005), (sub nom. *Bourdon v. Stelco*) 341 N.R. 207, [2005] 3 S.C.R. 279, (sub nom. *Bourdon v. Stelco Inc.*) 2005 C.E.B. & P.G.R. 8173, 48 C.C.P.B. 167, 2005 CarswellQue 9790, 2005 CarswellQue 9791, 2005 SCC 64, (sub nom. *Bourdon v. Stelco Inc.*) 259 D.L.R. (4th) 34 (S.C.C.) — referred to *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 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 CarswellBC 351 (S.C.C.) — referred to

Burke v. Hudson's Bay Co. (2010), 406 N.R. 109, 324 D.L.R. (4th) 498, 2010 SCC 34, 2010 CarswellOnt 7450, 2010 CarswellOnt 7451, [2010] 2 S.C.R. 273, 84 C.C.P.B. 1, 60 E.T.R. (3d) 1, 2010 C.E.B. & P.G.R. 8408, D.T.E. 2010T-674, 268 O.A.C. 1 (S.C.C.) — referred to

Canadian Western Bank v. Alberta (2007), [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 2007 CarswellAlta 702, 2007 CarswellAlta 703, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) — referred to

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1992] 1 W.W.R. 245, 9 C.C.L.T. (2d) 1, 39 C.P.R. (3d) 449, 131 N.R. 321, 85 D.L.R. (4th) 129, 61 B.C.L.R. (2d) 1, 6 B.C.A.C. 1, 13 W.A.C. 1, [1991] 3 S.C.R. 534, 43 E.T.R. 201, 1991 CarswellBC 269, 1991 CarswellBC 925 (S.C.C.) — referred to

Cusson v. Quan (2009), 397 N.R. 94, 314 D.L.R. (4th) 55, 2009 SCC 62, 2009 CarswellOnt 7958, 2009 CarswellOnt 7959, 70 C.C.L.T. (3d) 1, 102 O.R. (3d) 480 (note), (sub nom. *Quan v. Cusson*) [2009] 3 S.C.R. 712, 258 O.A.C. 378 (S.C.C.) — referred to

Davey v. Woolley, Hames, Dale & Dingwall (1982), 1982 CarswellOnt 844, 35 O.R. (2d) 599, 133 D.L.R. (3d) 647 (Ont. C.A.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — referred to

GenCorp Canada Inc. v. Ontario (Superintendent of Pensions) (1998), 158 D.L.R. (4th) 497, 114 O.A.C. 170, 1998 CarswellOnt 1036, 39 O.R. (3d) 38, 37 C.C.E.L. (2d) 69, 17 C.C.P.B. 268, 1998 C.E.B. & P.G.R. 8336 (headnote only) (Ont. C.A.) — referred to

Hodgkinson v. Simms (1994), 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, [1994] 3 S.C.R. 377, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, 1994 CarswellBC 438, 1994 CarswellBC 1245, [1994] 9 W.W.R. 609, 49 B.C.A.C. 1, 80 W.A.C. 1, 22 C.C.L.T. (2d) 1, 16 B.L.R. (2d) 1, 6 C.C.L.S. 1 (S.C.C.) — referred to

Imperial Oil Ltd. v. Ontario (Superintendent of Pensions) (1995), 1995 CarswellOnt 2252, (sub nom. *Koskie & Minsky v. Ontario (Superintendent of Pensions)*) 18 C.C.P.B. 198 (Ont. Pension Comm.) — considered

Indalex Ltd., Re (2009), 2009 CarswellOnt 9396 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 1998, 52 C.B.R. (5th) 61 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 9397 (Ont. S.C.J. [Commercial List]) — referred to

International Corona Resources Ltd. v. LAC Minerals Ltd. (1989), 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, 1989 CarswellOnt 126, 1989 CarswellOnt 965 (S.C.C.) — referred to

Intertan Canada Ltd., Re (2009), 49 C.B.R. (5th) 232, 2009 CarswellOnt 324 (Ont. S.C.J. [Commercial List]) — referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) — distinguished

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R. 152, 75 O.R. (3d) 479 (note), 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — referred to

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.*) 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re*) 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2010), 406 N.R. 390 (note), 270 O.A.C. 400 (note), 2010 CarswellOnt 1760, 2010 CarswellOnt 1761 (S.C.C.) — referred to

Ontario Hydro-Electric Power Commission v. Albright (1922), 1922 CarswellOnt 134, 64 S.C.R. 306, [1923] 2 D.L.R. 578 (S.C.C.) — considered

R. v. Domm (1996), 1996 CarswellOnt 4539, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 31 O.R. (3d) 540, 95 O.A.C. 262, 40 C.R.R. (2d) 289 (Ont. C.A.) — considered

R. v. Litchfield (1993), 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

R. v. Wilson (1983), 1983 CarswellMan 154, 1983 CarswellMan 189, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97 (S.C.C.) — referred to

Soulos v. Korkontzilas (1997), [1997] 2 S.C.R. 217, 212 N.R. 1, 1997 CarswellOnt 1490, 1997 CarswellOnt 1489, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 17 E.T.R. (2d) 89, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241 (S.C.C.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada*) 2011 D.T.C. 5006 (Eng.), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re*) 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — distinguished

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

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Chapter 7 — referred to

Chapter 11 — referred to

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

Generally — referred to

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

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

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — referred to

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

Generally — referred to

s. 1 — referred to

s. 1(1) "administrator" — referred to

s. 1(1) "pension plan" — considered

s. 1(1) "wind up" — referred to

s. 8 — referred to

s. 14 — considered

s. 14(1) — referred to

s. 22 — considered

s. 22(1) — considered

s. 22(2) — considered

s. 22(4) — considered

s. 57 — referred to

s. 57(1)-57(5) — referred to

s. 57(4) — considered

s. 57(5) — referred to

s. 68(1) — considered

s. 68(2) — referred to

s. 68(4) — referred to

s. 69(1) — considered

s. 70(1) — referred to

s. 70(4) — referred to

s. 74 — referred to

s. 74(1) — referred to

s. 75 — considered

s. 75(1) — referred to

s. 75(1)(a) — considered

s. 75(1)(b) — considered

s. 75(2) — considered

s. 76 — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

s. 30(7) — considered

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1

art. 147 — referred to

Regulations considered:

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

General, R.R.O. 1990, Reg. 909

Generally — referred to

s. 31 — considered

s. 31(1) — considered

s. 31(2) — considered

s. 31(3) — referred to

APPEALS by pension claimants from judgment reported at *Indalex Ltd., Re* (2010), 2010 CarswellOnt 893, 2010 ONSC 1114, 79 C.C.P.B. 301 (Ont. S.C.J. [Commercial List]), dismissing pension claimants' motions for declaration that sale proceeds were subject to deemed trusts in favour of pension plan beneficiaries.

E E. Gillese J.A.:

1 A Canadian company is insolvent. Its pension plans are underfunded and in the process of being wound up. The company is the administrator of the pension plans.

2 The company obtains protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*). A court order enables it to borrow funds pursuant to a debtor-in-possession (DIP) credit agreement. The order creates a "super-priority" charge in favour of the DIP lenders. The obligation to repay the DIP lenders is guaranteed by the company's U.S. parent company (the Guarantee).

3 The company is sold through the *CCAA* proceedings but the sale proceeds are insufficient to repay the DIP lenders. The U.S. parent company covers the shortfall, in accordance with its obligations under the Guarantee.

4 The *CCAA* monitor holds some of the sale proceeds in a reserve fund. The pension plan beneficiaries claim the money based on the deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (*PBA*). The U.S. parent company claims the money based on its payment under the Guarantee.

5 Must the money in the reserve fund be used to pay the deficiencies in the pension plans in preference to the secured creditor? What fiduciary obligations, if any, does the company have in respect of its underfunded pension plans during the *CCAA* proceeding? These appeals wrestle with these difficult questions.

Overview

6 Indalex Limited was the sponsor and administrator of two registered pension plans: the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies (the Salaried Plan) and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies (the Executive Plan) (collectively, the Plans).

7 On March 20, 2009, Indalex's parent company and its U.S. based affiliates (collectively, Indalex U.S.) sought Chapter 11 protection in the United States.

8 On April 3, 2009, Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc. (Indalex or the Applicants) obtained protection from their creditors under the *CCAA*. At that time, the Salaried Plan was in the process of being wound up. Both Plans were underfunded. FTI Consulting Canada ULC (the Monitor) was appointed as monitor.

9 On April 8, 2009, the court authorized Indalex to borrow funds pursuant to a DIP credit agreement. The court order gave the DIP lenders a super-priority charge on Indalex's property. Indalex U.S. guaranteed Indalex's obligation to repay the DIP lenders.

10 On July 20, 2009, Indalex moved for approval of the sale of its assets on a going-concern basis. It also moved for approval to distribute the sale proceeds to the DIP lenders, with the result that there would be nothing to fund the deficiencies in the Plans. Without further payments, the underfunded status of the Plans will translate into significant cuts to the retirees' pension benefits.

11 At the sale approval hearing, the United Steelworkers appeared on behalf of its members who had been employed by Indalex and are the beneficiaries of the Salaried Plan (the USW). In addition, a group of retired executives appeared on behalf of the beneficiaries of the Executive Plan (the Former Executives).

12 Both the USW and the Former Executives objected to the planned distribution of the sale proceeds. They asked that an amount representing the total underfunding of the Plans (the Deficiencies) be retained by the Monitor as undistributed proceeds,

pending further court order. Their position was based on, among other things, the deemed trust provisions in the *PBA* that apply to unpaid amounts owing to a pension plan by an employer.

13 The court approved the sale. However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional \$6.75 million of the sale proceeds in reserve (the Reserve Fund), an amount approximating the Deficiencies.¹

14 The sale closed on July 31, 2009. The sale proceeds were insufficient to repay the DIP lenders. Indalex U.S. paid the shortfall of approximately US\$10.75 million, pursuant to its obligations under the Guarantee.

15 In accordance with a process designed by the *CCAA* court, the USW and the Former Executives brought motions returnable on August 28, 2009, based on their deemed trust claims. They claimed the Reserve Fund was subject to deemed trusts in favour of the Plans' beneficiaries and should be paid into the Plans in priority to Indalex U.S. They also claimed that during the *CCAA* proceedings, Indalex breached its fiduciary obligations to the Plans' beneficiaries.

16 Indalex then brought a motion in which it sought to lift the stay and assign itself into bankruptcy (the Indalex bankruptcy motion). This motion was directed to be heard on August 28, 2009, along with the USW and Former Executives' motions.

17 By orders dated February 18, 2010, (the Orders under Appeal), the *CCAA* judge dismissed the USW and Former Executives' motions on the basis that, at the date of sale, no deemed trust under the *PBA* had arisen in respect of either plan. He found it unnecessary to decide the Indalex bankruptcy motion.

18 The USW and the Former Executives (together, the appellants) appeal. They ask this court to order the Monitor to pay the Reserve Fund to the Plans.

19 On November 5, 2009, the Superintendent of Financial Services (Superintendent) appointed the actuarial firm of Morneau Sobeco Limited Partnership (Morneau) as administrator of the Plans.

20 Morneau was granted intervenor status. It supports the appellants.

21 The Superintendent also appeared. He, too, supports the appellants.

22 Sun Indalex, as the principal secured creditor of Indalex U.S., asks that the appeals be dismissed and the Reserve Fund be paid to it. As a result of its payment under the Guarantee, Indalex U.S. is subrogated to the rights of the DIP lenders. Its claim to the Reserve Fund is based on the super-priority charge.

23 The Monitor appeared. It supports Sun Indalex and asks that the appeals be dismissed. The Monitor and Sun Indalex will be referred to collectively as the respondents.

24 George L. Miller, the trustee of the bankruptcy estates of Indalex U.S., appointed under Chapter 7 of Title 11 of the United States Bankruptcy Code (the U.S. Trustee), was given leave to intervene. He joins with the Monitor and Sun Indalex in opposing these appeals.

25 For the reasons that follow, I would allow the appeals and order the Monitor to pay, from the Reserve Fund, amounts sufficient to satisfy the deficiencies in the Plans. For ease of reference, the various statutory provisions to which I make reference can be found in the schedules at the end of these reasons.

Background

26 Indalex Limited is a Canadian corporation. It is the entity through which the Indalex group of companies operates in Canada. It is a direct wholly-owned subsidiary of its U.S. parent, Indalex Holding Corp., which in turn is a wholly-owned subsidiary of Indalex Finance.

27 Together, the group of companies referred to as Indalex and Indalex U.S. were the second largest manufacturer of aluminum extrusions in the United States and Canada. Aluminum is a durable, light weight metal that can be strengthened through the extrusion process, which involves pushing aluminum through a die and forming it into strips, which can then be customized for a wide array of end-user markets.

28 Indalex Limited produced a portion of the raw material used in the extrusion process, called aluminum extrusion billets, through its casting division located in Toronto. It also processed the raw extrusion billets into extruded product at its Canadian extrusion plants, for sale to end users. In 2008, Indalex Limited accounted for approximately 32% of the Indalex group of companies total sales to third parties.

29 Indalex Limited provided separate pension plans for its executives and salaried employees. The Plans were designed to pay pension benefits for the lives of the retirees and those of their designated beneficiaries. Indalex Limited was the sponsor and administrator of both Plans. The Plans were registered with the Financial Services Commission of Ontario (FSCO) and the Canadian Revenue Agency.

The Salaried Plan

30 The USW has several locals certified as bargaining agents on behalf of members employed with Indalex, including members who are beneficiaries of the Salaried Plan. It was certified to represent certain Indalex employees, seven of whom were members of the Salaried Plan and have deferred vested entitlements under that plan.

31 The Salaried Plan contains a defined benefit and defined contribution component.

32 Unlike the Executive Plan, the Salaried Plan was in the process of being wound up when Indalex began *CCAA* proceedings. The effective date of wind up is December 31, 2006. Special wind up payments were made in 2007 (\$709,013), 2008 (\$875,313) and 2009 (\$601,000). As of December 31, 2008, the wind up deficiency was \$1,795,600.

33 All current service contributions have been made to the Salaried Plan.

34 Article 4.02 of the Salaried Plan obligates Indalex to make sufficient contributions to the Salaried Plan. Article 14.03 of the Salaried Plan requires Indalex to remit "amounts due or that have accrued up to the effective date of the wind-up and which have not been paid into the Fund, as required by the Plan and Applicable Pension Legislation".

The Executive Plan

35 The Executive Plan is a defined benefit plan. Effective September 1, 2005, Indalex closed the Executive Plan to new members.

36 As of January 1, 2008, there were eighteen members of the Executive Plan, none of whom were active employees.

37 The Executive Plan is underfunded.

38 As of January 1, 2008, the Executive Plan had an estimated funding deficiency, on an ongoing basis, of \$2,535,100. On a solvency basis, the funding deficiency was \$1,102,800 and on a windup basis, the deficiency was \$2,996,400. An actuarial review indicated that as of July 15, 2009, the wind up deficiency had increased to an estimated \$3,200,000.

39 In 2008, Indalex made total special payments of \$897,000 to the Executive Plan. No further special payments were due to be made to the Executive Plan until 2011. All current service contributions had been made.

40 Due to its underfunded status, the Former Executives' monthly pension benefits have already been cut by 30-40%. Unless money is paid into the Executive Plan, these cuts will become permanent. The Former Executives have also lost their supplemental pension benefits which were unfunded and terminated by Indalex after it obtained *CCAA* protection. Between the two cuts, the Former Executives have lost between one half and two-thirds of their pension benefits.

41 On June 26, 2009, counsel for the Former Executives sent a letter to counsel to Indalex and the Monitor, advising that the Former Executives reserved all rights to the deemed trust under s. 57(4) of the *PBA* in the *CCAA* proceedings. There was no response or objection to that letter from Indalex, the Monitor or any other party.

42 At the time the Orders under Appeal were made, the Executive Plan had not been wound up. However, a letter from counsel for the Monitor dated July 13, 2009, indicated that it was expected that the Executive Plan would be wound up.

43 On March 10, 2010, the Superintendent issued a Notice of Proposal to wind up the Executive Plan effective as of September 30, 2009. The wind up process is currently underway.

Pension and Corporate Governance During the CCAA Proceedings

44 Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the *CCAA* proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

45 Mr. Cooper was the primary negotiator of the DIP credit agreement on behalf of Indalex. He does not recall discussing Indalex's pension obligations in respect of the Salaried and Executive Plans during the negotiation of the DIP credit agreement. He was aware that the Plans were underfunded and that pensions would be reduced if the shortfalls were not met.

46 FTI Consulting Inc., the company for which Mr. Cooper works, and the Monitor are affiliated entities. The Monitor (FTI Consulting Canada ULC) is a wholly-owned subsidiary of FTI Consulting Inc.

47 On July 31, 2009, all of the directors of Indalex resigned. On that same day, Indalex Holding Corp. (part of Indalex U.S.) became the management of Indalex. Thus, as of July 31, 2009, Indalex and Indalex U.S. formally had the same management.

48 On August 12, 2009, a Unanimous Shareholder Declaration was executed in which Mr. Cooper was appointed to direct the affairs of all Indalex entities.

49 On August 13, 2009, Indalex (which was now under the management of Indalex U.S.) announced its intention to bring a motion to bankrupt the Canadian company.

The CCAA Proceedings

The Initial Order, as amended (April 3 and 8, 2009)

50 On April 3, 2009, pursuant to the order of Morawetz J. [2009 CarswellOnt 9396 (Ont. S.C.J. [Commercial List])], Indalex obtained protection from its creditors under the *CCAA* (the Initial Order). A stay of proceedings against Indalex was ordered.

51 On April 8, 2009 [2009 CarswellOnt 1998 (Ont. S.C.J. [Commercial List])], the Initial Order was amended to authorize Indalex to borrow funds pursuant to a DIP credit agreement among Indalex, Indalex U.S. and a syndicate of lenders (the DIP lenders). JP Morgan Chase Bank, N.A. was the administrative agent (the DIP Agent). The DIP credit agreement contemplated that the DIP loan would be repaid from the proceeds derived from a going-concern sale of Indalex's assets on or before August 1, 2009.

52 Indalex's obligation to repay the DIP borrowings was guaranteed by Indalex U.S. The Guarantee was a condition to the extension of credit by the DIP lenders.

53 Paragraph 45 of the Initial Order, as amended, is the super-priority charge. It provides that the DIP lenders' charge "shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise", other than the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order.

The Initial Order is Further Amended (June 12, 2009)

54 On June 12, 2010, Morawetz J. heard and granted a motion by the Applicants for approval of an amendment to the DIP credit agreement to increase the borrowings by about \$5 million, from US\$24.36 million to US\$29.5 million. This resulted in an order dated June 12, 2009, further amending the Initial Order (the June 12, 2009 order).

55 Counsel for the Former Executives was served with motion material on June 11, 2009, at 8:27 p.m. In response to an email from the Former Executives' counsel questioning the urgency of the motion, the Monitor's counsel responded that the motion was simply directed at obtaining more money under the DIP credit agreement.

56 At the hearing of the motion on June 12, 2010, the Former Executives initially sought to reserve their rights to confirm that the motion was about an increase to the DIP and nothing more. When that was confirmed, the Former Executives withdrew their reservation and the motion proceeded later that afternoon.

The Sale Approval Order (July 20, 2009)

57 Indalex brought two motions that were heard on July 20, 2009 [2009 CarswellOnt 9397 (Ont. S.C.J. [Commercial List])], by Campbell J. (the *CCAA* judge).

58 First, Indalex sought approval of a sale of its assets, as a going concern, to SAPA Holdings AB (SAPA). Total consideration for the sale of Indalex and Indalex U.S. was approximately US\$151,183,000.00. The Canadian sale proceeds were to be paid to the Monitor.

59 As a term of the sale, SAPA assumed no responsibility or liability for the Plans.

60 Second, Indalex moved for approval of an interim distribution of the sale proceeds to the DIP lenders.

61 Both the Former Executives and the USW objected to the planned distribution of the sale proceeds. They asserted statutory deemed trust claims in respect of the underfunded pension liabilities in the Plans, arguing that preference was to be given for amounts owing to the Plans pursuant to ss. 57 and 75 of the *PBA*. They also relied on s. 30(7) of the Ontario *Personal Property Security Act*, R.S.O. 1990, c. P.10 (*PPSA*), which expressly gives priority to the deemed trust in the *PBA* over secured creditors.

62 The Former Executives and the USW further argued that Indalex had breached its fiduciary duty to the Plans' beneficiaries by failing to adequately meet its obligations under the Plans and by abdicating its responsibilities as administrator once *CCAA* proceedings had been undertaken.

63 The court approved the sale in an order dated July 20, 2009 (the Sale Approval order). However, as a result of the USW and Former Executives' reservation of rights, the Monitor retained an additional \$6.75 million of the sale proceeds in reserve, an amount approximating the Deficiencies.

64 It was agreed that an expedited hearing process would be undertaken in respect of the USW and Former Executives' deemed trust claims and that the Reserve Fund held by the Monitor would be sufficient, if required, to satisfy the deemed trust claims.

The Guarantee is Called on

65 On July 31, 2009, the sale to SAPA closed. The sale proceeds available for distribution were insufficient to repay the DIP loan in full. The Monitor made a payment of US\$17,041,391.80 to the DIP Agent. This resulted in a shortfall of US \$10,751,247.22 in respect of the DIP borrowings. The DIP Agent called on the Guarantee for the amount of the shortfall, which Indalex U.S. paid.

The Orders under Appeal (August 28, 2009)

66 The USW and Former Executives brought motions to determine their deemed trust claims. The motions were set for hearing on August 28, 2009. Indalex then filed its bankruptcy motion, in which it sought to file a voluntary assignment in bankruptcy.

67 By orders dated February 18, 2010, the *CCAA* judge dismissed the USW and Former Executives' motions.

68 The *CCAA* judge found it unnecessary to deal with Indalex's bankruptcy motion.

The Reasons of the CCAA Judge

The Former Executives' Motion

69 The *CCAA* judge dismissed the Former Executives' motion on the basis that since the wind up of the Executive Plan had not yet taken place, there were no deficiencies in payments to that plan as of July 20, 2009. As there were no deficiencies in payments, there was no basis for a deemed trust.

The USW Motion

70 Because the Salaried Plan was in the process of being wound up, the *CCAA* judge dismissed the USW motion for different reasons.

71 The *CCAA* judge saw the issue raised on the USW motion to be whether the *PBA* required Indalex to pay the windup deficiency in the Salaried Plan as at the date of closing of the sale and transfer of assets, namely, July 20, 2009. In resolving the issue, the *CCAA* judge considered ss. 57 and 75 of the *PBA*. He called attention to the words "accrued to the date of the wind up but not yet due" in s. 57(4).

72 The *CCAA* judge also considered ss. 31(1) and (2) of R.R.O. 1990, Reg. 909 (the Regulations). He concluded that because s. 31 of the Regulations permitted Indalex to make up the deficiency in the Salaried Plan over a period of years, the amount of the yearly payments did not become due until it was required to be paid. Were it not for s. 31 of the Regulations, the *CCAA* judge stated that Indalex would have had an obligation under the *PBA* to pay in any deficiency as of the date of wind up.

73 The *CCAA* judge concluded:

[49] ... I find that as of the date of closing and transfer of assets there were no amounts that were "due" or "accruing due" on July 20, 2010. On that date, Indalex was not required under the *PBA* or the Regulations thereunder to pay any amount into the [Salaried] Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.

[50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.

[51] Since under the initial order priority was given to the DIP Lenders, they are entitled to be repaid the amounts currently held in escrow. Those entitled to windup deficiency remain as of that date unsecured creditors.

The Indalex Bankruptcy Motion

74 Having found that the deemed trust claims failed, the *CCAA* judge considered that the question of Indalex's assignment into bankruptcy might be moot. He went on, in para. 55 of his reasons for decision, to state:

[55] ... In my view, a **voluntary assignment under the *BIA* should not be used to defeat a secured claim under valid Provincial legislation**, unless the Provincial legislation is in direct conflict with the provisions of Federal Insolvency Legislation such as the *CCAA* or the *BIA*. For that reason I did not entertain the bankruptcy assignment motion first.

[Emphasis added.]

75 He found no conflict between the federal and provincial legislative regimes and allowed the Applicants to renew their request for bankruptcy relief in a further motion.

The Issues

76 The central issue raised on these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA* and, specifically, in finding that no deemed trust existed with respect to the Deficiencies as at July 20, 2009.

77 The USW and the Former Executives ask the court to decide a second issue: whether during the *CCAA* proceedings Indalex breached the fiduciary obligations that it owed to the Plans' beneficiaries by virtue of being the Plans' administrator.²

78 The U.S. Trustee's submission raises two additional issues. Does the collateral attack rule bar the appellants' deemed trust motions? Do the principles of cross-border insolvencies apply to these appeals?

79 The final issue that arises is that of remedy: how is the Reserve Fund to be distributed?

80 Given the centrality of the wind up process to these appeals, I will briefly outline the salient aspects of the wind up process before turning to a consideration of each of these issues.

Winding UP a Pension Plan

81 To understand the wind up process, one must first understand how the pension plan operates while it is ongoing.

82 A pension plan to which the employees contribute is called a contributory plan. In the case of contributory plans, the employer is obliged to remit the employee contributions, including payroll deductions, within a specified time frame. This aspect of an employer's obligations does not arise in these appeals.

83 In addition to remitting the employee contributions, if any, while a defined benefit pension plan is ongoing, the employer must make two types of contributions to ensure that the plan is adequately funded and capable of paying the promised pension benefits.

1. *Current service or "normal cost" contributions* — the employer contributions necessary to pay for current service costs in respect of benefits that are currently accruing to members as a result of their ongoing participation in the plan as active employees. These must be made in monthly instalments within 30 days after the month to which they relate.

2. *Special payments* — a plan administrator must file an actuarial report annually in which the pension plan is valued on two different bases: a "going-concern" basis, where it is assumed the plan will continue to operate indefinitely; and a "solvency" basis, where it is assumed that the employer will discontinue its business and wind up its plan. If the actuarial report discloses a going-concern liability, the employer is required to make monthly special payments over a 15 year period to fund the unfunded liability. If the actuarial report discloses a solvency deficiency, the employer is required to make monthly special payments over a 5 year period to fund the deficiency.

84 It is important to understand that the solvency valuation is not the same thing as a wind up report. To repeat, the solvency valuation is prepared while the pension plan is ongoing. A solvency valuation is required while the plan is ongoing because it is crucial that there be adequate funds with which to pay pensions if the company becomes insolvent and the plan is wound up.

85 The wind up of a pension plan is defined in the *PBA* as "the termination of the pension plan and the distribution of the assets of the pension fund" (s. 1(1)). At the effective date of wind up, the plan members cease to accrue further entitlements under the plan. Naturally, no new members may join the plan after the wind up date. The pension fund of a plan that is wound up continues to be subject to the *PBA* and the Regulations until all of the assets of the fund have been disbursed (s. 76).

86 Winding up a pension plan must be distinguished from closing the plan, which simply means that no new entrants are permitted to join the plan.

87 Under the *PBA*, there are two ways that a pension plan can be wound up. First, s. 68(1) recognizes that an employer³ can voluntarily wind up the pension plan. Second, under s. 69(1), in certain circumstances, the Superintendent may order the wind up of the plan.

88 The *PBA* contains a detailed statutory scheme that must be followed when a pension plan is to be wound up. This scheme imposes obligations on the employer and plan administrator, including the following:

- The administrator has to give written notice of proposal to wind up to various people, including the Superintendent, and the notice must contain specified information (s. 68(2) and (4));
- A wind up date must be chosen and the administrator must file a wind up report showing, among other things, the plan's assets and liabilities as at that date (s. 70(1));
- No payments can be made out of the pension fund until the Superintendent has approved the wind up report (s. 70(4));
- Plan members with a certain combination of age and years of service or membership in the plan are entitled to additional benefits on wind up (grow-ins) (s. 74).

89 Importantly, s. 75 requires an employer to make two different categories of payment on plan wind up. Sections 75(1) (a) and (b) read as follows:

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

90 Section 75(1)(a) requires the employer to make all payments that are due immediately or that have accrued and not been paid into the pension fund. Any unpaid current service costs and unpaid special payments are caught by this subsection. In other words, by virtue of this subsection, any payments that the employer had to make while the plan was ongoing must be paid. It will be recalled that while the plan was ongoing, some special payments could be made over time.

91 Section 75(1)(b) requires the employer to pay additional amounts into the pension fund if there are insufficient assets to cover the value of the pension benefits in the three categories set out in s. 75(1)(b).

92 It will be apparent that on wind up, an employer will often be faced with having to make significant additional contributions under s. 75(1)(b), in addition to being required to bring all contributions up to date because of s. 75(1)(a). Section 75(2) stipulates that "the employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times." Section 31 of the Regulations prescribes the manner and timing for the s. 75 wind up payments. It provides that the amounts an employer is to contribute under section 75 shall be by annual special payments, commencing at the effective date of the wind up, over not more than five years.

The PBA Deemed Trust

93 The central issue in these appeals is whether the *CCAA* judge erred in his interpretation of s. 57(4) of the *PBA*. Section 57(4) reads as follows:

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

[emphasis added]

94 The modern approach to statutory construction dictates that in interpreting s. 57(4), the words must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.⁴

95 Section 57(4) deems an employer to hold in trust an amount equal to the contributions "accrued to the date of wind up but not yet due under the plan or regulations". The question is: what employer contributions are caught by s. 57(4) and, thus, are subject to the deemed trust?

96 The introductory words of s. 57(4) refer to where a pension plan is "wound up". Therefore, to answer this question, one must refer to the wind up regime created by the *PBA* and Regulations, a summary of which is set out above.

97 It will be recalled that when a pension plan is wound up, an actuarial calculation is made of the assets and liabilities, as of the wind up date. Because the plan liabilities relate to service that was provided up to the wind up date and not beyond, it is clear that all plan liabilities are accrued as of the wind up date. Put another way, no additional liability can accrue following the wind up because all events crystallize on the windup date — all pension benefit accruals by members cease and all amounts that an employer is required to pay into a pension plan are calculated as of the wind up date. For the same reason, the amounts that s. 75 requires an employer to contribute to the pension fund, on wind up, are accrued to the date of wind up. The required contributions are the amounts that an employer must make to the pension fund so that the accrued pension benefits of the plan members can be paid.

98 It will be further recalled that s. 31 of the Regulations gives the employer up to five years in which to make all of the required s. 75 contributions. However, the fact that an employer is given time in which to pay the requisite contributions into the pension fund does not change the fact that the liabilities accrued by the wind up date.

99 This point is reinforced when one distinguishes amounts that are "accrued" from amounts that are "not yet due". In *Ontario Hydro-Electric Power Commission v. Albright* (1922), 64 S.C.R. 306 (S.C.C.), at para. 23, the Supreme Court of Canada explains that money is "due" when there is a legal obligation to pay it, whereas payments are "accrued" when the rights or obligations are constituted and the liability to pay exists, even if the payment does not need to be made until a later date (*i.e.* is not "due" until a later date).

100 Thus, just as s. 57(4) contemplates, while the amounts that the employer must contribute to the pension fund pursuant to s. 75 "accrued to the date of wind up", because of s. 31 those contributions are "not yet due under the ... regulations".

101 There is nothing in the wording of s. 57(4) to suggest that its scope is confined to the amounts payable under only s. 75(1)(a), as the respondents contend. On the contrary, the words of s. 57(4), given their grammatical and ordinary meaning, contemplate that all amounts owing to the pension plan on wind up are subject to the deemed trust, even if those amounts are not yet due under the plan or regulations. Therefore, the deemed trust in s. 57(4) applies to all employer contributions that are required to be made pursuant to s. 75. In short, the words "employer contributions accrued to the date of wind up but not yet due" in s. 57(4) include all amounts owed by the employer on the wind up of its pension plan.

102 This interpretation accords with a contextual analysis of s. 57(4).

103 As these appeals demonstrate, during the five-year "grace" period permitted by s. 31 of the Regulations, the rights of plan beneficiaries are at risk. Sections 57(4) and (5) provide some protection to the plan beneficiaries during that period. The employees' interest is in receiving their full pension entitlements. For that to happen, all s. 75 employer contributions must be made into the pension fund. The employer, on the other hand, has an interest in having a reasonable period of time within which to make the requisite s. 75 contributions. Section 31 of the Regulations gives the employer up to five years to make the contributions, during which time the deemed trust in s. 57(4) and the lien and charge in s. 57(5) provide a measure of protection for the employees over the amount of the unpaid employer contributions, contributions that had *accrued* to the date of wind up *but [were] not yet due under the regulations*.

104 Further, this interpretation is consistent with the overall purpose of the *PBA*, which is to establish minimum standards,⁵ safeguard the rights of pension plan beneficiaries,⁶ and ensure the solvency of pension plans so that pension promises will be fulfilled.⁷ As the Supreme Court of Canada said in *Monsanto*, at para. 38:

The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (citations omitted).

105 Much reference has been made to the two cases in which s. 57(4) has been discussed: *Ivaco Inc., Re* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]), *aff'd* (2006), 83 O.R. (3d) 108 (Ont. C.A.), and *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). In my view, these decisions are of little assistance in deciding this issue.

106 Factually, *Ivaco* and *Usarco* differ from the present case. In *Ivaco* and *Usarco*, the prospect of bankruptcy was firmly before the court whereas in this case, at its highest, there is a motion to lift the stay and file for bankruptcy.

107 Moreover, there are conflicting statements in *Ivaco* and *Usarco* regarding the applicability of the deemed trust to wind up deficiencies. In *Usarco*, a bankruptcy petition had been filed but no steps had been taken to proceed with the petition. The company was not under *CCAA* protection. In that context, Farley J., the motion judge, held that the deemed trust provision referred only to the regular contributions together with special contributions that were to have been made but had not been.⁸ In *Ivaco*, the major financiers and creditors wished to have the *CCAA* proceeding, which was functioning as a liquidation, transformed into a bankruptcy proceeding. The case was focused primarily on whether there was a reason to defeat the bankruptcy petition. In *Ivaco*, Farley J. took a different view of the scope of the s. 57(4) deemed trust, stating that in a non-bankruptcy situation, the company's assets were subject to a deemed trust on account of unpaid contributions and wind up liabilities.⁹ On appeal, although this court indicated that it thought that Farley J.'s statement in *Usarco* was correct, it found it unnecessary to decide the matter. Accordingly, these decisions are not determinative of the scope of the deemed trust created by s. 57(4) of the *PBA*.

108 The *CCAA* judge concluded that because Indalex had made the going-concern and special payments to the Salaried Plan at the date of closing, there were no amounts due to the Salaried Plan. Therefore, there could be no deemed trust. Respectfully,

I disagree. As I have explained, the deemed trust in s. 57(4) is not limited to the payment of amounts contemplated by s. 75(1)(a). It applies to all payments required by s. 75(1), including payments mandated by s. 75(1)(b).

109 Accordingly, the deficiency in the Salaried Plan had accrued as of the date of wind up (December 31, 2006) and, pursuant to s. 57(4) of the *PBA*, was subject to a deemed trust. The *CCAA* judge erred in holding that no deemed trust existed with respect to that deficiency as at July 20, 2009. The consequences that flow from this conclusion are explored in the section below on how the Reserve Fund is to be distributed.

110 Are the unpaid liability payments owing to the Executive Plan also subject to the s. 57(4) deemed trust? The Former Executives, Superintendent and Morneau all contend that they are. On the plain wording of s. 57(4), I find it difficult to accept this argument — the introductory words of the provision speak to "where a pension plan is wound up". In other words, wind up of the pension plan appears to be a requirement for s. 57(4) to apply. If that is so, no deemed trust could arise unless and until a plan wind up occurred. As has been noted, the Executive Plan had not been wound up at the relevant time.

111 Having said this, I am troubled by the notion that Indalex can rely on its own inaction to avoid the consequences that flow from wind up. In its letter of July 13, 2009, counsel for the Monitor confirmed that the Executive Plan would be wound up. Indeed, the *CCAA* judge acknowledged that the material filed with the court showed an intention on the part of the Applicants to wind up the plan. If the deemed trust does not extend to the Executive Plan, in the circumstances of this case, it appears that the result would be a triumph of form over substance.

112 In the end, however, the question that drives these appeals is whether the Monitor should be directed to distribute the Reserve Fund to the Plans. As I explain below in the section on how the Reserve Fund should be distributed, in my view, such an order should be made. Consequently, it becomes unnecessary to decide whether the deemed trust applies to the deficiency in the Executive Plan and I decline to do so. It is a question that is best decided in a case where the result depends on it and a fuller record would enable the court to appreciate the broader implications of such a determination.

Did Indalex Breach Its Fiduciary Obligation?

113 The appellants say that Indalex, as administrator of the Plans, owed a fiduciary duty to the Plans' members and beneficiaries. Both appellants list a number of actions that Indalex took or failed to take during the *CCAA* proceedings that they say amounted to breaches of its fiduciary obligation. They contend that the appropriate remedy for those breaches is an order requiring the Reserve Fund to be paid into the Plans.

114 The Monitor acknowledges that pension plan administrators have both a statutory and common law duty to act in the best interests of the plan beneficiaries and to avoid conflicts of interest, and that these duties are "fiduciary in nature". However, the Monitor contends that Indalex took all of the impugned actions in its role as employer and, therefore, could not have breached the fiduciary duties it owed to the Plans' beneficiaries as administrator. In any event, the Monitor adds, the issue is moot because any such breaches would merely give rise to an unsecured claim outside the ambit of the deemed trusts created by the *PBA*.

115 Sun Indalex echoes the Monitor's latter argument and says that the allegations of breach of fiduciary duty are irrelevant in these appeals. Its submission on this issue is summarized in para. 79 of its factum:

[79] There is no provision in the *PBA* that creates a deemed trust in respect of any claim for damages based on an alleged breach of fiduciary duty by an employer and there is no basis in the *PBA* for conferring a priority with respect to such a claim. If a claim for breach of fiduciary duty on the part of Indalex exists, it is merely an unsecured claim outside the ambit of the deemed trusts created by the *PBA* that does not have priority over Sun's secured claim or the super-priority DIP Lenders Charge.

116 For the reasons that follow, I accept the appellants' submission that Indalex breached its fiduciary obligations as administrator during the *CCAA* proceedings. I deal with the question of what flows from that finding when deciding the issue of remedy.

117 It is clear that the administrator of a pension plan is subject to fiduciary obligations in respect of the plan members and beneficiaries.¹⁰ These obligations arise both at common law and by virtue of s. 22 of the *PBA*.

118 The common law governing fiduciary relationships is well known. A fiduciary relationship will be held to exist where, given all the surrounding circumstances, one person could reasonably have expected that the other person in the relationship would act in the former's best interests.¹¹ The key factual characteristics of a fiduciary relationship are: the scope for the exercise of discretion or power; the ability to exercise that power unilaterally so as to affect the beneficiary's legal or practical interests; and, a peculiar vulnerability on the part of the beneficiary to the exercise of that discretion or power.¹²

119 It is readily apparent that these characteristics exist in the relationship between the pension plan administrator and the plan members and beneficiaries. The administrator has the power to unilaterally make decisions that affect the interests of plan members and beneficiaries as a result of its responsibility for the administration of the plan and management of the fund. Those decisions affect the beneficiaries' interests. The plan members and beneficiaries reasonably rely on the administrator to ensure that the plan and fund are properly administered. And, as these appeals demonstrate, they are peculiarly vulnerable to the administrator's exercise of its powers. Thus, at common law, Indalex as the Plans' administrator owed a fiduciary duty to the Plans' members and beneficiaries to act in their best interests.

120 Section 22 of the *PBA* also imposes a fiduciary duty on the administrator in the administration of the plan and fund. As well, it expressly prohibits the administrator from knowingly permitting its interest to conflict with its duties in respect of the pension fund. The relevant provisions in s. 22 read as follows:

Care, diligence and skill

22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

...

Conflict of interest

(4) An administrator ... shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

121 In Ontario, an employer is expressly permitted to act as the administrator of its pension plan: see ss. 1 and 8 of the *PBA*.¹³ It is self-evident that the two roles can conflict from time to time. In *Imperial Oil Ltd. v. Ontario (Superintendent of Pensions)* (1995), 18 C.C.P.B. 198 (Ont. Pension Comm.) (*Imperial Oil*), the Pension Commission of Ontario grappled with this statutorily sanctioned conflict in roles.

122 In that case, the employer Imperial Oil was the administrator of two employee pension plans. Imperial Oil sought to file amendments to the pension plans with the PCO. Prior to the amendments, a plan member with 10 or more years of service with Imperial Oil whose employment was terminated for efficiency reasons was entitled to an enhanced early retirement annuity (the enhanced benefit). The effect of the amendments was to deny such an employee the enhanced benefit unless the employee would have been able to retire within five years of termination. Put another way, after the amendments, in addition to the other requirements, an employee had to be 50 years of age or older at the time his or her employment was terminated for efficiency reasons in order to receive the enhanced benefit.

123 The Superintendent accepted the amendments for registration.

124 Some six months after the amendments were passed, Imperial Oil terminated the employment of a large number of employees for efficiency reasons. A number of the affected employees had 10 or more years of service but, because they had not reached the age of 50, they were denied the enhanced benefit.

125 A group of former employees (the Entitlement 55 Group) objected to the registration of the amendments. They brought an application to the PCO, seeking a declaration that the amendments were void and an order compelling Imperial Oil to administer the pension plans according to the terms of the plans in place before the amendments were passed.

126 Among other things, the Entitlement 55 Group argued that when Imperial Oil amended the plans, it was acting in both its capacity as employer and its capacity as administrator of the plans. Thus, they contended, Imperial Oil placed itself in a conflict of interest situation prohibited by s. 22(4) of the *PBA* because in its role as employer it wished to reduce pension fund liabilities but in its role as administrator it had a duty to protect the interests of the beneficiaries who had reached the 10 year service qualification and thereby "qualified" for the enhanced benefit.

127 The PCO dismissed the application. In so doing, it rejected the submission that Imperial Oil had contravened s. 22(4) by passing the amendments. It held that Imperial Oil had acted solely in its capacity as employer when it passed the amendments.

128 The PCO acknowledged that the *PBA* allows an employer to wear "two hats" — one as employer and the other as administrator. However, at para. 33 of its reasons, the PCO explained that an employer plays a role in respect of the pension plan that is distinct from its role as administrator:

Its role as employer permits it to make the decision to create a pension plan, to amend it and to wind it up. Once the plan and fund are in place, it becomes an administrator for the purposes of management of the fund and administration of the plan. If we were to hold that an employer was an administrator for all purposes once a plan was established, of what use would a power of amendment be? An employer could never use the power to amend the plan in a way that was to its benefit, as opposed to the benefit of the employees. Section 14 presupposes this power is with an employer as it created parameters around the exercise of a power of amendment.

129 The "two hats" analogy in *Imperial Oil* assists in understanding the parameters of the dual roles of an employer who is also the administrator of its pension plan. The employer, when managing its business, wears its corporate hat. Although the employer *qua* corporation must treat all stakeholders fairly when their interests conflict, the directors' ultimate duty is to act in the best interests of the corporation: see *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 81-84. On the other hand, when acting as the pension plan administrator, the employer wears its fiduciary hat and must act in the best interests of the plan's members and beneficiaries.

130 The question raised by these appeals is whether, as the respondents contend, Indalex wore only its corporate hat during the *CCAA* proceedings. In my view, it did not. As I will explain, during the *CCAA* proceedings, in the unique circumstances of this case, Indalex wore both its corporate and its administrator's hats.

131 I begin from the position that Indalex had the right to make the decision to commence *CCAA* proceedings wearing solely its corporate hat. That decision is not part of the administration of the pension plan or fund nor does it necessarily engage the rights of the beneficiaries of the pension plan. For example, an employer might sell its business under *CCAA* protection, with the purchaser agreeing to continue the pension plan. In that situation, there should be no effect on the payment of pension benefits. Similarly, if the pension plan were fully funded, *CCAA* proceedings should have no effect on pension entitlements.

132 However, just because the initial decision to commence *CCAA* proceedings is solely a corporate one that does not mean that all subsequent decisions made during the proceedings are also solely corporate ones. In the circumstances of this case, Indalex could not simply ignore its obligations as the Plans' administrator once it decided to seek *CCAA* protection. Shortly after initiating *CCAA* proceedings, Indalex moved to obtain DIP financing, in which it agreed to give the DIP lenders a super-

priority charge. At the same time, Indalex knew that the Plans were underfunded and that unless more funds were put into the Plans, pensions would have to be reduced. The decisions that Indalex was unilaterally making had the potential to affect the Plans beneficiaries' rights, at a time when they were particularly vulnerable. The peculiar vulnerability of pension plan beneficiaries was even greater than in the ordinary course because they were given no notice of the *CCAA* proceedings, had no real knowledge of what was transpiring and had no power to ensure that their interests were even considered — much less protected — during the DIP negotiations.

133 In concluding that Indalex was subject to its fiduciary duties as administrator as well as its corporate obligations during the *CCAA* proceedings, two points need to be made.

134 First, it is significant that Indalex is unclear as to what it thinks happened to its role as administrator during the *CCAA* proceedings. When cross-examined on this matter, Mr. Cooper gave various responses as to whom he believed filled that role: Indalex, a combination of him and the Monitor, and a combination of him and his staff. This confusion is understandable, given the number of roles that Mr. Cooper played in these proceedings. It will be recalled that prior to the commencement of the *CCAA* proceedings, he became the Chief Restructuring Officer for Indalex U.S., a position which included responsibility for the Canadian group of Indalex companies. In this position, he served as Indalex's primary negotiator of the DIP credit agreement. But, at the same time, he worked for FTI Consulting Inc. The Monitor is a wholly-owned subsidiary of FTI Consulting Inc. This blending of roles no doubt contributed to the apparent disregard for the obligations owed by the Plans' administrator.

135 In any event, it is not apparent to me that Indalex could ignore its role as administrator or divest itself of those obligations without taking formal steps through the Superintendent, plan amendment, the courts, or some combination thereof, to transfer that role to a suitable person. However, I will not consider this particular question further because it was not squarely raised and argued by the parties and, in any event, even if Mr. Cooper became the administrator, through his various roles, including as Chief Restructuring Officer for Indalex U.S., he is so clearly allied in interest with Indalex that the following analysis remains applicable.

136 Second, the respondents' submission that Indalex wore only its corporate hat during the proceedings is implicitly premised on the notion that an employer will wear its corporate hat or its administrator's hat, but never both. I do not accept this premise. Nor do I accept that the reasoning in *Imperial Oil*, which the respondents rely on, supports this submission.

137 In *Imperial Oil*, the PCO had to decide whether certain acts taken in respect of a pension plan were those of the employer or the administrator. Because the provision of pension plans is voluntary in Canada, the employer has the right to decide questions of plan design, including whether to offer a pension plan and, if it does, whether to end it. In part because of the wording of s. 14 of the *PBA* and in part because the amendments at issue in *Imperial Oil* were a matter of plan design, the PCO concluded that the employer was found to be acting solely in its corporate role when it passed the amendments. There is nothing in *Imperial Oil* to suggest that an employer cannot find itself in a position where it is wearing both hats at the same time.

138 I turn next to the question of breach.

139 As previously noted, when Indalex commenced *CCAA* proceedings, it knew that the Plans were underfunded and that unless additional funds were put into the Plans, pensions would be reduced. Indalex did nothing in the *CCAA* proceedings to fund the deficit in the underfunded Plans. It took no steps to protect the vested rights of the Plans' beneficiaries to continue to receive their full pension entitlements. In fact, Indalex took active steps which undermined the possibility of additional funding to the Plans. It applied for *CCAA* protection without notice to the Plans' beneficiaries. It obtained a *CCAA* order that gave priority to the DIP lenders over "statutory trusts" without notice to the Plans' beneficiaries. It sold its assets without making any provision for the Plans. It knew the purchaser was not taking over the Plans.¹⁴ It moved to obtain orders approving the sale and distributing the sale proceeds to the DIP lenders, knowing that no payment would be made to the underfunded Plans. And, Indalex U.S. directed Indalex to bring its bankruptcy motion with the intention of defeating the deemed trust claims and ensuring that the Reserve Fund was transferred to it. In short, Indalex did nothing to protect the best interests of the Plans' beneficiaries and, accordingly, was in breach of its fiduciary obligations as administrator.

140 Further, in my view, Indalex was in a conflict of interest position. As has been mentioned, Indalex's corporate duty was to treat all stakeholders fairly when their interests conflicted, but its ultimate duty was to act in the best interests of the corporation. Indalex's duty as administrator was to act in the Plans' beneficiaries best interests. It is apparent that in the circumstances of this case, these duties were in conflict.

141 The common law prohibition against conflict of interest is not confined to situations where the fiduciary's personal interest conflicts with those of the beneficiaries. It also precludes the fiduciary from placing itself in a position where it acts for two parties who are adverse in interest: *Davey v. Woolley, Hames, Dale & Dingwall* (1982), 35 O.R. (2d) 599 (Ont. C.A.), at para. 8. In *Davey*, a solicitor who acted for both sides of a business transaction was found to be in breach of his fiduciary obligations. Wilson J.A., writing for this court, explained that the conflict arose because the solicitor could not fulfill his duties in respect of both clients at the same time. At para. 18, she concluded that the solicitor was bound to refuse to act for the plaintiff in the circumstances.

142 The prohibition against a fiduciary being in a position of conflicting duties governs the situation in which Indalex found itself in during the *CCAA* proceedings.

143 Indalex was not at liberty to resolve the conflict in its duties by simply ignoring its role as administrator. A fiduciary relationship does not end simply because it becomes impossible of performance. At the point where its duty to the corporation conflicted with its duties as administrator, it was incumbent on Indalex to take steps to address the conflict.

144 Even if I am in error in concluding that Indalex was in breach of its common law fiduciary obligations, I would find that its actions amounted to a breach of s. 22(4) of the *PBA*. Section 22(4) prohibits an administrator from knowingly permitting its interest to conflict with its duties and powers in respect of the pension fund. Under s. 57(5) of the *PBA*, as administrator, Indalex had a lien and charge on its assets for the amount of the deemed trust. Any steps that it might have taken pursuant to s. 57(5), as administrator, would have been in respect of the pension fund. Thus, if nothing else, Indalex's actions during the *CCAA* proceedings demonstrate that it permitted its corporate interests to conflict with the administrator's duties and powers that flow from the lien and charge.

145 Having found that Indalex breached its fiduciary obligations to the Plans' beneficiaries, the question becomes: what flows from such a finding? I address that question below when considering the issue of how to distribute the Reserve Fund. At that time I will return to the arguments of the Monitor and Sun Indalex to the effect that such a finding is largely irrelevant in these proceedings.

Does the Collateral Attack Rule Bar the Deemed Trust Motions?

146 The U.S. Trustee submits that even if the *PBA* creates a deemed trust for any wind up deficiencies in the Plans, the appeals should be dismissed because the underlying motions are an impermissible collateral attack on previous orders made in the *CCAA* proceedings. His argument runs as follows.

147 The Initial Order, the June 12, 2009 order and the Sale Approval order (the "Court Orders") are all valid, enforceable court orders. The Court Orders gave super-priority rights to the DIP lenders and Indalex U.S. is subrogated to those rights. None of the Court Orders were appealed and no party sought to have them set aside or varied. As the appellants' motions seek to alter the priorities established by the Court Orders, they should be barred because they are an impermissible collateral attack on those orders.

148 I do not accept this submission for three reasons, the first two of which can be shortly stated.

149 First, this submission is an attack on the underlying motions. As such, it ought to have been raised below. The Former Executives say that the collateral attack doctrine was raised for the first time on appeal. Certainly, if it was raised below, the *CCAA* judge makes no reference to it. As a general rule, it is not appropriate to raise an issue for the first time on appeal. The

exceptions to this general rule are very limited and do not apply in this case: see *Cusson v. Quan*, [2009] 3 S.C.R. 712 (S.C.C.), at paras. 36-37.

150 Second, the USW and the Former Executives raised the matter of the deemed trusts in the *CCAA* proceedings. The *CCAA* judge designed a process by which their claims would be resolved. They followed that process. The USW and Former Executives can scarcely be faulted for complying with a court-designed process. Further, the Sale Approval order acknowledged the deemed trust issue in that it required the Monitor to hold funds in reserve that were sufficient to satisfy the deemed trust claims. That acknowledgment is inconsistent with a subsequent claim of impermissible collateral attack.

151 Third, as I will now explain, an appreciation of the *CCAA* regime makes it apparent that the collateral attack rule does not apply in the circumstances of this case.

152 The collateral attack rule rests on the need for court orders to be treated as binding and conclusive unless they are set aside on appeal or lawfully quashed. Court orders may not be attacked collaterally. That is, a court order may not be attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order. See *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at para. 8.

153 The fundamental policy behind the rule against collateral attacks is "to maintain the rule of law and to preserve the repute of the administration of justice": see *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at para. 22. If a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it: see *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 (S.C.C.), at para. 72.

154 The *CCAA* regime is designed to deal with all matters during an insolvent company's attempt to reorganize. The court-ordered stay of proceedings ensures that there is only one forum where parties can put forth their arguments and claims. By pre-empting other legal proceedings, the stay gives a corporation breathing space, which promotes the opportunity for reorganization.

155 The *CCAA* regime is a flexible, judicially supervised reorganization process that allows for creative and effective decisions: see *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.), at para. 21. The *CCAA* judge is accorded broad discretion because the proceedings are a fact-based exercise that requires ongoing monitoring and because there is often a need for the court to act quickly. There is an underlying assumption, however, that the *CCAA* proceedings will provide an opportunity for affected persons to participate in the proceedings.

156 This assumption finds voice in para. 56 of the Initial Order, as amended, which permits any interested party to apply to the *CCAA* court to vary or amend the Initial Order (the come-back clause). That is precisely what the appellants did. As interested parties, they went to the *CCAA* court to ask that the super-priority charge be varied or amended so that their claims could be properly recognised.

157 Moreover, I do not accept that the appellants failed to act promptly in asserting their claims. It was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court.

158 The U.S. Trustee's argument that the Court Orders were never appealed is not persuasive. In *Algoma Steel Inc., Re* (2001), 147 O.A.C. 291 (Ont. C.A.), at paras. 7-9, this court stated that it is premature to grant leave to appeal from an initial order — brought on an urgent basis to deal with seemingly desperate circumstances — when the order specifically opens the proceeding to all interested parties and invites dissatisfied parties to bring their concerns to the court on a timely basis using a come-back provision.

159 As the Former Executives point out, had the appellants sought to advance their deemed trust claims by bringing a motion challenging the paragraph of the Initial Order that established the DIP super-priority charge, it is likely that they would have been

met by a response that their motions were premature. Depending on the amount paid for the company and/or the arrangements made in respect of the Plans, the interests of the Plans' beneficiaries might not have been affected by a sale. Indeed, on July 2, 2009, when Indalex brought a motion to have the bidding procedures approved for the asset sale and the Former Executives objected because of concerns that the Plans were underfunded, the *CCAA* judge endorsed the record as follows: "The issues can be raised by the retirees on any application to approve a transaction — but that is for another day."

160 The appellants followed that direction. When Indalex moved to have the sale transaction approved and the jeopardy to the appellants' interests became apparent, they went to the *CCAA* court and raised the deemed trust issue.¹⁵

161 Thus, as I have said, I do not view the deemed trust motions as collateral attacks on the Court Orders. The motions were raised in a timely manner in the same court in which the orders were made. They can scarcely be termed attempts to circumvent decisions rendered against the USW and the Former Executives when no decision had ever been rendered in which their claims had been squarely raised and addressed. The process the USW and the Former Executives followed is exactly that which is contemplated in *CCAA* proceedings and, specifically, the come-back clause.

162 Even if the collateral attack rule were applicable, however, this is not a case for its strict application.

163 In *Litchfield*, the Supreme Court of Canada recognized that there will be situations in which the collateral attack rule should not be strictly applied. In that case, a physician had been charged with a number of counts of sexual assault on his patients. On motion, a judge (not the trial judge) ordered that the counts be severed and divided and three different trials be held. After one trial, the physician was acquitted. The Crown appealed. One of the grounds of appeal related to the pre-trial severance order. The question arose as to whether the Crown's challenge to the validity of the severance order violated the collateral attack rule.

164 At paras. 16-19 of *Litchfield*, Iacobucci J., writing for the majority, explains that "some flexibility" is needed in the application of the rule against collateral attacks. Strictly applied, the rule would prevent the trial judge from reviewing the severance order because the trial was not a proceeding whose specific object was the reversal, variation or nullification of the severance order. However, Iacobucci J. noted, the rule is not intended to immunize court orders from review. He reiterated the powerful rationale behind the rule: to maintain the rule of law and preserve the repute of the administration of justice. This promotes certainty and finality, key aspects of the orderly and functional administration of justice. However, he concluded that flexibility was warranted because permitting a collateral attack on the severance order did not offend the underlying rationale for the rule.

165 Similarly, in *R. v. Domm* (1996), 31 O.R. (3d) 540 (Ont. C.A.), at para. 31, Doherty J.A., writing for this court, states that if a collateral attack can be taken without harm to the interests of the rule of law and the repute of the administration of justice, the rule should be relaxed. At para. 36 of *Domm*, he says that the rule must yield where a person has "no other effective means" of challenging the order in question.

166 I acknowledge that certainty and finality are necessary to the proper functioning of the legal system. And, I recognize that permitting the appellants' motions to proceed has generated some degree of uncertainty as to the priorities established by the Court Orders. However, in the circumstances of this case, there was no other effective means by which the appellants could assert their claims to a deemed trust. As has been mentioned, it was only when Indalex brought a motion for approval of the sale of its assets to SAPA and for a distribution of the sale proceeds to the DIP lenders that it became clear that Indalex intended to abandon the Plans in their underfunded states. The appellants immediately took steps to assert their claims in the very forum in which all of the Court Orders had been made, namely, the *CCAA* court. By permitting their motions to be heard, the *CCAA* judge did not damage the repute of the administration of justice. On the contrary, he strengthened it. He enabled the sale to proceed while ensuring that the competing claims to the Reserve Fund would be decided on the merits and expeditiously.

167 Nor can it be said, for the reasons already given about the nature of *CCAA* proceedings, that the deemed trust motions jeopardize the rule of law. Given the nature of a *CCAA* proceeding, the court must often make orders on an urgent and expedited basis, with little or no notice to creditors and other interested parties. Its processes are sufficiently flexible that it can accommodate situations such as the one that arose here. A strict application of the rule would preclude the appellants from

having the opportunity to meaningfully challenge the super-priority charge in the Initial Order, as amended. In my view, that result would be a fundamental flaw in the *CCAA* process, one in which procedure triumphed over substance. As Iacobucci J. said in *Litchfield*, at para. 18, such a result cannot be accepted.

168 Accordingly, in my view, while the collateral attack rule does not apply, even if it did, there are compelling reasons in this case to relax its strict application.

Do The Principles of Cross-Border Insolvencies Apply?

169 The U.S. Trustee also submits that the principles of cross-border insolvencies should be applied when deciding these appeals. He contends that notwithstanding that separate proceedings were commenced in Canada and the U.S., those principles apply because the Applicants were direct and indirect subsidiaries of certain of the U.S. debtors, who commenced proceedings under Chapter 11 of Title 11 of the United States Bankruptcy Code in March 2009. Further, the U.S. Trustee contends that if the appellants' claims were to succeed, it would seriously undermine the basic principles underlying cross-border insolvencies and the confidence of foreign creditors and courts in the Canadian insolvency system.

170 While this argument provides context for the U.S. Trustee's collateral attack submission, I do not see it as disclosing any legal grounds relevant to these appeals. By order dated May 12, 2009, Morawetz J. approved a cross-border protocol in these proceedings that stipulates that the U.S. and Canadian courts retain exclusive jurisdiction over the proceedings in their respective jurisdictions. Furthermore, there is no evidence to support the U.S. Trustee's claim that allowing these appeals would impair future lending practices by U.S. companies. Finally, nothing has been raised which supports the notion that upholding valid provincial law in the circumstances of these appeals will undermine the principles of cross-border insolvencies.

How Is the Reserve Fund to Be Distributed?

The Salaried Plan

171 Having concluded that a deemed trust exists with respect to the deficiency in the Salaried Plan as at July 20, 2009, the question becomes whether the Monitor should be ordered to pay the amount of that deficiency, from the Reserve Fund, into the Salaried Plan.

172 The USW argues, on behalf of the beneficiaries of the Salaried Plan, that the deemed trust ranks in priority to all secured creditors and, therefore, the order should be made. Its argument rests on s. 30(7) of the *PPSA*, which reads as follows:

30. (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*. [emphasis added]

173 The USW contends that as s. 30(7) gives priority to the *PBA* deemed trust and no finding of paramountcy was made in these proceedings, it must be given effect.

174 The respondents argue that the super-priority charge has priority over any deemed trusts and, therefore, the Reserve Fund should be paid to Sun Indalex, as the principal secured creditor of Indalex U.S. They point to well-established law that authorizes the court to grant super-priority to DIP lenders in *CCAA* proceedings and argue that without such a charge, DIP lenders will no longer provide financing to companies under *CCAA* protection. Without DIP funding they say, many companies under *CCAA* protection will be unable to continue in business until a compromise or arrangement has been worked out. Consequently, companies will file for bankruptcy where deemed trusts have no priority. This, they say, will frustrate the very purpose of the *CCAA*, which is to facilitate the making of compromises or arrangements between insolvent debtor companies and their creditors.

175 There is a great deal of force to the respondents' submissions. Indeed, in general, I agree with them. It is important that the courts not address the interests of pension plan beneficiaries in a manner that thwarts or even discourages DIP funding in

future *CCAA* proceedings. Nonetheless, in the circumstances of this case, it is my view that the Monitor should be ordered to pay the amount of the deficiency, from the Reserve Fund, into the Salaried Plan.

176 The *CCAA* court has the authority to grant a super-priority charge to DIP lenders in *CCAA* proceedings.¹⁶ I fully accept that the *CCAA* judge can make an order granting a super-priority charge that has the effect of overriding provincial legislation, including the *PBA*. I also accept that without such a charge, DIP lenders may be unwilling to provide financing to companies under *CCAA* protection. However, this does not mean that the super-priority charge in question has the effect of overriding the deemed trust. To decide whether it does, one must turn to the doctrine of paramountcy.

177 Valid provincial laws continue to apply in federally regulated bankruptcy and insolvency proceedings absent an express finding of federal paramountcy. The onus is on the party relying on the doctrine of paramountcy to demonstrate that the federal and provincial laws are 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: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3 (S.C.C.), at para. 75 and *Nortel Networks Corp., Re* (2009), 99 O.R. (3d) 708 (Ont. C.A.), at para. 38, leave to appeal to S.C.C. refused, (S.C.C.).

178 In this case, there is nothing in the record to suggest that the issue of paramountcy was invoked on April 8, 2009, when Morawetz J. amended the Initial Order to include the super-priority charge. The documents before the court at that time did not alert the court to the issue or suggest that the *PBA* deemed trust would have to be overridden in order for Indalex to proceed with its DIP financing efforts while under *CCAA* protection. To the contrary, the affidavit of Timothy Stubbs, the then CEO of Indalex, sworn April 3, 2009, was the primary source of information before the court. In para. 74 of his affidavit, Mr. Stubbs deposes that Indalex intended to comply with all applicable laws including "regulatory deemed trust requirements".

179 While the super-priority charge provides that it ranks in priority over trusts, "statutory or otherwise", I do not read it as taking priority over the deemed trust in this case because the deemed trust was not identified by the court at the time the charge was granted and the affidavit evidence suggested such a priority was unnecessary. As no finding of paramountcy was made, valid provincial laws continue to operate: the super-priority charge does not override the *PBA* deemed trust. The two operate sequentially, with the deemed trust being satisfied first from the Reserve Fund.

180 Does this conclusion thwart the purpose of the *CCAA* regime, which is to facilitate the restructuring of failing businesses to avoid bankruptcy and liquidation? It does not appear that would have happened in the present case. The granting of a stay in a *CCAA* proceeding provides a company with breathing space so that it can restructure. In this case, the stay of proceedings gave Indalex the breathing space it needed to effect a sale of its business. Recall that this was a "liquidating *CCAA*" from the outset. There was no restructuring of the company. There was no plan of compromise or arrangement prepared and presented to creditors. Within days of obtaining *CCAA* protection, Indalex began a marketing process to sell itself. Very shortly thereafter, it sold its business as a going-concern. There is nothing in the record to suggest that giving the deemed trust priority would have frustrated Indalex's efforts to sell itself as a going-concern business.

181 What of the contention that recognition of the deemed trust will cause DIP lenders to be unwilling to advance funds in *CCAA* proceedings? It is important to recognize that the conclusion I have reached does not mean that a finding of paramountcy will never be made. That determination must be made on a case by case basis. There may well be situations in which paramountcy is invoked and the record satisfies the *CCAA* judge that application of the provincial legislation would frustrate the company's ability to restructure and avoid bankruptcy. But, this depends on the applicant clearly raising the issue of paramountcy, which will alert affected parties to the risks to their interests and put them in a position where they can take steps to protect their rights. That, however, is not this case.

182 Nor am I persuaded by the argument that if the deemed trust is given effect in the unique circumstances of this case, companies will file for bankruptcy instead of moving for *CCAA* protection. This argument suggests that companies will act based on the desire to avoid their pension obligations. That motivation does not conform with the obligations that directors owe to the corporation. The obligation to act in the best interests of the corporation suggests that companies will choose the route that maximizes recovery for creditors. As the respondents point out, Indalex sought a going-concern sale for exactly that reason.

In addition, by selling its business as a going concern, Indalex preserved value for suppliers and customers who can continue to do business with the purchaser and preserved approximately 950 jobs for its former employees. Surely the desire to maximize recovery for their creditors — along with those other considerations — would have prevailed had Indalex known it would have to satisfy the deemed trust when considering whether to pursue bankruptcy or *CCAA* proceedings. In this regard, it is worth recalling that consideration for the sale exceeded \$151 million, all DIP lenders were repaid in full, the Reserve Fund consists of undistributed proceeds, and the total deficiencies in the Plans appear to be approximately \$6.75 million.

183 As for the suggestion that Indalex will pursue its bankruptcy motion in order to defeat the deemed trust, I would simply echo the comments of the *CCAA* judge that a voluntary assignment into bankruptcy should not be used to defeat a secured claim under valid provincial legislation. I would add this additional consideration: it is inappropriate for a *CCAA* applicant with a fiduciary duty to pension plan beneficiaries to seek to avoid those obligations to the benefit of a related party by invoking bankruptcy proceedings when no other creditor seeks to do so.

184 There is also the matter of Indalex U.S.'s apparent reliance on the super-priority charge when it gave the Guarantee. As explained more fully above, Indalex U.S. was fully aware of Indalex's obligations to the Plans when it entered into the Guarantee. Again as explained more fully above, there were a number of different steps that Indalex could have taken to deal with these obligations. It chose not to. This is not a case in which the secured creditor is an arm's length third party taken by surprise by the claims of the Plans' beneficiaries.

185 A final consideration that must be addressed at this stage arises from the recent decision of the Supreme Court of Canada in *Century Services*, which was released after the oral hearing of the appeals. The parties were invited to make written submissions on the impact of *Century Services*, if any, on these appeals. I am grateful for the excellence of those submissions, which mirrors the quality of the original submissions.

186 *Century Services* deals with conflicting provisions in two pieces of federal legislation: s. 222(3) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, which gives the federal Crown a deemed trust for unpaid GST, and s. 18.3(1) (now s. 37) of the *CCAA*, which expressly excludes deemed trusts in favour of the Crown from applying in *CCAA* proceedings. Deschamps J., for the majority, conducted a comprehensive analysis of the two conflicting sections and held that s. 18.3(1) of the *CCAA* prevails. In sum, *Century Services* stands for the proposition that s. 18.3(1) of the *CCAA* excludes the deemed trust for unpaid GST created by s. 222 of the *Excise Tax Act* from applying in a *CCAA* proceeding.

187 It will be readily apparent that *Century Services* is distinguishable from the present case in a number of ways. Three significant differences between it and the present appeals are worthy of note.

188 First, in *Century Services*, reorganization efforts had failed and the company sought leave to make an assignment into bankruptcy. Liquidation on a piecemeal basis through bankruptcy was inevitable. The *CCAA* proceedings in the present case, on the other hand, were successful — they resulted in the sale of Indalex's assets and the continuation of the business, albeit through another entity. It is not a situation in which transition to the bankruptcy regime was inevitable because efforts under the *CCAA* had failed.

189 Second, *Century Services* deals with competing provisions in two federal statutes. The conflict between the two provisions was patent: one or the other had to prevail. They could not be read together. Section 18.3(1) was found to prevail, in part because of its wording, which expressly excludes a deemed trust in favour of the Crown. The present appeals involve a consideration of the doctrine of federal paramountcy and whether a deemed trust under provincial legislation applies to a charge granted in a *CCAA* proceeding. Significantly, unlike the situation in *Century Services*, there is nothing in the *CCAA* that expressly excludes the provincial deemed trust for unpaid pension contributions from applying in *CCAA* proceedings. In these appeals, exclusion of the provincial deemed trust is dependent on the *CCAA* judge engaging in a factual examination and a determination that preservation of pension rights through the deemed trust would frustrate the purpose of the *CCAA* proceeding. Moreover, it is difficult to see how a finding of paramountcy would have been made on the record at the time the super-priority charge was made, given the evidence that Indalex intended to comply with all regulatory deemed trust requirements.¹⁷

190 Third, no issue of fiduciary duty arose in *Century Services*. In the present case, as discussed previously and again below, the impact of fiduciary duties during the *CCAA* proceeding plays a significant role.

191 The respondents contend that *Century Services* is crucial in the disposition of these appeals because it stands for the proposition that federal priorities under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) apply in *CCAA* proceedings. If *Century Services* stood for that proposition, I would agree. In a series of cases, the Supreme Court of Canada has repeatedly said that a province cannot, by legislating a deemed trust, alter the scheme of priorities under the *BIA*: see, for example, *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (S.C.C.).

192 However, in my view, *Century Services* does not stand for that unqualified proposition. In *Century Services*, Deschamps J. explains that the *CCAA* and *BIA* are to be read in an integrated fashion but she is at pains to say that the *BIA* scheme of liquidation and distribution is the backdrop for what happens *if a CCAA reorganization is unsuccessful*.¹⁸ Here, as I have noted, the *CCAA* proceedings were successful.

193 Moreover, Deschamps J. repeatedly distinguishes the two regimes on the basis that the *BIA* is "characterized by a rules-based approach"¹⁹ whereas the *CCAA* "offers a more flexible mechanism with greater judicial discretion".²⁰ Permitting the *PBA* deemed trust to survive, absent an express finding of paramountcy, is consistent with both those key features of the *CCAA* proceedings — greater flexibility and greater judicial discretion on the part of the *CCAA* court. This flexibility and discretion on the part of the *CCAA* court enables it to meaningfully assess the baseline considerations of appropriateness, good faith and due diligence, referred to by Deschamps J. at para. 70 of *Century Services*.

194 The respondents point to paras. 47, 48 and 76 of *Century Services*, in which Deschamps J. notes the "strange asymmetry" that would occur if the *ETA* Crown priority were interpreted differently in *CCAA* proceedings than in *BIA* proceedings. She says this would encourage forum shopping in cases where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims. No "strange asymmetry" would occur in cases such as the present appeals. If the *CCAA* judge found that recognition of the *PBA* deemed trust would frustrate the purpose of the *CCAA* proceeding and paramountcy had been invoked, the *CCAA* judge would be free to make a super-priority charge that overrode the deemed trust. This approach leaves the *CCAA* court with greater flexibility and the ability to be "cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees".²¹

195 In para. 70 of her reasons, Deschamps J. exhorts the *CCAA* courts to be "mindful that chances for successful reorganizations are enhanced where participants achieve common ground and *all stakeholders are treated as advantageously and fairly as the circumstances permit*" [emphasis added]. The Plans' beneficiaries are stakeholders. And, once the deemed trust claims are recognized, they are not to be treated as mere unsecured creditors. If, as the respondents contend based on *Century Services*, the deemed trusts are automatically overridden, there will be no incentive for companies that are similarly situated to Indalex to attempt to deal with their underfunded pension plans. There will be no incentive to treat pension plan beneficiaries "as advantageously and fairly as the circumstances permit". The incentive will be to do as Indalex did — go to court without notice to the affected pension plan beneficiaries and negotiate as if the pension obligations did not exist.

196 Justice Deschamps also says that no "gap" should exist between the *BIA* and the *CCAA* and approves of Laskin J.A.'s reasoning to that effect at paras. 62-63 of *Ivaco*.²² She explains that the gap is a situation "which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy". When the facts of the present case are considered carefully, it can be seen that a gap of this sort will not occur should the appeals be allowed. As I see it, the deemed trusts continued to exist during the *CCAA* proceedings although no steps could be taken to enforce them during the proceedings because of the stay. By the time of the Sale Approval Order, the *CCAA* court had become aware of the deemed trust claims. It dealt with the deemed trust claims as part of the *CCAA* proceedings, by deciding whether the undistributed sales proceeds held by the Monitor should go to Indalex U.S. or to the Plans' beneficiaries. Thus, rather than being a situation in which property interests that would be lost in bankruptcy were enforced at the conclusion of the *CCAA* proceedings, the property interests were dealt with as part of the *CCAA* proceedings.

197 However, even if I am wrong in concluding that the deemed trust has priority over the secured creditor in this case, I would make the order on the basis that it is the appropriate remedy for the breaches of fiduciary obligation.

198 It is important to keep in mind that the contest over the Reserve Fund is not a fight between the DIP lenders and the pensioners. The DIP lenders have been paid in full. The dispute is between the pensioners and Sun Indalex, the principal secured creditor of Indalex U.S. It is in that context that the court must consider the competing equities.

199 The *CCAA* was not designed to allow a company to avoid its pension obligations. To give effect to Indalex U.S.'s claim would be to sanction Indalex's breaches of fiduciary obligation. In the circumstances of this case, such a result would work an injustice. The equities are not equal. The Plans' beneficiaries were vulnerable to the exercise of power by Indalex. They were not part of the negotiations for the DIP financing nor were they involved in the sale negotiations. They had no opportunity to protect their interests and, as a result of Indalex's actions, there was no one who fulfilled the administrator's role. Indalex, on the other hand, was fully aware of the Plans' underfunding and the result to the pensioners of a failure to inject additional funds. It was Indalex who advised the *CCAA* court that it intended to comply with "regulatory deemed trust requirements". To permit Sun Indalex to recover on behalf of Indalex U.S. would be to effectively permit the party who breached its fiduciary obligations to take the benefit of those breaches, to the detriment of those to whom the fiduciary obligations were owed.

200 I do not accept the respondents' argument that a finding that Indalex breached its fiduciary obligation is irrelevant because it would merely give rise to an unsecured claim and there is no basis for conferring a priority for such a claim. This view fundamentally misunderstands the rights of the pension plan beneficiaries. Even if there is no deemed trust, the Plans' beneficiaries are not mere unsecured creditors. They are unsecured creditors to whom Indalex owed a fiduciary duty by virtue of its role as the Plans' administrator. There is a significant difference, in my view, between being a mere unsecured creditor and being an unsecured creditor to whom a fiduciary duty is owed.

201 Further, the Supreme Court has repeatedly stated that equitable remedies are sufficiently flexible that they can be molded to meet the requirements of fairness and justice: see, for example, *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at para. 86 and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), at para. 34.

202 In *Soulos*, at para. 36, McLachlin J. (as she then was) writing for the majority, held that constructive trusts may be imposed where "good conscience requires" it. She went on to identify two different types of cases in which constructive trusts may be ordered: 1) those in which property is obtained by a wrongful act of the defendant, notably breach of fiduciary duty or breach of the duty of loyalty; and, 2) those in which there may not have been a wrongful act, but where there has been unjust enrichment. While the second type of case — one in which there is unjust enrichment — is not relevant to these appeals, the first is.

203 At para. 45 of *Soulos*, McLachlin J. sets out four conditions that should "generally be satisfied" if a constructive trust based on wrongful conduct is to be ordered:

- (1) the defendant must have been under an equitable obligation in relation to the activities giving rise to the assets in his or her hands;
- (2) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his or her equitable obligation to the plaintiff;
- (3) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (4) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

204 As I have already explained, in the circumstances of this case, Indalex's fiduciary obligations as administrator were engaged in relation to the *CCAA* proceedings and it is those proceedings that gave rise to the asset (*i.e.* the Reserve Fund) (condition 1). The assets that would flow to Indalex U.S., absent the constructive trust, are directly connected to the process

in which Indalex committed its breaches of fiduciary obligation (condition 2). Without the proprietary remedy, the Plans' beneficiaries have no meaningful remedy. Moreover, there must be some incentive to require employers who are also the administrators of their pension plans to remain faithful to their duties (condition 3). And, because Indalex U.S. is not an arm's length innocent third party, imposing a constructive trust in favour of the Plans' beneficiaries is not unjust (condition 4).

The Executive Plan

205 As I explained above, it is not clear to me that a deemed trust arose in respect of the underfunded amounts in the Executive Plan because it had not been wound up at the time of sale. However, based on the breaches of fiduciary duty, the court is entitled to consider the equities of the parties competing for the Reserve Fund. For the reasons given in respect of the Salaried Plan in respect of those equities, I would make the same order in respect of the Executive Plan, namely, that the Monitor pay the deficiency from the Reserve Fund to the Executive Plan in priority to those entitled under the super-priority charge.

206 In light of this conclusion, I find it unnecessary to deal with the Former Executives' submission that the doctrine of equitable subordination applies to remedy Indalex's breaches of fiduciary duty. In any event, I would decline to decide that issue as it was not argued below. It offends the general rule that appellate courts are not to entertain new issues on appeal.

Disposition

207 Accordingly, I would allow the appeals and declare that the claims of the USW and the Former Executives take priority over the claim asserted by Indalex U.S./Sun Indalex. I would order the Monitor to pay from the Reserve Fund into each of the Salaried Plan and the Executive Plan an amount sufficient to satisfy the deficiencies in each plan. I understand that the Reserve Fund is sufficient to satisfy the Deficiencies but if this proves problematic, the parties may return to the court for direction on that matter.

208 If the parties are unable to agree on costs, they may make brief written submissions on that matter. The appellants, Morneau and the Superintendent shall file their submissions within fifteen days of the date of release of these reasons. The respondents shall have a further seven days within which to file their submissions.

J.C. MacPherson J.A.:

I agree.

R.G. Juriansz J.A.:

I agree.

Schedule "A"

Pension Benefits Act, R.S.O. 1990, c. P.8, ss. 1(1), 8, 14(1), 22, 57(1) - (5), 70(1), 74(1), 75(1), (2), 76

Definitions

1. (1) In this Act, ...

"administrator" means the person or persons that administer the pension plan; ...

"wind up" means the termination of a pension plan and the distribution of the assets of the pension fund;

Administrator

Requirement

8. (0.1) A pension plan must be administered by a person or entity described in subsection (1).

Prohibition

(0.2) No person or entity other than a person or entity described in subsection (1) shall administer a pension plan.

Administrator

(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

- (a) the employer or, if there is more than one employer, one or more of the employers;
- (b) a pension committee composed of one or more representatives of,
 - (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
 - (ii) members of the pension plan;
- (c) a pension committee composed of representatives of members of the pension plan;
- (d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;
- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;
- (f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;
- (g) a person appointed as administrator by the Superintendent under section 71; or
- (h) such other person or entity as may be prescribed.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Interpretation

(3) For the purposes of clause (1) (b), "employer" includes the following persons and entities:

1. Affiliates within the meaning of the *Business Corporations Act* of the employer.
2. Such other persons or entities, or classes of persons or entities, as may be prescribed.

Reduction of benefits

14. (1) An amendment to a pension plan is void if the amendment purports to reduce,

- (a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
- (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or

(c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Care, diligence and skill

22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the agent is employed, and the administrator shall carry out such supervision of the agent as is prudent and reasonable.

Employee or agent

(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1), (2) and (4).

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

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 the pension fund.

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.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

Wind up report

70. (1) The administrator of a pension plan that is to be wound up in whole or in part shall file a wind up report that sets out,

- (a) the assets and liabilities of the pension plan;
- (b) the benefits to be provided under the pension plan to members, former members and other persons;
- (c) the methods of allocating and distributing the assets of the pension plan and determining the priorities for payment of benefits; and
- (d) such other information as is prescribed.

Combination of age and years of employment

74. (1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario.

Payment

(2) The employer shall pay the money due under subsection (1) in the prescribed manner and at the prescribed times.

Pension fund continues subject to Act and regulations

76. The pension fund of a pension plan that is wound up continues to be subject to this Act and the regulations until all the assets of the pension fund have been disbursed.

Schedule "B"

Pension Benefits Act, Regulation 909, R.R.O. 1990, s. 31(1), (2) and (3)

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30(2) (b) and (c).

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded.

Appeals allowed.

Footnotes

1 The Monitor retained the Reserve Fund as part of the Undistributed Proceeds. The Undistributed Proceeds also include amounts for the payment of cure costs, other costs associated with the completion of the SAPA transaction, legal and professional fees, and amounts owing under the DIP charge.

- 2 The appellants had raised this issue below but it had not been dealt with by the *CCAA* judge.
- 3 Or, in the case of a multi-employer plan, the administrator.
- 4 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.), at para. 26.
- 5 *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.), at para. 13, relying on *GenCorp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503.
- 6 *Ibid.*
- 7 *Boucher c. Stelco Inc.*, [2005] 3 S.C.R. 279 (S.C.C.), at para. 24.
- 8 At para. 26.
- 9 At para. 11.
- 10 *Burke v. Hudson's Bay Co.*, [2010] 2 S.C.R. 273 (S.C.C.), at paras. 39-41.
- 11 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at para. 32.
- 12 *Ibid.*, at para. 30; *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), at p. 646.
- 13 In contrast, Quebec legislation requires that plan administration be entrusted to a pension committee of at least three persons, including a representative of each of the active and inactive members of the plan and an independent member. See *Supplemental Pension Plans Act*, R.S.Q. c. R-15.1, s. 147.
- 14 On advice of counsel, Mr. Cooper refused to answer questions about what, if any, steps were taken to have the purchaser take over the Plans.
- 15 To the extent that the U.S. Trustee suggests that the Former Executives raised the deemed trust issue at the motion heard on June 12, 2010, I reject this submission. As explained in the background portion of these reasons, the Former Executives' reservation of rights on June 12, 2010, was to obtain time to confirm that the motion related solely to an increase in the DIP loan amount.
- 16 See, for example, *Intertan Canada Ltd., Re* (2009), 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). And, the granting of super-priority charges is referred to with approval in *Century Services*, at para. 62.
- 17 See para. 178 of these reasons.
- 18 See, for example, para. 23.
- 19 At para. 13, for example.
- 20 See, for example, para. 14.
- 21 *Century Services*, at para. 60.
- 22 At para. 78.

TAB 14

(File No. 71453.1)

THE KING'S BENCH
WINNIPEG CENTRE

THE HONOURABLE) ~~WEDNESDAY~~FRIDAY THE
~~6TH~~15TH)
MADAM JUSTICE GRAMMOND) DAY OF MAY, 2026

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 WAREHOUSE ONE CLOTHING LTD.

(the ~~"Applicant"~~)

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

AMENDED AND RESTATED INITIAL ORDER

THIS ~~APPLICATION~~MOTION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), was heard this day at the Law Courts Building at 408 York Avenue, in the City of Winnipeg, in the Province of Manitoba.

ON READING the Affidavit of Shamsh Kassam sworn May 1, 2026 and the Exhibits thereto (the ~~"First Kassam Affidavit" and~~), the Pre-filing Report dated May 4, 2026 of Alvarez & Marsal Canada Inc. ~~dated May 4, 2026 ("A&M")~~, in its capacity as proposed Monitor, the First Report dated May 12, 2026 of A&M, in its capacity as monitor of the Applicant (the "Monitor"), and the Consent of A&M to act

[as Monitor](#) and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicant, counsel for ~~A&M~~[the Monitor](#), counsel for Highgate Capital Ltd. (~~“(“Senior Lender” and “DIP Lender”);”~~), and WHO Industries Inc., R.I.S. Media Ltd. and Highgate Capital Ltd. (each an ~~“(“Affiliate Lender”);”~~), no one appearing for any other interested parties although duly served as appears from the Affidavit of Service of Elenore Kesterke sworn May 4, ~~____~~, 2026, and the Affidavit of Service of ~~Erie~~[Erik](#) Axell sworn May 4, ~~____~~, 2026, ~~and on reading the consent of A&M to act as monitor (in such capacity, the “Monitor”);~~

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of ~~Application~~[Motion](#) and the supporting materials is hereby abridged and validated so that this ~~Application~~[Motion](#) is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

~~3.4.~~ THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to the terms of this Order and any further Order of this Court,

the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "**Business**") and Property. The Applicant is authorized and empowered to continue to retain and employ the employees, contractors, advisors, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

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

5.6. THIS COURT ORDERS that the Applicant shall be entitled, subject to the DIP Budget (as defined in the DIP Agreement as set out in paragraph ~~33~~40 hereof), but not required, to pay the following expenses whether incurred prior to, on or after May 6, 2026 (the ~~date of this Order:~~ "Filing Date):

- (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and employment-related obligations, in each case incurred in

the ordinary course of business and consistent with existing compensation policies and arrangements;

- (b) amounts owing for goods or services supplied to the Applicant prior to the ~~date of this Order~~ Filing Date if, in the opinion of the Applicant with approval of the Monitor, such payment is necessary to maintain the uninterrupted operations of the Business;
- (c) until May 13, 2026, all outstanding or future amounts related to honouring gift cards issued before, on or after the ~~date of this Order~~ Filing Date; and
- (d) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges.

~~6-7.~~ 7. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant in carrying on the Business in the ordinary course after ~~this Order~~ the Filing Date, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

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

(b) payment for goods or services actually supplied to the Applicant following the ~~date~~ Filing Date; and

~~(b)~~ (c) employee retention and incentive payments made by the Applicant, with the consent of this Order the Monitor and the DIP Lender, not to exceed \$350,000 in the aggregate.

~~7-8.~~ 8. THIS COURT ORDERS that the Applicant shall remit, in accordance with legal requirements, or pay:

- (a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;
- (b) all goods and services taxes, harmonized sales taxes or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the ~~date of this Order~~Filing Date, or where such Sales Taxes were accrued or collected prior to the ~~date of this Order~~Filing Date but not remitted until on or after the ~~date of this Order~~Filing Date, and
- (c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicant.

~~8-9.~~ THIS COURT ORDERS that until a real property lease (each, a "Lease") is disclaimed in accordance with the CCAA, the Applicant shall pay all amounts constituting rent or payable as rent under ~~real property leases~~such Lease (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord (each, a "Landlord") under the ~~lease~~Lease) or as otherwise may be negotiated between the Applicant and the ~~landlord~~Landlord from time to time ("**Rent**"), twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears), except for any component of Rent which is percentage rent, which percentage rent shall be calculated based on applicable revenues received by the Applicant from and after

the ~~date of this Order~~Filing Date and shall be paid in accordance with the terms of the applicable ~~real property lease.~~Lease. Rent for the period commencing from the ~~date of this Order~~Filing Date and ending on May 14, 2026 shall be paid by the Applicant promptly following ~~issuance of this Order~~the Filing Date.

~~9.10.~~ THIS COURT ORDERS that, except as specifically permitted herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of ~~this date~~the Filing Date; (b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING **WIND-DOWN AND REALIZATION PROCESS**

~~10.11.~~ THIS COURT ORDERS that the Applicant shall, subject to such requirements as are imposed by the CCAA and such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

- (a) permanently or temporarily cease, downsize or shut down any of its business or operations, and to dispose of redundant or non-material assets not exceeding \$75,000 in any one transaction or \$300,000 in the aggregate;
- (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate; ~~and~~
- (c) disclaim any of their arrangements or agreements of any nature (including any Lease), whether oral or written, as the Applicant deems appropriate in accordance with section 32 of the CCAA;
- ~~(e)~~(d) with the assistance of the Monitor, pursue all avenues of refinancing of its or opportunities for any sale, assignment, restructuring or other transaction

in respect of the Business or Property, (including, without limitation, any leasehold interests, intellectual property or corporate attributes of the Applicant), in whole or in part, including pursuant to any marketing process conducted by the Monitor or bidding procedures letter circulated to potentially interested parties identified by the Applicant and the Monitor, provided that completion of any such sale, assignment, restructuring or other transaction shall be subject to prior approval of this Court being obtained ~~before any material refinancing,~~ (except as otherwise permitted in accordance with the terms of this Order); and

- (e) Notwithstanding subsections (a), (c) and (d) above, with respect to any real property leased premises, the Applicant may, subject to the requirements of the CCAA, vacate, abandon or quit the whole, but not part, of any leased premises and may permanently, but not temporarily, cease, downsize or shut down its operations in such leased premises;

all of the foregoing to permit the Applicant to proceed with an orderly ~~restructuring of~~ wind-down and realization process for the Business ~~(the "Restructuring")~~.

12. THIS COURT ORDERS that the Consulting Agreement dated May 6, 2026 (the "Consulting Agreement") between the Applicant and Gordon Brothers Canada (ULC) the "Consultant" and the consulting services contemplated thereunder are hereby approved and authorized, and that the execution of the Consulting Agreement by the Applicant is hereby approved, authorized and ratified, nunc pro tunc, with such minor amendments to the Consulting Agreement as the Consultant and the Applicant, with the consent of the Monitor, may agree in writing. Notwithstanding the foregoing, the body of the Sale Guidelines (as defined below) may only be amended by further Order of this Court. Subject to the provisions of this Order, the Applicant is authorized to take any action as may be necessary or desirable to implement the Consulting Agreement and the transactions contemplated therein.

13. THIS COURT ORDERS that the Applicant is authorized and directed to pay to the consultant all fees, expenses, disbursements and other payments to which the Consultant may become entitled pursuant to the Consulting Agreement (including, subject to the terms of the Consulting Agreement, the Special Purpose Payment as defined in the Consulting Agreement), and that all such payments shall be paid to, and received by, the Consultant free and clear of all claims and Encumbrances (as defined below), whether or not such claims and Encumbrances have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims and Encumbrances arose or came into existence prior to, on or following the Filing Date (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise), including, without limitation, the Charges (as defined below) (all of the foregoing being collectively, the "**Claims**").

14. THIS COURT ORDERS that the sale guidelines attached hereto as Schedule "A" (the "**Sale Guidelines**") are hereby approved and ratified and that the Applicant, with the assistance of the Consultant, is authorized to conduct the Sale in accordance with this Order, the Sale Guidelines and the Consulting Agreement and to advertise and promote the Sale within the Stores (as defined in the Sale Guidelines) in accordance with the Sale Guidelines. If there is a conflict between this Order, the Sale Guidelines and the Consulting Agreement, the order of priority of documents to resolve each conflict is as follows: (1) this Order, (2) the Sale Guidelines, and (3) the Consulting Agreement.

15. THIS COURT ORDERS that the Applicant, with the assistance of the Consultant, is authorized to sell the merchandise and FF&E (as defined in the Sale Guidelines) in accordance with the Sale Guidelines on a "final sale" and/or "as is basis", free and clear of all Claims.

16. THIS COURT ORDERS that until the applicable Vacate Date (as defined in the Sale Guidelines) for each Store (which Vacate Date shall, subject to an

agreement with the applicable landlord to an alternate date, be no later than August 21, 2026), the Consultant shall have access to such Store in accordance with the applicable Lease, in each case in accordance with the Sale Guidelines and on the basis that the Consultant is assisting the Applicant and the Applicant has granted its right of access to the Store to the Consultant. To the extent that the terms of a Lease are in conflict with any term of this Order or the Sale Guidelines, the terms of this Order and the Sale Guidelines shall govern.

17. THIS COURT ORDERS that nothing in the Consulting Agreement or the Sale Guidelines shall amend or vary, or be deemed to amend or vary, the terms of any Lease. Nothing contained in this Order or in the Sale Guidelines shall be construed to create or impose upon the Applicant any additional restrictions not contained in any Lease.

~~14.~~18. THIS COURT ORDERS that the Applicant shall provide each of the relevant ~~landlords~~Landlords with notice of the ~~Applicant's~~Applicant's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant ~~landlord~~Landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the ~~landlord~~Landlord disputes the ~~Applicant's~~Applicant's entitlement to remove any such fixture under the provisions of the ~~lease~~Lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such ~~landlord~~Landlord and the Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) ~~days'~~days' notice to such ~~landlord~~Landlord and any such secured creditors. If the Applicant disclaims the ~~lease~~Lease governing such leased premises in accordance with Section 32 of the CCAA, it shall not be required to pay Rent under such ~~lease~~Lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in Section 32(5) of the CCAA), and the disclaimer of the ~~lease~~Lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

~~12.~~19. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the ~~landlord~~Landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, the relevant ~~landlord~~Landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such ~~landlord~~Landlord may have against the Applicant in respect of such ~~lease~~Lease or leased premises, provided that nothing herein shall relieve such ~~landlord~~Landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

~~13.~~20. THIS COURT ORDERS that until and including ~~May 15~~August 28, 2026 or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

~~14.~~21. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (a) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (b) affect such investigations, actions, suits or

proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (c) prevent the filing of any registration to preserve or perfect a security interest, or (d) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

~~15-22.~~ 22. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, lease, sublease, licence or permit in favour of or held by the Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

~~16-23.~~ 23. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements or arrangements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, cash management services, payment processing services, payroll services, insurance, transportation, freight and logistics services, customs clearing services, utility or other services to the Business or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, suspending, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received from and after the ~~date of this Order~~ Filing Date are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NO PRE-FILING VS POST-FILING SET-OFF

~~17.24.~~ THIS COURT ORDERS that no Person may set off (or net) any claim that such Person has against the Applicant relating to the period prior to the ~~date of this Order~~Filing Date against any amount it owes to the Applicant relating to the period from and after the ~~date of this Order~~Filing Date, without the prior consent of the Applicant and the Monitor or leave of the Court.

NON-DEROGATION OF RIGHTS

~~18.25.~~ THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the ~~date of this Order~~Filing Date, nor shall any Person be under any obligation on or after the ~~date of this Order~~Filing Date to advance or re-advance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

~~19.26.~~ THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations.

~~DIRECTORS'~~DIRECTORS' AND ~~OFFICERS'~~OFFICERS' INDEMNIFICATION AND CHARGE

~~20-27.~~ THIS COURT ORDERS that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or willful misconduct.

~~24-28.~~ THIS COURT ORDERS that the directors and officers of the Applicant shall be entitled to the benefit of and are hereby granted a charge (the "~~Directors'~~Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of \$1,675,000, as security for the indemnity provided in paragraph ~~24~~27 of this Order. The ~~Directors'~~Directors' Charge shall have the priority set out in paragraphs ~~37~~45 and ~~39~~47 herein.

~~22-29.~~ THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicant's directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph ~~20~~27 of this Order.

APPOINTMENT OF MONITOR

~~23-30.~~ THIS COURT ORDERS that A&M is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and

discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

24.31. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements;
- (b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein;
- (c) assist the Applicant, to the extent required by the Applicant, in its dissemination to the DIP Lender and its counsel of financial and other information as agreed to between the Applicant and the DIP Lender;
- (d) advise the Applicant in its preparation of the ~~Applicant's~~Applicant's cash flow results and the related reporting required by the DIP Lender, which information shall be reviewed with the Monitor and delivered to the DIP Lender and its counsel on a periodic basis, but not less than weekly or as otherwise agreed to by the DIP Lender;
- (e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form, and other financial documents of the Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;
- (f) liaise, advise and consult with the Applicant and Consultant with respect to the Sale and any matters relating to the Property and the Business;
- ~~(f)~~(g) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

~~(g)~~(h) hold funds in trust or in escrow, to the extent required by the Applicant and agreed to by the Monitor; and

~~(h)~~(i) perform such other duties as are ~~required~~ authorized by this Order or by this Court from time to time.

~~25.~~32. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

~~26.~~33. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, *The Environment Act* (Manitoba), *The Water Resources Conservation Act* (Manitoba), *The Contaminated Sites Remediation Act* (Manitoba), *The Dangerous Goods Handling and Transportation Act* (Manitoba), *The Public Health Act* (Manitoba) or *The Workplace Safety and Health Act* (Manitoba), and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in Possession.

~~27.34.~~ THIS COURT ORDERS ~~that~~ that the Monitor shall provide any creditor of the Applicant and the DIP Lender with information provided by the Applicant in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicant is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicant may agree.

~~28.35.~~ THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, neither the Monitor nor any of its employees or representatives shall incur any liability or obligation as a result of the ~~Monitor's~~ Monitor's appointment or carrying out of the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

~~29.36.~~ THIS COURT ORDERS that the Monitor, counsel to the Monitor and counsel to the Applicant shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicant as part of the costs of these proceedings. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, counsel to the Monitor and counsel to the Applicant on a twice-monthly basis or at such other time as the Applicant and such Person may agree and, in addition, the Applicant is hereby authorized, *nunc pro tunc*, to have paid to the Monitor, counsel to the Monitor, and counsel to the Applicant, retainers, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

~~30.37.~~ THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of this Court, but nothing herein shall

fetter this ~~Court's~~Court's discretion to refer such matters to an Associate Judge of this Honourable Court.

ADMINISTRATION CHARGE

~~31.~~38. THIS COURT ORDERS that the Monitor, counsel to the Monitor, and the ~~Applicant's~~Applicant's counsel shall be entitled to the benefit of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of ~~\$500~~750,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs ~~38~~45 and ~~40~~47 hereof.

DIP FINANCING

~~32.~~39. THIS COURT ORDERS that the Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from Highgate Capital Ltd. (the "**DIP Lender**") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed the ~~principal amount of \$3,000,000, with approval to advance up to a principal amount of \$1,000,000 only during the initial stay of proceedings from the date of this Order to and including May 15, 2026 (the "Initial Stay Period")~~aggregate principal amount of \$3,000,000 unless permitted by further Order of this Court.

~~33.~~40. THIS COURT ORDERS THAT such credit facility shall be on the terms and subject to the conditions set forth in the DIP Term Sheet between the Applicant and the DIP Lender dated as of May 1, 2026 (the "**DIP Agreement**"), filed.

~~34.~~41. THIS COURT ORDERS that the Applicant is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively with the DIP Agreement, the "**Definitive Documents**"), as are

contemplated by the DIP Agreement or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

~~35.42.~~ THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "**DIP Lender's Lender's Charge**") on the Property, which DIP Lender's Charge shall not secure an obligation that exists before this Order is made. The DIP ~~Lender's~~ Lender's Charge shall have the priority set out in paragraphs ~~3845~~ and ~~4047~~ hereof.

~~36.43.~~ THIS COURT ORDERS that, notwithstanding any other provision of this Order:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP ~~Lender's~~ Lender's Charge or any of the Definitive Documents;
- (b) upon the occurrence of an event of default under the Definitive Documents or the DIP ~~Lender's~~ Lender's Charge, the DIP Lender may (i) cease making advances to the Applicant, set off and/or consolidate any amounts owing by the DIP Lender to the Applicant against the obligations of the Applicant to the DIP Lender under the Definitive Documents or the DIP ~~Lender's~~ Lender's Charge, and make demand, accelerate payment and give other notices, and (ii) upon seven (7) ~~days'~~ days' notice to the Applicant and the Monitor, exercise any and all of its other rights and remedies against the Applicant or the Property under or pursuant to the Definitive Documents and the DIP ~~Lender's~~ Lender's Charge, including without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and

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

~~37.44.~~ THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any Plan filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* (Canada) (the "BIA"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

~~38.45.~~ THIS COURT ORDERS that the priorities of the Administration Charge, the DIP ~~Lender's~~Lender's Charge and the ~~Directors'~~Directors' Charge (collectively, the "~~Charges~~";"), as among them, shall be as follows:

First – Administration Charge (to the maximum amount of ~~\$500~~750,000);

Second – DIP ~~Lender's~~Lender's Charge (to the maximum principal amount of ~~\$13,000,000~~); plus all accrued interest and other amounts payable to the DIP Lender under the DIP Agreement; and

Third – ~~Directors'~~Directors' Charge (to the maximum amount of \$1,675,000).

~~39.46.~~ THIS COURT ORDERS that the filing, registration or perfection of the Charges shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

~~40.47.~~ THIS COURT ORDERS that each of the Charges shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests,

trusts, hypothecs, liens, mortgages, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, notwithstanding the order of perfection or attachment, provided, however, that the Charges shall not rank in priority to any Encumbrance ~~(a) in favour of any Person that was not served with notice of the application for this Order and who is likely to be affected by the Charges, or (b) arising pursuant to section 11.8(8) of the CCAA. The Applicant and the beneficiaries of the Charges shall be entitled to seek priority of the Charges ahead of such Encumbrances on a subsequent motion on notice to those Persons likely to be affected thereby~~arising pursuant to section 11.8(8) of the CCAA.

~~41.~~48. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the Applicant also obtains the prior written consent of the Monitor and the applicable chargees entitled to the benefit of the Charges (collectively, the "**Chargees**"), or further Order of this Court.

~~42.~~49. THIS COURT ORDERS that the Charges and the Definitive Documents shall not be rendered invalid or unenforceable, and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy or receivership order(s) issued pursuant to BIA or other applicable law, or any bankruptcy or receivership order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan document, contract, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicant, and notwithstanding any provision to the contrary in any Agreement:

- (a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the Definitive Documents shall create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Definitive Documents by the Applicant; and
- (c) the payments made by the Applicant pursuant to this Order or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct, or other challengeable or voidable transactions under any applicable law.

~~43.50.~~ THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

~~44.51.~~ THIS COURT ORDERS that the Monitor shall (a) without delay, publish in the Winnipeg Free Press a notice containing the information prescribed under the CCAA, (b) within five days after the ~~date of this Order~~ Filing Date, (i) make this Order publicly available in the manner prescribed under the CCAA, (ii) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicant of more than \$1,000, and (iii) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with Section 23(1)(a) of the CCAA and the regulations made thereunder, provided that the Monitor shall not make publicly

available the names, addresses and claims of individuals who are creditors unless otherwise ordered by the Court.

~~45.52.~~ THIS COURT ORDERS that the Applicant and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, and any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile or electronic transmission to the ~~Applicant's~~Applicant's creditors, employees or other interested parties at their respective addresses (including, with respect to employees, to the ~~employee's~~employee's corporate email address or personal email address) as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

~~46.53.~~ THIS COURT ORDERS that counsel for the Applicant shall prepare and keep current a service list ("**Service List**") containing the name and contact information (which may include the address, telephone number and facsimile number or email address) for service to: the Applicant; the Monitor; and each creditor or other interested Person who has sent a request, in writing, to counsel for the Applicant to be added to the Service List. The Service List shall indicate whether each Person on the Service List has elected to be served by email or facsimile, and failing such election the Service List shall indicate service by email. The Service List shall be posted on the website of the Monitor at the address indicated in paragraph ~~48~~54 herein. **For greater certainty, creditors and other interested Persons who have received notice in accordance with paragraph ~~44~~51 of this Order and/or have been served in accordance with paragraph ~~45~~52 of this Order, and who do not send a request, in writing, to counsel for the Applicant to be added to the Service List, shall not be required to be further served in these proceedings.**

~~47.54.~~ THIS COURT ORDERS that the Applicant, the Monitor, and any party on the Service List may serve any court materials in these proceedings by facsimile or by

e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its case website at: www.alvarezandmarsal.com/WarehouseOne. Service shall be deemed valid and sufficient if sent in this manner.

GENERAL

~~48.~~55. THIS COURT ORDERS that the Applicant or the Monitor may from time to time apply to this Court for advice and directions in the discharge of their powers and duties hereunder.

~~49.~~56. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.

~~50.~~57. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicant, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

~~51.~~58. THIS COURT ORDERS that each of the Applicant and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within

proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

~~52-59.~~ THIS COURT ORDERS that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) ~~days'~~days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

~~53-60.~~ THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Central Standard Time on the date of this Order.

May **COMEBACK HEARING**
15, 2026

~~54. THIS COURT ORDERS that the comeback motion in these CCAA proceedings shall be heard by Madam Justice Grammond of the Manitoba Court of King's Bench on Friday, May 15, 2026 at 10:00 a.m.~~

~~May 6, 2026~~

J.

I, CATHERINE HOWDEN, OF THE FIRM OF PITBLADO LLP HEREBY CERTIFY THAT I HAVE RECEIVED THE CONSENTS AS TO FORM OF THE FOLLOWING PARTIES: BRADLEY WIFFEN of GOODMAN'S LLP, COUNSEL FOR THE MONITOR ALVAREZ & MARSAL CANADA INC., JJ BURNELL OF MLT AIKINS LLP, COUNSEL FOR HIGHGATE CAPITAL LTD., WHO INDUSTRIES LTD. AND R.I.S. MEDIA LTD.

AS DIRECTED BY THE HONOURABLE MADAM JUSTICE GRAMMOND

SCHEDULE "A"
SALE GUIDELINES

See attached.