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APPLICANT	ACCESS MORTGAGE CORPORATION (2004) LIMITED
RESPONDENT	ARRES CAPITAL INC.
DOCUMENT	**BRIEF OF LAW AND ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCARTHY TÉTRAULT LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Walker W. MacLeod / Pantelis Kyriakakis Telephone: 403-260-3710 / 3536 Facsimile: 403-260-3501 Email: wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca

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BRIEF OF LAW AND ARGUMENT OF THE RESPONDENT ALVAREZ & MARSAL CANADA INC.

APPLICATION TO BE HEARD BY THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK

August 13, 2019 at 10:00 a.m.

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MT DOCS 19434130v4

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I. INTRODUCTION

1. This Bench Brief is submitted by the Receiver in response to the application made by the Represented Investors. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Fourth Receiver's Report, the Claims Process Order, and/or the Agreed Statement of Facts, as applicable.

2. The subject application involves the Graybriar Funds, an amount of approximately $1,000,000 that was previously held in Court and in a solicitor's trust account. The Graybriar Funds are the net sale proceeds from seven condominium units in a development commonly known as Graybriar Greens that were sold pursuant to vesting orders. The Receiver advanced a simple and straightforward argument to the Graybriar Funds: the Debtor had a valid and enforceable mortgage against the units (being the Graybriar Mortgage) when the vesting orders were issued and the net sale proceeds should flow to the Debtor as first ranking mortgagee. The Debtor held the subject funds in trust for the benefit of Persons who invested in the Graybriar Mortgage pursuant to the Trust Agreements and the Receiver would make *pro rata* distributions accordingly.

3. While nothing about this matter has been simple or straightforward (as evidenced by, amongst other facts, three previously contested applications that have occurred since the issuance of the Receivership Order), the Receiver's theory of the Debtor's Claim to the Graybriar Funds has been effectively accepted by this Honourable Court through the reasons for judgment of Justice Jones issued on December 20, 2018.[1] In that judgment the Claims made by each of Terrapin and the Related Parties to the Graybriar Funds were dismissed in their entirety. The sole remaining dispute in relation to the Graybriar Funds is the priority, if any, to be afforded to the portion of the Sugimoto Claim that relates to fees and disbursements charged by Sugimoto and Company to the Represented Investors.

4. The Brief of the Law and Argument of the Represented Investors in support of a Claim for priority is remarkable in that, in the respectful submission of the Receiver, it makes no reference to the two most pertinent facts on this application. Those facts are: (a) the Trust Agreement signed by each of the Represented Investors that expressly confirms that fees form part of the "Proportionate Share" and do not have any form of elevated priority; and (b) the formal insolvency proceedings involving the Debtor and the allowance of the Sugimoto Claim (including the portion

[1] *Access Mortgage Corporation (2004) Limited v Arres Capital Inc*, 2018 ABQB 1034 **[TAB 1]**

relating to the fees) within that process. Although ignored entirely by the Represented Investors, those two documents form Tab 1 and Tab 2 to the Agreed Statement of Facts.

5. The Represented Investors rely on the decision in *Ex Parte James*, which is a case in equity. They do so because there is no basis in law (either in statute or by form of contract) for them to assert a legal priority. Unfortunately for the Represented Investors, they also fail on each of the three prongs of the test in *Ex Parte James*:

(a) the Receiver does not dispute that a portion of the Graybriar Funds are available for distribution to all Investors because of the intervention of the Represented Investors in staying the operation of the Ex Parte Order. However, the mere fact that a person has contributed to the preservation of assets for the benefit of a court officer of an insolvent estate does not mean that the estate has been wrongfully or unjustly enriched (or, for that matter, that the person making the contribution is entitled to Claim in priority to other identically situated creditors);

(b) the benefit of *Ex Parte James* is generally only available in instances where the applicant creditor is unable to make a claim in the insolvency proceeding. This case involves precisely the opposite circumstance, where the Represented Investors are disputing a Claim that has been submitted and allowed by the Receiver; and

(c) there are a multitude of factors that suggest the Represented Investors are not deserving of a remedy in equity. The most notable such factor is that granting such relief would be wholly inconsistent with the express terms of the Trust Agreements that all Investors are party to. They also include the fact that the Represented Investors have never previously sought priority to the Graybriar Funds, have not sought to act as a representative group for the benefit of all Investors and have unsuccessfully opposed the efforts of the Receiver to administer the Graybriar Funds in the within proceedings, thereby unnecessarily increasing costs and causing the entirely innocent Non-Represented Investors to suffer additional losses.

6. The situation that all of the Investors face in this case is grim as, regardless of the outcome of the current priority dispute, significant losses will be sustained by all parties. The Receiver is sympathetic to position of the Represented Investors. However the Receiver, as an officer of this

Honourable Court, cannot allow empathy to lead to a manifestly incorrect result and seeks the dismissal of the application filed by the Represented Investors.

II. ISSUES

7. The Receiver submits that the sole issue before this Honourable Court is whether the Sugimoto Claim for legal fees should rank *pro rata* with the Claims of the Non-Represented Investors to the Graybriar Funds. Significantly, the Represented Investors are the applicant in this matter and bear the onus of establishing their Claim for priority.

III. LAW AND ARGUMENT

A. The Scheme of Distribution

8. In the case at bar, the Represented and Non Represented Investors are all trust creditors; they are party to substantially identical Trust Agreements with the Debtor and (save for the priority issue) advance substantially identical Claims to the Graybriar Funds. While this application deals with trust property that is exempt from distribution under the the *Bankruptcy and Insolvency Act* ["***BIA***"], as a starting position the Receiver submits that underlying policy principles regarding the fair and equitable distribution of assets under the BIA are equally applicable where, as here, the creditors have agreed to a contractual scheme of distribution and such distribution is occurring within a court-supervised insolvency proceeding that will result in a shortfall.

9. The BIA establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding.[2] Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. The Trust Agreements provide for a contractual scheme of distribution that also establishes a equal and rateable sharing of the interest in the Graybriar Mortgage and that was expressly agreed to by all of the Investors. The Trust Agreements define "Proportionate Share" as follows:

> "**Proportionate Share**" shall mean the undivided ownership interest of the in the Loan, expressed as a percentage, equal to the fraction having as its numerator the total principal advanced by the Investor, from time to time, pursuant to this Agreement and having as its denomination the total principal of the Loan advanced, from time to time, to the Borrower;[3]

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[2] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 ["***BIA***"]

[3] Statement of Agreed Facts and Exhibits, at Tab 2

10. According to the Supreme Court of Canada in *Molonye,* one of the overarching purposes of the *BIA* is the fair and equitable distribution of assets to the creditors.[4] The priority scheme advances the goals of orderliness and fairness in insolvency proceedings.[5] It is for these reasons that courts are hesitant to re-arrange priorities as stated in the *BIA.* This is also why it is generally accepted that remedies such as constructive trust, which operate to disturb the established priority scheme and which is the basis of the Claim made by the Represented Investors, are only granted in extraordinary cases.[6] Relatedly, the Supreme Court in *Soulos* notes that constructive trust should not unfairly disadvantage third-party creditors.[7] This discretionary remedy should not be imposed without taking into account the interests of others who may be affected by granting the remedy.[8]

11. The essence of the Receiver's position on this application is that this is not an extraordinary case where a complete rearrangement of priority scheme that was agreed upon by all parties pursuant to the Trust Agreements is warranted and, if such a result is allowed, it would have the undesirable effect of affecting the completely innocent Non Represented Investors.

B. <u>Applicability of the Rule in *Ex Parte James*</u>

12. The Represented Investors seek payments in priority to the Non Represented Investors and relying on the Rule in *Ex Parte James.* The Rule of *Ex Parte James* generally applies where money has been remitted to a trustee in bankruptcy under a mistake in law or equity.[9] For the Rule to apply, the following conditions must be met:[10]

(a) the bankrupt estate must have been enriched or could be enriched at the expense of the person making the claim;

(b) in most cases, the claimant must not be in a position to file a proof of claim in the bankruptcy; and

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[4] *Alberta (Attorney General) v Molonye*, [2015] 3 SCR 327, 2015 SCC 51, at paras 32-33 ["***Molonye***"] **[TAB 2]**; also see *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, at para 9 **[TAB 3]**

[5] *Orphan Well Association v Grant Thornton Ltd,* 2019 SCC 5, at para 253 ["***Redwater***"] **[TAB 4]**

[6] *Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160, at para 32 ["***Credifinance***"] **[TAB 5]**

[7] *Soulos v Korkontzilas,* [1997] SCJ No 52, at para 45 **[TAB 6]**

[8] *Caterpillar Financial Services Ltd v 360networks Corp* (2007), 2007 BCCA 14 **[TAB 7]**

[9] *CIBC Wood Gundy Inc v BDO Canada Ltd,* 2017 MBQB 71, at para 21 ["***CIBC Wood Gundy***"] **[TAB 8]**

[10] *CIBC Wood Gundy, supra* note 9, at para 21 **[TAB 8]**; *Bank of Montreal v Grafikom Limited Partnership,* 2009 CanLII 55117 (ON SC), at para 59 ["***Grafikom***"] **[TAB 9]**

(c) to allow the trustee to retain the enrichment would be unfair and unjust. The court will not lend assistance to or encourage the trustee in bankruptcy in any transaction that would result in a dishonest or unjust advantage being obtained by the bankrupt estate that would be inconsistent with natural justice.

13. None of the three criteria are satisfactory in the by the Represented Investors in the instant case.

C. <u>There has been no enrichment at the expense of the Represented Investors</u>

14. The Receiver submit that there has been no enrichment at the expense of the Represented Investors.

15. This case is analogous to a situation whereby a single unsecured creditor obtains some form of pre-judgment (e.g., a *Civil Enforcement Act* freezing order) or post-judgment (e.g, payment of garnished accounts into Court) against a debtor and the debtor later becomes bankrupt. In such a case the assets that have been frozen or paid into court can be claimed by the trustee in bankruptcy and are available for the distribution to all unsecured creditors. The general body of unsecured creditors have derived a benefit from the actions of the single unsecured creditor who obtained the pre-judgment or post-judgment relief but was unable to complete execution on the subject assets. The single unsecured creditor may be entitled to include its legal fees in pursuing the pre-judgment or post-judgment relief as part of its unsecured claim but it is obviously unable to elevate such fees to a position of priority over the body of general unsecured creditors. The Represented Investors (being the unsecured creditor who obtained the pre-judgment relief) are in the precisely identical circumstance in relation to the Non-Represented Investors (being the general body of unsecured creditors); the law does not provide for a priority in such an instance.

D. <u>The Represented Investors Claim has been accepted</u>

16. Paragraph 20 of the Brief of Law and Argument of the Represented Investors states as follows:

> 20. The Receiver has determined that the Represented Investors cannot maintain a claim for their legal costs incurred in preserving the Graybriar trust assets.[11]

[11] Bench Brief of the Represented Investors, at para 20

17. That statement is categorically false. The Agreed Statement of Facts provides as follows:

> 21. The Sugimoto Claim **has been revised and allowed** in the total amount of $15,081,771. (emphasis added).
>
> …
>
> 23(b) the Receiver take the position that the claim for legal fees and disbursements charged by Sugimoto and Company to the Represented Investors (**which has been allowed by the Receiver** in the amount of $221,623 on a *pro rata* basis and included within the total Represented Investors Claims), should rank *pro rata* with the allowed Claims of the Non Represented Investors. (emphasis added).[12]

18. The Sugitomo Claim has been allowed by the Receiver, and the Represented Investors are aware of this fact. What the Receiver contests is the Represented Investors' position that the fee portion of the Sugimoto Claim be granted priority over the Non-Represented Investors.

19. The decision in *Re Park City Ltd.*, which appears to be relied upon by the Represented Investors even though it is entirely supportive of the position of the Receiver, is illustrative of why a creditor who can make a claim in bankruptcy cannot rely on *Ex Parte James*. In that decision the creditor seeking to rely on *Ex Parte James* was entitled to submit a claim into the bankruptcy process. That fact was justification for dismissal of its application as permitting the alternative result would amount to an alteration of the priority scheme:

> [17] In *Re Clark* [1975] 1 All ER 453, Walton, J. held that in order for the rule in *Ex parte James* to apply, in most cases the bankrupt must not be in a position to file a proof of claim in a bankruptcy. The reason is that if the claimant can file a proof of claim, the application of the rule in *Ex parte James* would conflict with the mandatory *pari passu* division of the bankrupt estate among the creditors as required by the bankruptcy legislation.
>
> ...
>
> [19] The fact that the bankrupt estate was enriched as a result of [the Creditor's] effort and at [the Creditor's] expense is not enough to justify the application of the rule in *Ex parte James*. If it were, any supplier of inventory would have protection under that rule. [The Creditor] cannot use the rule in *Ex parte James* to elevate an unsecured claim into a secured claim.
>
> [20] For these reasons, I find that the rule in *Ex parte James* is not applicable. [The Creditor's] appeal is dismissed.[13]

20. The Receiver's opposition to the application made by the Represented Investors is premised on the identical concern. Allowing the application would elevate the already submitted

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[12] Agreed Statement of Facts and Exhibits, at paras 21-23

[13] *Bankruptcy of Park City Products Ltd*, 2001 MBQB 200, at paras 17-20 ["***Re Party City Ltd.***"] **[TAB 10]**

and allowed Sugimoto Claim for fees from a *pro rata* Claim to a priority position without any lawful justification.

E. There is no unjust advantage to the Estate

21. The concepts of unfairness and inconsistency with natural justice, which are hallmarks of the rule in *Ex Parte James*, parallel the concept of a juristic reason in a claim for unjust enrichment. In both instances, the court is determining whether this is some valid reason for the (alleged) benefit or enrichment to occur. It is noteworthy that it is well established that the existence of a contract is a valid juristic reason to deny a claim for unjust enrichment:

> **The established categories that can constitute juristic reasons include a contract** (Pettkus, *supra*), a disposition of law (Pettkus, *supra*), a donative intent (Peter, *supra*), and other valid common law, equitable or statutory obligations (Peter, *supra*). (emphasis added).[14]

22. The policy rationale for this well-established common law rule is simple and easy to justify; parties cannot escape the consequences of contractual covenants they have agreed to by making claims in equity. The Trust Agreements clearly and unequivocally provide for a *pro rata* ranking of fees amongst all Investors. The starting point of this analysis definition of the term "Loan" in the Trust Agreement, which includes "fees":

> "Loan" means the Loan Amount advanced or to be advanced to the Borrower by the Investor on the terms subject to the conditions set out in the Commitment Letter and includes, without limitation, all principal, interest, fees, expenses, charges and all other amounts owing by the Borrower from time to time to the Investor pursuant to the Commitment Letter and also includes the Loan Security;[15]

23. In accepting the Sugimoto Claim for legal fees, the Receiver has recognized that a reasonable interpretation of the Trust Agreement is that "fees" includes professional advisory fees such as solicitors account charges. Absent this favourable reading, there would be no basis for any legal fees to be recovered by the Represented Investors. The critical part of the contractual analysis is understanding that, pursuant to the Trust Agreements, each Investor expressly agreed to take an undivided ownership interest in the Loan (including the Claim for legal fees):

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[14] *Garland v Consumers' Gas Co*, [2004] 1 SCR 629, 2004 SCC 25, at para 44 ["***Garland***"] **[TAB 11]**

[15] Agreed Statement of Facts and Exhibits, at Tab 2

> 2.2 Interest in the Loan
>
> Upon the Investor delivering to the Trustee advances in accordance with Article 3.1, the Investor shall have a beneficial interest in the Loan to the extent of its Proportionate Share in the Loan.[16]

24. Each Investor can make a Claim for legal fees pursuant to the Trust Agreements. However, no Investor can elevate such a fee Claim to a priority position vis-à-vis any Claim of the other Investors because such an outcome is entirely at odds with a plain reading of the Trust Agreement.

25. The Receiver respectfully submits that the terms of the Trust Agreement (as summarized above) and the reasoning of the Supreme Court of Canada in *Garland* (as stated above) is determinative of the current issue. The Represented Investors were always aware of the ranking of the fee Claim pursuant to the Trust Agreements:

> The Trust Agreements that each of the Investors entered into with Arres contain substantively identical terms and provide for a *pari passu* ranking of Claims amongst all Investors. **At all material times, each of the Represented Investors was aware that its investment in the Graybriar Mortgage ranked *pro rata* with other Persons who invested in the Graybriar Mortgage**. Pursuant to the Trust Agreements, each Investor has a "Proportionate Share" in the Graybriar Mortgage. (emphasis added).[17]

26. In the specific context of *Ex Parte James*, in *Bank of Montreal v Grafikom Limited Partnership,* the Receiver was enriched at the expense of the Applicant, ADP, who had made payments to employees, and by so doing, the Receiver was not required to pay each employee out of the bankrupt's assets before paying any other creditors.[18] Relying on the principle in *Ex Parte James,* ADP argued that it was not fair for secured creditors to profit in this manner, and sought an order from the court to pay ADP's invoice even if not legally required to do so.[19] In its decision, the Ontario Superior Court of Justice refused to apply the Rule in *Ex Parte James* because while the Receiver was enriched at the expense ADP (which is denied in this case), ADP was still in a position to file a claim as an unsecured creditor.[20] The court noted that the loss at issue was a foreseeable commercial risk.

27. Similar to *Grafikom*, the Represented Investors are still in a position to maintain their Claim as trust creditors. The Receiver has allowed their Claim for legal fees and the sole issue that

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[16] Statement of Agreed Facts and Exhibits, at Tab 2

[17] Statement of Agreed Facts and Exhibits, at para 5

[18] *Grafikom, supra* note 10, at para 3, **[TAB 9]**

[19] *Grafikom, supra* note 10, at para 50 **[TAB 9]**

[20] *Grafikom, supra* note 10, at para 70 **[TAB 9]**

remains is the priority issue. The Represented Investors chose not to negotiate a different priority arrangement for fees even though they had the opportunity to do so and were aware that they ranked *pro rata* with other creditors when they took voluntary steps to preserve assets. On these facts, there is no basis for elevation of the fee portion of the Sugimoto Claim to a priority position.

IV. RELIEF SOUGHT

28. The Receiver reasonably submits that the Represented Investors have failed to establish legal basis for priority to the Graybriar Funds and that this Honourable Court dismiss the application of the Represented Investors.

ALL OF WHICH IS RESPECTFULLY SUMITTED THIS 8TH DAY OF AUGUST, 2019.

McCarthy Tétrault LLP
Walker W. MacLeod / Pantelis Kyriakakis
Counsel for Alvarez & Marsal Canada Inc., in its capacity as the court-appointed receiver of Arres Capital Inc.

V. LIST OF AUTHORITIES

1. *Access Mortgage Corporation (2004) Limited v Arres Capital Inc*, 2018 ABQB 1034;
2. *Alberta (Attorney General) v Molonye,* 2015 SCC 51;
3. *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453;
4. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5;
5. *Credifinance Securities Limited v DSLC Capital Corp*, 2011 ONCA 160;
6. *Soulos* v Korkontzilas, [1997] SCJ No 52;
7. *Caterpillar Financial Services Ltd v 360networks Corp (2007)*, 2007 BCCA 14;
8. *CIBC Wood Gundy Inc v BDO Canada Ltd*, 2017 MBQB 71;
9. *Bank of Montreal v Grafikom Limited Partnership*, 2009 CanLII 55117 (ON SC);
10. *Bankruptcy of Park City Products Ltd*, 2001 MBQB 200; and
11. *Garland v Consumers' Gas Co*, 2004 SCC 25.

TAB 1

Court of Queen's Bench of Alberta

Citation: Access Mortgage Corporation (2004) Limited v Arres Capital Inc, 2018 ABQB 1034

Date: 20181220
Docket: 1401 12431
Registry: Calgary

Between:

Access Mortgage Corporation (2004) Limited

Plaintiff

- and -

Arres Capital Inc

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice C.M. Jones

I. Introduction

[1] This matter involves competing claims to funds under the administration of a court-appointed receiver.

[2] By order of this Court dated February 13, 2015, Alvarez & Marsal Canada Inc. was appointed receiver ("Receiver") of Arres Capital Inc. ("Arres"). Arres was assigned into bankruptcy on July 26, 2017 and the Receiver now acts as trustee of Arres' estate.

[3] The matter before me relates not to the whole of Arres' estate, but only to certain funds, referred to as the "Graybriar Funds". There are two separate and quite different claims to the Graybriar Funds. One of the Applicants, Terrapin Mortgage Investment Corp. ("Terrapin"), alleges an equitable mortgage over the Graybriar Funds. The other Applicants, Staci Serra, Wesley Serra and 875892 Alberta Limited ("875") are persons related to Arres. I will refer to them collectively as the "Serra Parties". Mr. Serra 100% of the shares in Arres Holdings Inc. which in turn owns 100% of the shares of Arres. Ms. Serra is Mr. Serra's spouse; she owns and controls 875. The Serra Parties claim entitlement to the Graybriar Funds as a result of assignments to one or more of them of amounts due to Arres (the "Alleged Assignments").

[4] I note that both Terrapin and the Serra Parties claim a priority interest in the Graybriar Funds. Thus, what is at issue before me is not so much their alleged entitlement to the Graybriar Funds as their alleged priority over other creditors.

II. Background

[5] As noted above, the claims of Terrapin and of the Serra Parties are quite different. While it will be necessary to analyze those claims separately and the specific facts relevant to the claims are different, both arise out of the same initial situation.

[6] Graybriar Land Company Limited and Graybriar Greens Inc. (collectively, “Graybriar”) sought to finance a condominium development near Stony Plain, Alberta.

[7] As part of its business, Arres arranged mortgage loans with borrowers. It raised mortgage monies through a group of private investors. It would advance those funds on the security of mortgages and it then administered those mortgages as a trustee on behalf of the investors.

[8] In this case, Arres acted as trustee for 76 investors (the “Graybriar Investors”) who collectively invested approximately $9,000,000. Those monies, together with others for a total of $9,700,00, were advanced to Graybriar and secured by a mortgage in favor of Arres (the “Graybriar Mortgage”) registered against title to the Graybriar condominiums. Arres held the Graybriar Mortgage in trust for the Graybriar Investors pursuant to written agreements (the “Trust Agreements”) that were the same for each investor, apart from the name of the investor and the dollar amount invested.

[9] Eventually, Graybriar defaulted on the Graybriar Mortgage and Arres took foreclosure action on behalf of the Graybriar Investors in respect of seven condominium units (the “Graybriar Units”).

[10] As part of foreclosure proceedings, Arres attempted to acquire the Graybriar Units, intending to keep three of them and to effect a transfer of the other four (the “179 Units”) to 1798582 Alberta Ltd. (“179”). Prior to its being struck in 2017, Ms. Serra was a director of 179 and her corporation, 875, held 100% of its voting shares. Apparently without notice to the Graybriar Investors, Arres sought an order approving its offer to purchase the Graybriar Units (the “Sale Order”). The Sale Order relieved Arres of the need to pay the purchase price for the Graybriar Units into Court. Instead, it was allowed to set off the purchase price against the amount outstanding under the Graybriar Mortgage.

[11] Terrapin agreed to finance the acquisition of the 179 Units and advanced funds in the amount of $426,000 (the “179 Loan”) to counsel for 179 on February 13 or 14, 2014. On or about February 14, 2014, counsel for 179 submitted documents, including the Sale Order, to the Land Titles Office, seeking to discharge the Graybriar Mortgage, transfer title to the 179 Units to 179, register a mortgage in favour of Terrapin (the “Terrapin Mortgage”) for the 179 Loan and transfer to Arres clear title to the three remaining Graybriar Units.

[12] The Registrar of Land Titles rejected the documents submitted by counsel for 179. Apparently, the Registrar required the correspondence directing registrations to be authored by Arres’ counsel and on Arres’ counsel’s letterhead.

[13] Meanwhile, Terrapin advanced the 179 Loan to counsel for 179 on trust conditions. Those monies were dispersed to various parties, but were not used to pay out the Graybriar Mortgage.

[14] On February 14, 2014, before the documents submitted to the Land Titles Office could be rectified permitting the Sale Order to be acted upon, some of the Graybriar Investors (the "Richcrooks Investors") obtained an *ex parte* order from this Court suspending foreclosure proceedings in respect of the Graybriar Units (the "Stay Order").

[15] The Richcrooks Investors took the position that Arres had lost the right to represent them in the Graybriar foreclosure action and should not have obtained the Sale Order without first advising them. The Richcrooks Investors asserted in their factum that:

> As a result of the bankruptcy proceedings commenced against Arres, legal counsel for the [Richcrooks Investors] wrote to Arres and its lawyers on October 31, 2013. This letter purported to terminate Arres as trustee in respect of the Mortgage and demanded the Graybriar Investors represented "receive from the Trustee a transfer of title to the Investor of the Investor's Proportionate Interest in the Mortgage...

[16] As a result of the Stay Order, the 179 Units were not transferred to 179 and, notwithstanding the advance of the 179 Loan, the Terrapin Mortgage was not registered against title to the 179 Units. Title to the 179 Units remained in the name of Graybriar Land Company Ltd. with the Graybriar Mortgage registered against title until a judicial sale was effected as noted *infra*.

[17] The Stay Order came back before this Court on September 15, 2014. Strekaf J, as she then was, declined the Richcrooks Investors' application for an indefinite stay of the Sale Order. She directed them to appeal the Sale Order and to provide an undertaking as to damages satisfactory to the Court.

[18] The Richcrooks Investors failed to provide the directed undertaking and on December 17, 2014, Strekaf J vacated the Stay Order.

[19] On December 9, 2015, the Court of Appeal allowed the Richcrooks Investors' appeal and directed, *inter alia*, that the sale proceeds of the Graybriar Units be paid into Court and that this Court determine who had the right to those sale proceeds. The Court of Appeal encouraged the parties "to proceed to resolve their outstanding litigation with dispatch".

[20] The Richcrooks Investors have taken no further steps in respect of the Sale Order or the Stay Order.

[21] Pursuant to an order of Romaine J dated June 4, 2018, the Graybriar Units have been sold, resulting in the Graybriar Funds, which are being held by the Receiver.

[22] Terrapin argues that the Richcrooks Investors have taken no steps to assert a claim to the Graybriar Funds. Terrapin would have this Court declare that the Richcrooks Investors' appeal has been effectively abandoned and that the Sale Order should be considered substantively valid.

III. Issues

[23] As noted above, both Terrapin and the Serra Parties claim priority entitlement to the Graybriar Funds. The issue before me is whether either of them has priority over Arres' other creditors.

IV. Analysis

A. Terrapin

[24] Terrapin argues that "if everything had gone properly" it would have a legal mortgage over the Graybriar Funds. Terrapin argues that the Sale Order would have been registered had the Richcrooks Investors not intervened and that their intervention did not alter the substantive elements of the Sale Order. Terrapin would have this Court give effect to the Sale Order, despite it never having been registered at the Land Titles Office, because the Richcrooks Investors have abandoned whatever basis they may have had for intervening and obtaining a stay.

[25] Counsel for the Richcrooks Investors advised that, at the time his clients obtained the Stay Order, there was an extant claim against Arres alleging breach of trust under the Trust Agreements and asserting a debt owing to the Richcrooks Investors. They took the position that the proceeds of sale of the Graybriar Units were trust moneys under the Trust Agreements. Counsel advised that the Richcrooks Investors did not consider it necessary to take further steps to recover these moneys because they intended to pursue them as part of the receivership of Arres that could be foreseen at the time.

[26] The Receiver's counsel pointed out that I am not required to resolve priorities as between Terrapin and the Richcrooks Investors. He noted that Arres' bankruptcy effective July 26, 2017 gave rise to a stay under s. 69 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. The effect of that stay was to freeze any actions by the Richcrooks Investors in respect of amounts allegedly belonging to them under the Trust Agreements.

[27] He clarified that priority as between Terrapin and the Richcrooks Investors was a matter for the Arres claims process. By contrast, the equitable mortgage sought by Terrapin before me is a priority contest between Terrapin and Arres. That contest, the Receiver pointed out, was between Arres' claims under a registered first mortgage and Terrapin's claim to an equitable mortgage. Moneys established to form part of Arres' estate may then be subject to claims of others, like the Richcrooks Investors and Terrapin.

[28] As between Arres and Terrapin, the Receiver takes the position that Arres has the first claim to the funds. I note that the Graybriar Mortgage no longer exists. All that remains are sale proceeds from the Graybriar Units against which the Graybriar Mortgage was registered.

[29] The Receiver argues that Terrapin has to establish some basis for priority to the Graybriar Funds over the Graybriar Mortgage. In the words of counsel for the Receiver, the Arres' first mortgage trumps any other claims to the Graybriar Funds unless Terrapin can establish a priority.

[30] As noted above, the Terrapin Mortgage was never registered. Recognizing that it does not have a legal mortgage, Terrapin asserts an equitable mortgage over the Graybriar Funds. Terrapin argues that, but for the action of the Richcrooks Investors, the sale to 179 would have

been completed pursuant to the Sale Order, funds would have been received by 179 and the Terrapin Mortgage would have been registered against the 179 Units.

[31] Terrapin claims a priority interest in Arres' estate by virtue of its alleged equitable mortgage. I note, however, that Terrapin did not lend funds to Arres. It loaned funds to 179, which had intended to purchase the 179 Units. Terrapin is therefore a creditor of a creditor (179) of Arres.

[32] The Receiver points out that, unlike a legal mortgage, an equitable mortgage does not transfer the legal estate in the property securing the mortgage. Rather, it creates, in equity, a charge upon the property**.** The Receiver's position is that no equitable mortgage arises on these facts and, even if one did, the Graybriar Mortgage would take priority.

[33] The Receiver cites *Falconbridge on Mortgages*, 5th ed (Toronto: Thomson Reuters Canada, 2017), note 16 at 5-2, in support of its position that an equitable mortgage may arise in one of three circumstances:

(a) The interest mortgaged is equitable or future, because in such a case, even if the mortgage complies with all formalities, it cannot be a legal mortgage;

(b) The mortgagor has not executed an instrument sufficient to transfer the legal estate. In this case, it is the informality of the mortgage that prevents it from being a legal mortgage. This category also includes a written agreement to execute a legal mortgage, that is, a promise to grant a legal mortgage which is itself not a grant of a legal mortgage; or

(c) There has been a deposit of title deeds.

[34] The second and third grounds have no application here. There was no defect in the mortgage documentation that prevented 179 from granting a legal mortgage to Terrapin. Indeed, the executed agreement between 179 and Terrapin was a legal mortgage document, not merely an agreement to execute a mortgage. Further, no title deeds were deposited with Terrapin.

[35] With respect to the first ground, 179 never acquired title to the 179 Units and thus did not have the right to grant Terrapin a mortgage over them. It therefore failed to comply with two covenants under its agreement with Terrapin. The Receiver argues this situation is analogous to that in ***Re Elias Markets Ltd*** (2006), 274 DLR (4th) 166 at paras 75-77 where the Ontario Court of Appeal determined that failure to satisfy conditions precedent set out in a mortgage document precluded a finding that an equitable mortgage had been granted.

[36] The Receiver also argues that Terrapin cannot assert a mortgage of an equitable or future interest. While the Receiver acknowledges that a valid contract for the sale of land may give the purchaser and equitable interest, it states that 179 never paid the purchase price for the 179 Units and therefore never became the equitable owner of them. Consequently, 179 had no interest in the 179 Units, whether legal or equitable, that could support a mortgage to Terrapin.

[37] Moreover, the Receiver argues that even if Terrapin could establish an equitable mortgage, it would rank lower in priority than the Graybriar Mortgage.

[38] The Graybriar Mortgage is dated 2006 and 2007, before Terrapin entered into the 179 Loan. It was registered against title to the Graybriar Units under the *Land Titles Act*, RSA 2000, c L-4 ("*LTA*"). Section 14 of the *LTA* provides that the serial number attached to each instrument

or caveat in the Registrar's daily record determines the priority of the instrument or caveat filed or registered.

[39] The Receiver argues that even an earlier equitable mortgage is subordinated to a later legal mortgage. It points to s. 203(2) of the *LTA*, which provides that a person who takes a mortgage from an owner is not, except in the case of fraud by that person:

> (a) bound or concerned, for the purposes of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money; or
>
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

[40] The Receiver argues that its position is affirmed by both *Falconbridge* and ***Re Elias Markets***. *Falconbridge* states in note 16 at 7-4:

> ... between a first equitable mortgage and a second legal mortgage, the second mortgage has priority if the mortgagee has acquired the legal estate in good faith for value and without notice.

[41] The Ontario Court of Appeal stated in ***Re Elias Markets*** at para 69:

> As between a first legal mortgage and a second equitable mortgage, the first mortgage has priority, unless the second mortgagee, being a mortgagee in good faith for value and without notice, has been misled by the fraud or negligence of the first mortgagee in connection with the taking of the first mortgage or the subsequent fraud (as distinguished from mere negligence) of the first mortgagee, or unless the first mortgagee is estopped from claiming priority.

[42] Terrapin responds by reiterating its earlier observation that the Sale Order was never appealed and that the Richcrooks Investors never took the additional steps directed by the Court. Through a somewhat unusual series of events, Terrapin advanced moneys that were never used to acquire an interest in real property, with the result that the presumptive mortgagor did not have the requisite interest to grant the mortgage. What ultimately happened to those funds is unclear, but they do not appear to be capable of being traced or followed into the Graybriar Funds. Terrapin argues that its legitimate interests should not be frustrated on these facts.

[43] I agree with the Receiver. While I am not without sympathy for Terrapin, it cannot satisfy the requirements for an equitable mortgage, given 179's lack of interest in the Graybriar Units. Further, even if an equitable mortgage could be established, it is clear that it would rank behind the Graybriar Mortgage. Accordingly, Terrapin's request for a declaration that the Graybriar Funds are held for it pursuant to an equitable mortgage is dismissed.

B. The Serra Parties

[44] Arres seeks an Order declaring the Alleged Assignments from Arres to the Serra Parties valid and enforceable. The Receiver opposes that application. The Alleged Assignments pertain

to a number of expenses, charges and debts arising under different agreements and circumstances.

[45] Under the terms of the Trust Agreements, Arres was permitted to “set off, deduct and withhold” certain administrative costs, fees and expenses associated with its management of the Graybriar Mortgage prior to distributing remaining funds to the Graybriar Investors.

[46] On November 11, 2008, the Graybriar Mortgage was renewed for one year. Arres claims that the Graybriar Investors signed renewal letters evidencing their approval of this renewal. A renewal agreement (the “Renewal Agreement”) set out the terms and conditions of this renewal. Pursuant to the terms of the Renewal Agreement and a commitment letter that was attached to and formed part of each of the Trust Agreements (the “Commitment Letter”) Arres purported to charge a renewal fee not to exceed 2% of the principal balance owing on the Graybriar Mortgage at the time of renewal. Arres also purported to charge an interest rate spread as further compensation for administering and servicing the Graybriar Mortgage.

[47] When Graybriar encountered financial difficulty, two “priority mortgages” were approved by the Graybriar Investors. These priority mortgages, which ranked ahead of the Graybriar Mortgage, totalled approximately $1,235,162.38 by July 2010. The priority mortgages were contributed to by “co-lenders” who entered into loan administration agreements with Arres (the “Co-Lender Administration Agreements”). Arres claims that the Co-Lender Administration Agreements, like the Trust Agreements, allowed it to set off and deduct certain administrative costs, fees and expenses associated with its management of the priority mortgages prior to distributing any and all proceeds thereof to the co-lenders.

[48] Arres argues that both the Trust Agreements and the Co-Lender Administration Agreements allowed Arres to assign rights accruing to it under those agreements. Arres and the Serra Parties assert that fees payable to Arres under the Trust Agreements and Co-Lender Agreements were assigned to Ms. Serra and to 875.

[49] Further, Arres points to a document dated December 5, 2009 under which it argues it was to advance $287,360 towards new home warranties (the “New Home Warranty Agreement”). Arres claims that, in order to fulfill this obligation, it borrowed these monies from Mr. Serra and from 1499760 Alberta Ltd. (”149”), a company controlled by Mr. Serra. Arres claims that pursuant to the New Home Warranty Agreement, 149 and Mr. Serra were to earn fees from ongoing monitoring costs.

[50] The Serra Parties claim priority over the Graybriar Funds stemming from these assignments.

[51] The Receiver challenges the Serra Parties’ claim on three grounds. First, it asserts that if the Alleged Assignments actually took place and did so for consideration, they were subject to the *Personal Property Security Act*, RSA 2000, c P-7 (“*PPSA*”). As the Alleged Assignments were not registered in the Personal Property Registry (“PPR”), the Receiver argues that they are unperfected security interests that do not take priority over other creditors. Second, the Receiver asserts that there is insufficient evidence that the Serra Parties gave sufficient (or any) consideration for the Alleged Assignments. Third, the Receiver argues that because Arres was prohibited from assigning any interest in the Trust Agreements, the Alleged Assignments were invalid.

1. Application of the PPSA

[52] As between a debtor and a creditor, registration of a debt under the *PPSA* is not necessary. The parties' rights and obligations are governed by their agreement. A creditor registers its interest at the PPR to protect the priority of its claims against third parties. Registration serves as notice to third parties of the creditor's security interest and helps to elevate a creditor's claim above that of unsecured creditors.

[53] This priority survives a debtor's bankruptcy. Section 136 of *BIA* provides that secured creditors have first priority to a distribution by the trustee.

[54] Generally, priority among secured creditors is determined by the order in which they have "perfected" their interests. An interest is perfected when a security agreement has been executed, the debtor has possession of the subject property and the security interest has been registered. Accordingly, the first creditor to have registered at the PPR generally will be entitled to claim priority.

[55] It is undisputed that the Alleged Assignments were not registered at the PPR.

[56] The Receiver argues that the Alleged Assignments are subject to section 3 of the *PPSA*, which provides that:

> 3(1) Subject to section 4, this Act applies to
>
> (a) every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting the generality of clause (a), a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, assignment, consignment, lease, trust and transfer of chattel paper where they secure payment or performance of an obligation.
>
> (2) Subject to sections 4 and 55, this Act applies to
>
> (c) a transfer of an account or chattel paper…
>
> that does not secure payment of an account or performance of an obligation.

[57] The Receiver asserts that an assignment of receivables to secure payment or performance of an obligation is a "security interest". It points to s. 1(1)(tt) of the *PPSA*, which provides that:

> (tt) "security interest" means
>
> (i) an interest in goods, chattel paper, investment property, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, other than the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of the agent of the seller unless the parties have otherwise evidenced an intention to create or provide for investment property interest in the goods...

[58] The Receiver argues that ss. 3(1) and 3(2) of the *PPSA* contemplate a very broad range of financing transactions and non-financing transactions, respectively. The Serra Parties do not argue that the Alleged Assignments do not fall within those sections. Rather, they rely on an exception to the need for registration, as discussed *infra*.

[59] I find that the Alleged Assignments, assuming they were valid, would constitute a security interest as they originate in documents that purport to secure payment or performance of an obligation. At the very least, I accept that, if the Alleged Assignments are valid, they fall within section 3(2). Whatever else they may be, they appear to reflect the transfer of an account.

[60] Therefore, the Serra Parties will be unsecured creditors unless some exception applies to obviate the necessity of registering the Alleged Assignments at the PPR.

[61] The Serra Parties rely upon the exception in s. 4(d) of the *PPSA*, which provides, *inter alia*, that:

> 4 Except as otherwise provided under this Act, this Act does not apply to the following:
>
> …
>
> (d) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services.

[62] The Serra Parties argue that the Alleged Assignments fall within this exception because they amount to the creation or transfer of an interest in present or future compensation for services other than fees for professional services. They argue that Arres, as a mortgage broker, was compensated by setting off and deducting certain administrative costs, fees and expenses associated with its management of the Graybriar Mortgage, prior to distributing any remaining proceeds to Graybriar Investors. They assert that compensation thus earned by Arres should not be viewed as fees paid for professional services.

[63] The Serra Parties point to the decision of this Court in ***Re Lloyd***, [1995] 164 AR 59. There, the Master held that the *PPSA* does not apply to fees earned by a real estate agent. He found that professional services did not include those of a real estate salesperson and, thus, fees paid to that person were not fees paid for professional services.

[64] The Serra Parties argue that the same analysis should apply to mortgage brokers such as Arres. They point out that both real estate agents and mortgage brokers are governed by the *Real Estate Act*, RSA 2000, c R-5 ("*REA*"). Section 1(1)(r) of the *REA* provides, in part, that:

> "mortgage broker" means a person who on behalf of another person for consideration **or other compensation**
>
> (A) solicits a person to borrow or lend money to be secured by a mortgage,
>
> (B) negotiates a mortgage transaction,
>
> (C) collects mortgage payments and otherwise administers mortgages, or
> (D) buys, sells or exchanges mortgages or offers to do so… [Emphasis added.]

[65] Thus, they argue, like a real estate agent who is not considered a professional and whose compensation is not subject to *PPSA* registration for purposes of establishing priorities among claimants in the event of an assignment, Arres should be able to avail itself of the exception in section 4(d) of the *PPSA*.

[66] In response, the Receiver notes that s. 4 of the *PPSA* provides narrow exceptions to transactions that otherwise would fall within its ambit and require registration to perfect a priority. The Receiver argues that the term "compensation" must be construed with reference to the words "wages, salary, pay, [and] commission". Section 4(d), the Receiver argues, addresses a narrow category of assignments of wages or analogous modes of payment for labour or personal services that are not otherwise prohibited under s. 53 of the *Consumer Protection Act*, RSA 2000, c C-26.3. That Act prohibits most assignments of wages or similar receivables for labour or personal services. For those few assignments of wages that are permitted, s. 4(d) of the *PPSA* reflects the impracticality of requiring such assignments to be registered.

[67] The Receiver argues that Arres acted as an intermediary in mortgage transactions and did not provide labour or personal services. Its view is that amounts owing to Arres do not fall within the exception in s. 4(d) because they cannot be said to be "wages, salary, pay, commission or any other compensation for labour or personal services". Rather, they relate to reimbursement of expenses incurred by Arres in the course of administering the Trust Agreements. The Receiver states that s. 4(d) was not intended to exclude the *PPSA*'s application to the assignment of such receivables. Any reference to these amounts not being for "professional services" is therefore irrelevant.

[68] The Receiver takes the position that the policy objectives of the *PPSA* would be undermined if assignments of fees computed with reference to the value of a transaction or of reimbursement for expenses were excluded by virtue of s. 4(d).

[69] I agree with the Receiver. While the amounts Arres was permitted to set off under the relevant agreements may have constituted its compensation, they were not akin to the payment of wages. The facts in ***Re Lloyd*** are not analogous to those before me and the reasoning in that case does not apply. Therefore, s. 4(d) of the *PPSA* does not exempt the Alleged Assignments from registration and the lack of registration means that the Alleged Assignments do not have priority over the claims of Arres' other creditors.

2. Valuable Consideration for the Alleged Assignments

[70] While non-compliance with the registration requirements of the *PPSA* negates any priority for the Alleged Assignments, I will also consider the Receiver's second basis for challenging Arres' claims.

[71] The Serra Parties argue that the Alleged Assignments comprise a number of assignments for which they have given valuable consideration. In Arres' Brief, the Serra Parties set out several assignments they claim Arres made and the consideration given for them. Though the facts alleged are somewhat confusing, I will attempt to set out the Alleged Assignments in chronological order.

[72] Arres alleges that on November 20, 2007, it agreed to purchase $200,000 of shares in a company called Grand Lion Entertainment Group (the "Grand Lion Shares"). It asserts that it paid $50,000 towards those shares and that 875 assumed the remainder of that obligation by

"providing an additional $150,000". Arres claims that 875 received the Grand Lion Shares and agreed to transfer them to Arres, provided Arres transferred a mortgage receivable or new investment of not less than $250,000 to 875 (the "Grand Lion Assignment"). The Serra Parties assert that the additional amount ($250,000 - $200,000 = $50,000) was to compensate 875 for its foregone mortgage interest and the risk of holding the Grand Lion Shares in lieu of mortgages.

[73] Arres asserts that on or about June 25, 2008, 875 borrowed $1,524,750 from Access Mortgage. Arres claims that the net proceeds from this loan in the amount of $1,017,487.29 were "given to Arres" and that this money was used to satisfy some of its obligations to Graybriar Investors under the Trust Agreements. In exchange, Arres executed an assignment in favour of 875 (the "June Assignment") of various accounts receivable from a number of projects, including the Trust Agreement fees.

[74] The Serra Parties assert that on September 1, 2008, Arres agreed to transfer a portion of the loan renewal fee owed to it pursuant to the Renewal Agreement, in the amount of $230,000, in partial satisfaction of its obligations under the Grand Lion Assignment.

[75] The Serra Parties claim that on January 31, 2009, Arres assigned any and all accounts receivable under the Trust Agreements to Ms. Serra (the "January Assignment"). They state that the consideration Arres received for the January Assignment was bonuses deemed to have been advanced to Mr. Serra and Ms. Serra on January 31, 2009 in the amount of $2,200,000 and a further $8,000 cash payment made by Mr. Serra. Arres points to a QuickBooks entry as evidence of these deemed bonuses and the $8,000 payment from Mr. Serra.

[76] The Serra Parties assert that on or about July 10, 2010, Mr. Serra and Ms. Serra "allotted" to Arres $105,000 from the proceeds of a separate project, Houseco. They claim this amount was paid to Arres by cheque "in further consideration towards the June Assignment and the January Assignment".

[77] Arres claims that it made an assignment to Ms. Serra on September 30, 2010 (the "September Assignment") in exchange for a cheque received from her for $97,500. The Serra Parties claim that the September Assignment included an assignment by Arres to Ms. Serra of any and all accounts receivable from the Trust Agreement Fees.

[78] As additional consideration for the June and January Assignments, the Serra Parties claim that Ms. Serra paid an additional $167,234.47 to Arres through a series of cheques. In its brief, Arres refers to this payment as an assignment dated March 23, 2012 (the "March Assignment").

[79] The Serra Parties also claim that Ms. Serra paid an additional $177,053 to Arres by cheque on October 11, 2012. In its brief, Arres refers to this as the "October Assignment" and claims this amount was paid as additional consideration for the June and January Assignments.

[80] The Serra Parties also point to a QuickBooks entry from Arres dated September 30, 2013 that purports to show a further $243,568.20 paid by Ms. Serra towards the June and January Assignments.

[81] In his Affidavit sworn July 17, 2018, Mr. Serra claims that a total of $2,079,747.03 represents accounts receivable assigned from Arres allegedly "from the Graybriar Mortgage." In addition, Mr. Serra deposes that Ms. Serra advanced $2,537,000 to Arres.

[82] The Receiver argues that the evidence of the Serra Parties does not establish that they gave sufficient, or any, consideration for which the Alleged Assignments validly could have been made.

[83] At paragraph 15 of its Third Report dated August 17, 2018, the Receiver notes as follows:

> The Receiver has reviewed the amount of $2,537,000 identified as being advanced by or otherwise owing by the [Serra] Parties to the Debtor at paragraph 37 of the Affidavit of Mr. Serra. The Receiver has confirmed that the sum of $97,500 was advanced by Ms. Serra to the Debtor on or about September 30, 2010 as discussed in the Second Report. Other than this amount, the Receiver has been unable to substantiate any of the other amounts reportedly advanced by the [Serra Parties] to the Debtor based on its review of Arres' financial records (ie. Balance Sheet and financial statements). In addition, the Receiver has been unable to identify the recording of the respective $2.35 M liability of the Debtor to any of the [Serra] Parties in Arres' accounting records.

[84] At para 16 of its Third Report, the Receiver makes the following observation in respect of each of the four accounts receivable alleged to comprise the $2,079,747 claimed by Mr. Serra:

> The Receiver has not been able to identify the recording of this amount as an account receivable in Arres' financial records.

[85] In addition to this overview, the Receiver also addresses the Alleged Assignments more specifically. With respect to the Grand Lion Assignment, the Receiver states in its brief that "no document has been entered into evidence" establishing that Arres actually received the Grand Lion shares.

[86] With respect to the alleged advance of $1,017,487 by 875 to Arres from funds borrowed by 875 from Access Mortgage, the Receiver again states that "no document has been entered into evidence" establishing that 875 borrowed these funds from Access Mortgage or that Arres received any of them.

[87] 875 alleges that it contributed a further $300,000 "towards the June Assignment" by agreeing to sell its interest in a "Bankview Mortgage" and transferring the funds to Arres. The Receiver states that the only documentation related to this alleged contribution is a deposit slip showing an amount received from Access Mortgage that has no evident connection to 875.

[88] With respect to the management bonuses of $2.2 million allegedly deemed to have been advanced to Mr. Serra and Ms. Serra and to have been satisfied, in part, by the Alleged Assignments, the Receiver argues that management bonuses of this magnitude are not sufficiently supported by Arres' accounting records. It argues that there is no journal entry that reflects elimination of Mr. Serra's and Ms. Serra's rights to be paid $2.2 million by way of receipt of the Alleged Assignments. The Receiver further argues that no evidence has been adduced to show that these alleged management bonuses were ever reported in Mr. Serra's or Ms. Serra's tax returns. The Receiver suggests that they may have been simply reversed in whole or in part by a subsequent journal entry.

[89] With respect to Mr. Serra's' alleged payment of $8,000 to Arres, the Receiver argues that accounting records suggest that this amount was actually a repayment by Mr. Serra of a shareholder's loan made to him by Arres. That accounting record is a debit entry to a bank

account which is identified as “SH Loan/Management Wages”. This record, the Receiver argues, shows no connection to Mr. Serra or the Alleged Assignments and is not evidence that Mr. Serra paid consideration for the Alleged Assignments.

[90] With respect to Mr. Serra’s and Ms. Serra’s alleged allotment to Arres of $105,000 from the proceeds of the Houseco project, the Receiver notes that this transaction is supported only by a notice of assignment signed by Mr. Serra and Ms. Serra. The Receiver contends in its brief that it cannot be determined if this notice was signed on behalf of Mr. Serra and Ms. Serra, 875 or Arres. It elaborated somewhat in oral argument, saying that there was no evidence of the $105,000 having been received by Arres.

[91] As noted above, Ms. Serra is alleged to have paid $167,234.47 and $177,053 to Arres as consideration for the March and October Assignments. The Receiver notes that copies of cheques attached to Mr. Serra’s Affidavit sworn on July 17, 2018 offered as evidence of consideration for the Alleged Assignments were drawn on Arres’ bank account, not Ms. Serra’s bank account.

[92] With respect to the sum of $243,568.20 allegedly paid by Ms. Serra to Arres in or around September 2013, the Receiver notes that this transaction is supported only by a line item in a listing of Arres’ bank transactions that does not show any connection between Ms. Serra and the deposit in question.

[93] The Receiver does acknowledge that payment of $97,500 is reflected in a cheque to Arres by Mr. Serra and Ms. Serra in or around September 2010. Still, it argues, it is impossible to verify whether this payment represents consideration for the Alleged Assignments. Further, there is no record on the Arres balance sheet dated July 31, 2014 showing amounts owing to the Serra Parties. Accordingly, the Receiver asserts that the Serra Parties have not proven that this amount is currently owing. Moreover, the Receiver’s position is that, even if this amount is proved owing, it does not take priority over Arres’ other debts because of the lack of *PPSA* registration.

[94] I accept the Receiver’s position. The evidence does not satisfy me that the Serra Parties provided consideration for the Alleged Assignments. Therefore, the Serra Parties have not proven that they are creditors of Arres in respect of the Alleged Assignments.

3. Validity of Alleged Assignments

[95] The Receiver argues that Arres could not validly have assigned its receivables because doing so would have been a breach of trust under the Trust Agreements. The Receiver notes that section 13.8 of each of the Trust Agreements requires a Graybriar Investor’s consent before an assignment can be made. It argues that there is no evidence of any prior or subsequent written consent to the Alleged Assignments.

[96] The Receiver further argues that it would be improper to allow Mr. Serra, as one of the Serra Parties, to benefit, directly or by virtue of his “connection” with Ms. Serra and 875, from a breach of trust when he was a principal, and essentially the mind and management of, Arres.

[97] The Serra Parties assert that the Graybriar Investors were given written notice of the Alleged Assignments in 2009 and acquiesced to them. It points out that clause 11.1(c) of the Trust Agreements provides that Arres’ trusteeship may be terminated by the Graybriar Investors if Arres purports to assign its rights without their prior written consent. The Receiver disputes the assertion that the Graybriar Investors acquiesced in any breach of trust by Arres. While it

acknowledges that the Trust Agreements allow the Graybriar Investors to terminate the trustee if they so choose, the Receiver argues that failing to exercise that right does not rise to the level of acquiescence to a breach of trust.

[98] Arres also argues that amounts it was allowed to set off and deduct from funds otherwise distributable to a Graybriar Investor never formed part of the property administered under the Trust Agreement. The Receiver disagrees and argues that the Alleged Assignments did not operate to remove these monies from what would otherwise have been trust property.

[99] I have reviewed an example of the Co-Lender Administration Agreements and I am unable to find any express power for either party to its assign rights thereunder. Further, I agree with the Receiver that clause 13.8 of the Trust Agreements permitted assignment of a party's rights only with the prior written consent of the other party. I am not satisfied that the prior consent of the Graybrair Investors was obtained.

[100] In addition, I reject Arres' argument that the amounts subject to the Alleged Assignments were not trust property. If an amount may be set off against otherwise distributable trust property, it follows that until that set off occurs the amount should be characterized as trust property. I note that the Trust Agreements do not provide that amounts to be set off or deducted by Arres are not part of the trust property.

[101] Accordingly, I agree that the Alleged Assignments, if they in fact arose, gave rise to a breach of the Trust Agreements.

[102] This raises the question of the effect of that breach of trust. The Receiver asserts that the Alleged Assignments were void *ab initio* because they were contrary to the terms of the Trust Agreements, but cites no authority for that proposition. In argument, I posed the question whether an assignment made in breach of trust might nevertheless be valid and enforceable by the assignee, but give the beneficiary an *in personam* action against the trustee for breach of trust or, in some circumstances, an *in rem* right to trace and recover the trust property. I note that *Waters' Law of Trusts in Canada*, 3d ed (Thomson Carswell: Toronto, 2005) states this at p13:

> Moreover, though the trust beneficiary who has only an equitable interest is unable to bring an action in conversion against the trustee or third party unless the beneficiary has a right to immediate possession of the trust property, the beneficiary does have a right to follow the property into the hands of third parties. First, he will sue the trustee personally for breach of trust, and if the trustee is unable to meet his claim he can proceed to trace the property, supposing it continues to be identifiable, and recover it from third parties. It is this right to trace which leads to the oft-made statement that the trust beneficiary's interest cannot be merely *in personam*, it must at least be partly *in rem*. What these obscure and confusing latinisms mean is that, since the beneficiary in protecting or asserting his equitable interest is not restricted to a personal action against the trustee, but may bypass the breaching trustee and sue the third party, he is asserting an interest of some kind in the trust property itself.

[103] Though this argument was not well developed by any of the parties, this seems to me to indicate that a transaction undertaken in breach of trust is not void *ab initio*. Rather, the aggrieved beneficiary is entitled to a remedy, which may be *in personam* or *in rem*, depending

upon the circumstances. However, given the lack of argument and my other conclusions, I need not decide this.

[104] I am satisfied that, to the extent the Alleged Assignments may have been made, registration under the *PPSA* would have been required to grant them priority over Arres' other creditors. Further, the evidence does not satisfy me that consideration was given for the Alleged Assignments and they should not, therefore, be recognized as valid.

V. Conclusion

[105] In the result, the applications of both Terrapin and the Serra Parties are dismissed. The parties may speak to costs.

Heard on the 21st day of September, 2018.
Dated at the City of Calgary, Alberta this 20th day of December, 2018.

C.M. Jones
J.C.Q.B.A.

Appearances:

Kerry Lynn Okita
For Terripan Mortgage Investment Corp

Walker W. MacLeod and Theodore Stathakos
for the Reciever

Judy Burke, Q.C. and Irfan Tharani
for Arres Capital Inc

Taimur R. Akbar
for Graybrair Land Company Limited

TAB 2

Attorney General of Alberta *Appellant*

v.

Joseph William Moloney *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan and Superintendent of Bankruptcy *Interveners*

INDEXED AS: ALBERTA (ATTORNEY GENERAL) *v.* MOLONEY

2015 SCC 51

File No.: 35820.

2015: January 15; 2015: November 13.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Property and civil rights — Judgment debt owed to province constituted claim provable in debtor's bankruptcy — Debtor obtained absolute discharge in bankruptcy — Federal legislation governing bankruptcy providing for debtor's release from all claims provable in bankruptcy upon discharge — Whether provincial legislation providing for continuing suspension of debtor's driver's licence and motor vehicle permits until payment of judgment debt constitutionally inoperative by reason of doctrine of federal paramountcy — Test for determining whether operational conflict exists — Whether federal and provincial legislation can operate side by side without conflict — Whether operation of provincial law frustrates purpose of federal law — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 178(2) — Traffic Safety Act, R.S.A. 2000, c. T-6, s. 102.

Procureur général de l'Alberta *Appelant*

c.

Joseph William Moloney *Intimé*

et

Procureur général de l'Ontario, procureure générale du Québec, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan et Surintendant des faillites *Intervenants*

RÉPERTORIÉ : ALBERTA (PROCUREUR GÉNÉRAL) *c.* MOLONEY

2015 CSC 51

N° du greffe : 35820.

2015 : 15 janvier; 2015 : 13 novembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon et Côté.

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

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Propriété et droits civils — Dette constatée par jugement envers la province constituant une réclamation prouvable lors de la faillite du débiteur — Libération absolue de faillite accordée au débiteur — Loi fédérale sur la faillite prévoyant que le débiteur est libéré de toutes réclamations prouvables en matière de faillite à sa libération — La loi provinciale prévoyant le maintien de la suspension du permis de conduire du débiteur et de ses certificats d'immatriculation jusqu'à ce qu'il acquitte la dette constatée par jugement est-elle inopérante du point de vue constitutionnel en raison de la doctrine de la prépondérance fédérale? — Analyse permettant de décider s'il existe un conflit d'application — La loi fédérale et la loi provinciale peuvent-elles coexister sans conflit? — L'application de la loi provinciale entrave-t-elle la réalisation de l'objet de la loi fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 178(2) — Traffic Safety Act, R.S.A. 2000, c. T-6, art. 102.

parties recognized the validity of the relevant provisions of the *BIA* and the *TSA*. Before this Court, they again conceded the validity of both laws. The only question is whether their concurrent operation results in a conflict. This requires analyzing the legislative schemes at issue at the outset so as to reach a proper understanding of the provisions that are allegedly in conflict.

l'une de l'autre. Dès le début des procédures, les parties ont reconnu la validité des dispositions pertinentes de la *LFI* et de la *TSA*. Elles ont de nouveau admis la validité de ces deux lois devant la Cour. La seule question en litige est de savoir si leur application concurrente crée un conflit. Pour bien comprendre les dispositions qui entreraient en conflit, il faut tout d'abord analyser les régimes législatifs en cause.

(a) *The Bankruptcy and Insolvency Act*

[32] Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

[33] The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

> 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, 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.

Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global

a) *La Loi sur la faillite et l'insolvabilité*

[32] Le Parlement a adopté la *LFI* en vertu de la compétence en matière de faillite et d'insolvabilité que lui confère le par. 91(21) de la *Loi constitutionnelle de 1867*. La *LFI*, notamment par le jeu des dispositions analysées ci-après, vise deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli (*Husky Oil*, par. 7).

[33] Le modèle de la procédure unique permet de réaliser le premier objectif de la faillite, soit le partage équitable des biens du failli. Selon ce modèle, les créanciers du failli qui souhaitent faire valoir une réclamation prouvable en matière de faillite doivent participer à une seule procédure collective, ce qui permet de garantir le partage équitable des biens du failli entre ses créanciers. En règle générale, tous les créanciers sont sur un pied d'égalité, les biens du failli étant partagés au prorata entre eux : art. 141 de la *LFI*; *Husky Oil*, par. 9. Dans *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 22, la juge Deschamps, au nom des juges majoritaires de la Cour, explique la raison d'être de ce modèle :

> 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 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.

Faire échec à l'inefficacité et au chaos, et favoriser un processus collectif ordonné, permet de maximiser le recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

[34] For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

> **69.3** (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005, at pp. 1015-16.)

[35] Yet there are exceptions to the principle of equitable distribution. Section 136 of the *BIA* provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the *BIA*. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the *BIA*; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the *BIA*. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

[36] The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

recouvrement global pour tous les créanciers : *Husky Oil*, par. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), p. 3.

[34] Pour assurer la viabilité de ce modèle, les créanciers ne doivent pas être autorisés à faire valoir leurs réclamations prouvables individuellement, c'est-à-dire hors du cadre de la procédure collective. L'article 69.3 de la *LFI* prévoit donc la suspension automatique des procédures engagées contre le failli, laquelle prend effet le premier jour de la faillite :

> **69.3** (1) Sous réserve des paragraphes (1.1) et (2) et des articles 69.4 et 69.5, à compter de la faillite du débiteur, ses créanciers n'ont aucun recours contre lui ou contre ses biens et ils ne peuvent intenter ou continuer aucune action, mesure d'exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite.

(Voir *R. c. Fitzgibbon*, [1990] 1 R.C.S. 1005, p. 1015-1016.)

[35] Il existe toutefois des exceptions au principe du partage équitable. Suivant l'art. 136 de la *LFI*, certains créanciers, les « créanciers privilégiés », sont payés en priorité. Il y a aussi des créanciers qui ne sont payés qu'après désintéressement de tous les créanciers ordinaires : par. 137(1), art. 139 et 140.1 de la *LFI*. De plus, la suspension automatique des procédures n'empêche pas les créanciers garantis de réaliser leur garantie : par. 69.3(2) de la *LFI*; *Husky Oil*, par. 9. Un tribunal peut également autoriser un créancier à introduire une procédure distincte et à contraindre le failli à payer une réclamation : art. 69.4 de la *LFI*. Ces exceptions reflètent les choix de politique générale effectués par le législateur pour permettre la réalisation de cet objectif de la faillite.

[36] Le fait que le débiteur soit libéré de ses dettes à la fin de la faillite permet de réaliser le deuxième objectif de la *LFI*, la réhabilitation financière du débiteur : *Husky Oil*, par. 7. Le paragraphe 178(2) de la *LFI* est rédigé en ces termes :

> (2) Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite.

TAB 3

Workers' Compensation Board *Appellant (Respondent)*

v.

Husky Oil Operations Ltd. *Respondent (Applicant)*

and

Her Majesty The Queen in right of Canada, as represented by the Minister of National Revenue, Her Majesty The Queen in right of the Province of Saskatchewan, as represented by the Minister of Human Resources, Labour and Employment, Her Majesty The Queen in right of the province of Saskatchewan, as represented by the Minister of Finance, Bank of Montreal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. and Deloitte & Touche Inc., as Trustee in Bankruptcy of the Estate of Metal Fabricating & Construction Ltd. *Respondents*

and

The Attorney General for Saskatchewan *Respondent (Intervener in the Court of Appeal)*

and

The Attorney General for Ontario,
the Attorney General for New Brunswick,
the Attorney General of British Columbia,
the Attorney General for Alberta,
the Workers' Compensation Board of Ontario,

Workers' Compensation Board *Appelante (Intimée)*

c.

Husky Oil Operations Ltd. *Intimée (Requérante)*

et

Sa Majesté la Reine du chef du Canada, représentée par le ministre du Revenu national, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Ressources humaines, du Travail et de l'Emploi, Sa Majesté la Reine du chef de la province de la Saskatchewan, représentée par le ministre des Finances, Banque de Montréal, Eric Zimmerman, Garth Price, Trevor Brown, Arthur Gingras, Kelly Houston, Darcy Kuzio, Hans Bohle, Charles Pshebenicki, Terry Sapergia, SBW—Wright Construction Inc., Campbell West (1991) Ltd., Fuller Austin Insulation Inc., United Industrial Equipment Rentals Ltd., Atco Enterprises Ltd. et Deloitte & Touche Inc., syndic de faillite de l'actif de Metal Fabricating & Construction Ltd. *Intimés*

et

Le procureur général de la Saskatchewan *Intimé (Intervenant en Cour d'appel)*

et

Le procureur général de l'Ontario,
le procureur général du Nouveau-Brunswick,
le procureur général de la Colombie-Britannique,
le procureur général de l'Alberta,

Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. [Emphasis added.]

9 The power to determine the priorities of distribution of the bankrupt's assets thus confirmed, Parliament has created an equitable distribution wherein the general rule is that creditors are to rank equally, with claims provable in bankruptcy being paid rateably (*Bankruptcy Act*, s. 141). The rule of creditor equality is subject to 10 classes of debt which are accorded priority in a stated order, the so-called list of "preferred" creditors (s. 136). Included in these classes of exceptions is "all indebtedness of the bankrupt under any Workmen's Compensation Act" in s. 136(1)(*h*), ranked eighth in the list. Lastly, the entire scheme of distribution is "[s]ubject to the rights of secured creditors" (s. 136) which, as Professor Hogg has noted, "enables secured creditors to realize their security as if there were no bankruptcy" (Hogg, *supra*, at p. 25-9).

B. *The "Quartet" of Supreme Court Bankruptcy Decisions*

10 In recent years, the constitutional relationship between the scheme of distribution under the *Bankruptcy Act* and various branches of provincial law governing property has received heightened scrutiny in the so-called "quartet" of decisions of this Court. Since my interpretation of the quartet differs from Iacobucci J.'s, I hope that I will be forgiven for re-canvassing that familiar terrain in order to explain the basis of my position.

(i) Overview of the Quartet

11 First, in *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35 (hereinafter *Re Bourgault*), the trustee in bankruptcy sought to cancel a privilege registered by the Quebec Deputy Minister of Revenue on the bankrupt's immovable

sur toutes les questions relevant du domaine de la faillite et de l'insolvabilité permet à ce dernier de légiférer sur la priorité relative des créanciers en cas de faillite ou de cession autorisée. [Je souligne.]

Après avoir ainsi reçu confirmation de son pouvoir d'établir l'ordre de priorité applicable au partage de l'actif du failli, le législateur fédéral a créé un plan de répartition équitable qui, en règle générale, veut que les créanciers soient sur un pied d'égalité et qu'il y ait paiement au prorata des réclamations pouvant être établies dans la faillite (*Loi sur la faillite*, art. 141). La règle de l'égalité des créanciers est assujettie à 10 catégories de créances classées selon un ordre de priorité, soit la liste dite des créanciers «privilégiés» (art. 136). L'une de ces catégories d'exceptions, «toutes dettes contractées par le failli sous l'autorité d'une loi sur les accidents du travail», prévue à l'al. 136(1)*h*), est au huitième rang de la liste. Enfin, l'ensemble du plan de répartition est appliqué «[s]ous réserve des droits des créanciers garantis» (art. 136), ce qui, comme l'a fait remarquer le professeur Hogg, [TRADUCTION] «permet aux créanciers garantis de réaliser leur garantie comme s'il n'y avait pas de faillite» (Hogg, *op. cit.*, à la p. 25-9).

B. *Le «quatuor» d'arrêts de la Cour suprême en matière de faillite*

Au cours des dernières années, dans quatre arrêts qualifiés de «quatuor», notre Cour a fait une étude particulière des rapports qui, du point de vue constitutionnel, existent entre le plan de répartition fondé sur la *Loi sur la faillite* et les divers aspects du droit provincial régissant la propriété. Puisque mon interprétation du quatuor d'arrêts diffère de celle du juge Iacobucci, j'espère que l'on me pardonnera de revenir en terrain battu pour expliquer le fondement de ma position.

(i) Aperçu du quatuor d'arrêts

Dans le premier arrêt, *Sous-ministre du Revenu c. Rainville*, [1980] 1 R.C.S. 35 (ci-après *Re Bourgault*), le syndic de faillite cherchait à faire annuler un privilège enregistré par le sous-ministre du Revenu du Québec sur l'immeuble du failli en

TAB 4

SUPREME COURT OF CANADA

CITATION: Orphan Well Association *v.* Grant Thornton Ltd., 2019 SCC 5

APPEAL HEARD: February 15, 2018
JUDGMENT RENDERED: January 31, 2019
DOCKET: 37627

BETWEEN:

Orphan Well Association and Alberta Energy Regulator
Appellants

and

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches)
Respondents

\- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

REASONS FOR JUDGMENT: (paras. 1 to 164)	Wagner C.J. (Abella, Karakatsanis, Gascon and Brown JJ. concurring)
DISSENTING REASONS: (paras. 165 to 292)	Côté J. (Moldaver J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Orphan Well Association and
Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and
ATB Financial (formerly known as
Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Ecojustice Canada Society,
Canadian Association of Petroleum Producers,
Greenpeace Canada,
Action Surface Rights Association,
Canadian Association of Insolvency
and Restructuring Professionals and
Canadian Bankers' Association *Interveners*

Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities associated with them or to satisfy secured creditors' claims ahead of company's environmental liabilities — Whether regulator's use of powers under provincial legislation to enforce bankrupt company's compliance with end-of-life obligations conflicts with trustee's powers under federal bankruptcy legislation or with the order of priorities under such legislation — If so, whether provincial regulatory regime inoperative to extent of conflict by virtue of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, s. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, s. 1(1)(n).

Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig*, at para. 25; see also *Teva*, at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva*, at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

[252] Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in *Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve the goals of certainty, consistency or institutional legitimacy.

[253] This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of

orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

[254] Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
>
> . . .
>
> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that <u>there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.</u> [Emphasis added; paras. 30 and 36.]

[255] In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The

TAB 5

CITATION: Credifinance Securities Limited v. DSLC Capital Corp., 2011 ONCA 160
DATE: 20110302
DOCKET: C51766

COURT OF APPEAL FOR ONTARIO

Goudge, Sharpe and LaForme JJ.A.

In the Matter of the Bankruptcy of Credifinance Securities Limited, of the City of Toronto, in the Province of Ontario

BETWEEN

Deloitte & Touche Inc.,
in its Capacity as Trustee in Bankruptcy of
Credifinance Securities Limited

Appellant

and

DSLC Capital Corp.

Respondent

Catherine Francis, for the appellant

Gregory Sidlofsky, for the respondent

Heard: January 7, 2011

On appeal from the order of Justice F. N. Marrocco of the Superior Court of Justice, dated February 16, 2010, with reasons reported at 63 C.B.R. (5th) 250.

DSLC to bypass the BIA. Her view was – as it continues to be – that in bankruptcy proceedings, there is no special status accorded to a victim of a fraud.

[32] Second, she fairly conceded – again as she does here – that constructive trust principles can be applied in bankruptcy proceedings, however, those principles are applied only in the most extraordinary cases. She relies on *Ascent Ltd. (Re)* (2006), 18 C.B.R. (5th) 269 (Ont. S.C.) as illustrating such a case. Indeed, in her oral submissions, counsel conceded that a trustee could, albeit in extraordinary circumstances, find a *de facto* constructive trust by allowing the property claim, or otherwise refer the issue for a hearing before a Bankruptcy Registrar or judge of the Superior Court.

[33] There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings. Both the case law and authors of texts make this clear, although the test for proving the existence of a constructive trust in a bankruptcy setting is high: L.W. Houlden & Geoffrey Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: WL Can, 2011) at F§5(1). The authors add this at F§5(8): "A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct" (citations omitted).

[34] *Ascent*, a case decided by an Ontario Registrar in Bankruptcy, is a case that demonstrates the type of circumstances that can make a case extraordinary. I found this case to be very instructive.

TAB 6

Fotios Korkontzilas, Panagiota Korkontzilas and Olympia Town Real Estate Limited *Appellants*

v.

Nick Soulos *Respondent*

INDEXED AS: SOULOS *v.* KORKONTZILAS

File No.: 24949.

1997: February 18; 1997: May 22.

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trusts and trustees — Constructive trust — Agency — Fiduciary duties — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

Real property — Remedies — Constructive trust — Agency — Real estate agent making offer to purchase property on behalf of client — Vendor rejecting offer but advising agent of amount it would accept — Agent buying property for himself instead of conveying information to client — Market value of property decreasing from time of agent's purchase — Whether constructive trust over property may be imposed and agent required to transfer property to client even though client can show no loss.

K, a real estate broker, entered into negotiations to purchase a commercial building on behalf of S, his client. The vendor rejected the offer made and tendered a counteroffer. K rejected the counteroffer but "signed it back". The vendor advised K of the amount it would accept, but instead of conveying this information to S, K arranged for his wife to purchase to property, which was then transferred to K and his wife as joint tenants.

Fotios Korkontzilas, Panagiota Korkontzilas et Olympia Town Real Estate Limited *Appelants*

c.

Nick Soulos *Intimé*

RÉPERTORIÉ: SOULOS *c.* KORKONTZILAS

No du greffe: 24949.

1997: 18 février; 1997: 22 mai.

Présents: Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Fiducies et fiduciaires — Fiducie par interprétation — Mandat — Obligations fiduciaires — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

Immeuble — Réparation — Fiducie par interprétation — Mandat — Un agent immobilier a présenté une offre d'achat concernant un immeuble au nom de son client — Le vendeur a rejeté l'offre, mais il a informé l'agent du montant qu'il accepterait — L'agent a acheté l'immeuble pour lui-même au lieu de transmettre l'information à son client — La valeur marchande de l'immeuble a diminué depuis que l'agent l'a acheté — Est-il possible d'imposer une fiducie par interprétation à l'égard de l'immeuble et d'ordonner à l'agent de le transférer à son client, même si ce dernier ne peut établir qu'il a subi une perte?

K, un courtier en immeubles, a entamé des négociations au nom de S, son client, en vue d'acheter un immeuble commercial. Le vendeur a rejeté l'offre et présenté une contre-offre. K a rejeté la contre-offre, mais il est revenu à la charge. Le vendeur a informé K du montant qu'il accepterait, mais au lieu de transmettre cette information à S, K a pris des dispositions pour que son épouse achète l'immeuble. L'immeuble a ensuite été assist them in the breaches of their duty are called to account" (p. 302).

43 I conclude that in Canada, under the broad umbrella of good conscience, constructive trusts are recognized both for wrongful acts like fraud and breach of duty of loyalty, as well as to remedy unjust enrichment and corresponding deprivation. While cases often involve both a wrongful act and unjust enrichment, constructive trusts may be imposed on either ground: where there is a wrongful act but no unjust enrichment and corresponding deprivation; or where there is an unconscionable unjust enrichment in the absence of a wrongful act, as in *Pettkus v. Becker*, *supra*. Within these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate.

44 The process suggested is aptly summarized by McClean, *supra*, at pp. 169-70:

> The law [of constructive trust] may now be at a stage where it can distill from the specific examples a few general principles, and then, by analogy to the specific examples and within the ambit of the general principle, create new heads of liability. That, it is suggested, is not asking the courts to embark on too dangerous a task, or indeed on a novel task. In large measure it is the way that the common law has always developed.

VII

45 In *Pettkus v. Becker*, *supra*, this Court explored the prerequisites for a constructive trust based on unjust enrichment. This case requires us to explore the prerequisites for a constructive trust based on wrongful conduct. Extrapolating from the cases where courts of equity have imposed constructive trusts for wrongful conduct, and from a discussion of the criteria considered in an essay by Roy Goode, "Property and Unjust Enrichment", in Andrew Burrows, ed., *Essays on the Law of*

sonnes qui les aident à manquer à leurs obligations soient appelées à rendre des comptes» (p. 302).

Je conclus qu'au nom de la conscience, l'application de la fiducie par interprétation est reconnue au Canada tant pour sanctionner des conduites fautives tels la fraude et le manquement à un devoir de loyauté que pour remédier à l'enrichissement sans cause et à un appauvrissement correspondant. Bien qu'elle soit souvent imposée parce qu'il y a à la fois conduite fautive et enrichissement sans cause, la fiducie par interprétation peut aussi être accordée pour l'un ou l'autre motif: lorsqu'il y a conduite fautive mais aucun enrichissement sans cause ni appauvrissement correspondant ou lorsqu'il y a enrichissement sans cause moralement inadmissible, en l'absence de conduite fautive, comme dans l'arrêt *Pettkus c. Becker*, précité. Dans le cadre de ces deux grandes catégories les règles de droit relatives à la fiducie par interprétation pourront évoluer et se préciser au fil des ans et selon les cas qui pourront se présenter.

McClean, précité, a résumé avec habilité le processus évoqué (aux pp. 169 et 170):

> [TRADUCTION] Le droit [en matière de fiducie par interprétation] en est peut-être arrivé à une étape où il est possible de dégager certains principes généraux à partir d'exemples précis et de créer, par analogie et dans le respect de ces principes généraux, de nouveaux chefs de responsabilité. À notre avis, il ne s'agit pas de demander aux tribunaux de se lancer dans une entreprise trop risquée ni même nouvelle, en fait, puisque dans une large mesure, c'est de cette manière que la common law a toujours évolué.

VII

Dans l'arrêt *Pettkus c. Becker*, précité, notre Cour a examiné sous tous leurs angles les conditions préalables à la fiducie par interprétation fondée sur l'enrichissement sans cause. La présente espèce nous oblige à étudier minutieusement les conditions essentielles à l'existence de la fiducie par interprétation fondée sur un comportement fautif. À la lumière des décisions des tribunaux d'*equity* imposant la fiducie par interprétation par suite de comportements fautifs et des critères

Restitution (1991), I would identify four conditions which generally should be satisfied:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(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 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.

examinés dans un article de Roy Goode intitulé «Property and Unjust Enrichment», publié dans *Essays on the Law of Restitution* (1991), sous la direction d'Andrew Burrows, je conclus que quatre conditions doivent généralement être réunies:

(1) le défendeur doit avoir été assujetti à une obligation en *equity*, c'est-à-dire une obligation du type de celles dont les tribunaux d'*equity* ont assuré le respect, relativement aux actes qui ont conduit à la possession des biens;

(2) il faut démontrer que la possession des biens par le défendeur résulte des actes qu'il a ou est réputé avoir accomplis à titre de mandataire, en violation de l'obligation que l'*equity* lui imposait à l'égard du demandeur;

(3) le demandeur doit établir qu'il a un motif légitime de solliciter une réparation fondée sur la propriété, soit personnel soit lié à la nécessité de veiller à ce que d'autres personnes comme le défendeur s'acquittent de leurs obligations;

(4) il ne doit pas exister de facteurs qui rendraient injuste l'imposition d'une fiducie par interprétation eu égard à l'ensemble des circonstances de l'affaire; par exemple, les intérêts des créanciers intervenants doivent être protégés.

VIII

Applying this test to the case before us, I conclude that Mr. Korkontzilas' breach of his duty of loyalty sufficed to engage the conscience of the court and support a finding of constructive trust for the following reasons.

First, Mr. Korkontzilas was under an equitable obligation in relation to the property at issue. His failure to pass on to his client the information he obtained on his client's behalf as to the price the vendor would accept on the property and his use of that information to purchase the property instead for himself constituted breach of his equitable duty of loyalty. He allowed his own interests to conflict with those of his client. He acquired the property wrongfully, in flagrant and inexcusable breach of his duty of loyalty to Mr. Soulos. This is the sort of situation which courts of equity, in Canada and

VIII

Appliquant ce critère à l'espèce, je conclus que le manquement par M. Korkontzilas à son devoir de loyauté a suffi pour engager la conscience du tribunal et lui permettre de conclure à l'existence d'une fiducie par interprétation pour les motifs suivants. 46

Premièrement, M. Korkontzilas était assujetti à une obligation en *equity* relativement à l'immeuble en cause. L'omission de faire part à son client de l'information qu'il avait obtenue au nom de ce dernier quant au prix que le vendeur accepterait pour l'immeuble et l'utilisation de cette information pour acheter lui-même l'immeuble constituent un manquement au devoir de loyauté imposé par l'*equity*. Il a permis que ses propres intérêts entrent en conflit avec ceux de son client. Il a acheté l'immeuble de manière irrégulière, après avoir manqué de façon flagrante et inexcusable à son devoir de 47

TAB 7

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Caterpillar Financial Services v. 360networks corporation et al,***
2007 BCCA 14

Date: 20070109
Docket: CA32259

Between:

Caterpillar Financial Services Limited

Appellant
(Plaintiff)

And

**360networks corporation, 360fiber ltd., 360finance ltd.,
Carrier Centers (Canada) Ltd.,
360Urbanlink Ltd., 360networks (cdn fiber) Ltd.,
360networks services ltd., 360cayer ltée**

Respondents
(Defendants)

And

JPMorgan Chase Bank

Respondent
(Intervenor)

- and -

Docket: CA32286

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

In the Matter of the *Nova Scotia Companies Act*, S.C., c. 81

In the Matter of the *Companies Act*, R.S.B.C. 1996, c. 62

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

Between:

Caterpillar Financial Services Limited

Appellant

And

**360networks inc., 360networks (holdings) ltd., 360fiber ltd.,
360finance ltd., Carrier Centers (Canada) Ltd.,
360 Urbanlink Ltd., 360Networks (Cdn Fiber) Ltd.,
360networks services ltd., 360cayer ltée
360engineering ltd., 360pacific (canada) inc.,
360networks sub inc., Threesixty Atlantic (Barbados) Inc.,
360atlantic (canada) inc., 360atlantic (usa) inc.,
360atlantic sales (usa) inc.**

Petitioners
(Respondents)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick

D.A. Garner and J.A. Rost	Counsel for the Appellants
R.A. Millar and K. Robertson	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia November 17, 2006
Place and Date of Judgment:	Vancouver, British Columbia January 09, 2007

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Madam Justice Prowse

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

[1] The appellant, Caterpillar Financial Services Limited ("Caterpillar") appeals from the 11 August 2004 order of the Supreme Court that, with one relatively modest exception, denied Caterpillar's claim to recover the amounts owed to it under its equipment leases to the respondents, the 360 group of companies ("360"). Caterpillar's claims were determined in the context of proceedings under the ***Companies' Creditors Arrangement Act***, R.S.C. 1985, c. C-36 ("***CCAA***"), in which 360 sought to reorganize its affairs.

BACKGROUND

[2] The background facts to this appeal are deceptively straightforward because, as it will become evident, application of the law to these facts is complex. The essential facts are as follows.

[3] At all material times in question, 360 was involved in the development and construction of a worldwide fibre optic communications network. The work was initially undertaken by Ledcor Industries Limited. Ledcor Industries Limited subsequently transferred the fibre optic portion of its business to Ledcor Communications Ltd. in 1999. The trial judge found that Ledcor Communications Ltd. changed its name to 360fiber ltd. no later than on 28 June 2000.

[4] Caterpillar is in the business of leasing heavy duty construction equipment. On 14 February 1997, 360fiber's pre-predecessor company, Ledcor Industries Limited, entered into a Master Finance Lease with Caterpillar. The lease

contemplated that each piece of equipment (referred to as a "unit") leased by Caterpillar would be documented by a subsequently issued schedule. Essentially, each schedule constituted a separate lease agreement, but the provisions of the Master Finance Lease applied to each lease agreement.

[5] On 30 March 1999, 360fiber's predecessor company, Ledcor Communications Ltd., entered into a new Master Finance Lease. Under the terms of that lease, 360fiber had the option at the end of the term of each lease agreement to purchase the equipment, return the equipment, or agree with Caterpillar to extend the term of the lease.

[6] The governing Master Finance Lease provided:

> 4.1 Lessee shall not … (f) sell, assign or transfer, or directly or indirectly create, incur or suffer to exist any lien, claim, security interest or encumbrance on any of its rights hereunder or in any Unit.
>
> …
>
> 4.6 The Units are and shall remain the personal property of Lessor irrespective of their use or manner of attachment to realty, unless such units are purchased by the Lessee at the end of the lease term or at such time as Lessee has paid to Lessor the "Balance Due" (as hereinafter defined).
>
> …
>
> 11. Unless assigned by Lessor or applicable law provides otherwise, title to and ownership of the Units shall remain in Lessor as security for the obligations of Lessee hereunder until Lessee has fulfilled all of such obligations. Lessee hereby grants to Lessor a continuing security interest in the Units … and all proceeds of all of the foregoing, to secure the payment of all sums due hereunder.

"Balance Due" was defined under each Master Finance Lease as the sum of:

> (i) all amounts then due or accrued under this Lease with respect to such Unit, (ii) the present value of the entire unpaid balance of all rental for such Unit, and (iii) the present value of the … "Purchase Option Price" … of such Unit set forth on the applicable Schedule, (iv) less any insurance proceeds …

Each of the schedules issued pursuant to the Master Finance Leases contained the following option:

> At the end of the Lease term with respect to the Units, provided this Lease has not been earlier terminated with respect to such Units, Lessee may by written notice to Lessor no more than 60 days prior to the end of the Lease Term with respect to any Unit, elect to purchase at the end of such term such Unit for the Purchase Price of $ … If Lessee does not elect to purchase such Unit at the end of such term, Lessee shall return such Unit to Lessor as provided in Section 4 of the Master Finance Lease …

[7] This appeal centers on six units:

(a) Unit 1 was leased for four years commencing April 1997. Financing statements were registered for this unit under s. 43 of the ***Personal Property Security Act***, R.S.B.C. 1996, c. 359 ("***PPSA***"). However, Caterpillar did not file a financing change statement under s. 51 of the ***PPSA*** when Ledcor Communications Limited changed its name to 360fiber.

(b) Unit 2 was leased for three years commencing August 1999. The trial judge found, and Caterpillar does not contest this finding on appeal, that Caterpillar failed to register a financing statement for this unit under the ***PPSA***.

(c) Unit 3 was leased for three years commencing August 1999. No financing statement was registered for this unit.

(d) Unit 4 was leased for three years commencing December 1997. The term was extended for two years by a modification agreement. Caterpillar registered financing statements and financing change statements for this unit.

(e) Unit 7 was leased for three years commencing April 2000. Financing statements and financing change statements were registered for this unit.

(f) Unit 8 was leased for one year commencing June 2000. The term was extended for three years by a modification agreement. Financing statements and financing change statements were registered for this unit.

[8] The total amount claimed by Caterpillar in respect of these units was $785,392.27.

Disposition of the Units and Use of Sale Proceeds

[9] By February 2001, 360 was experiencing financial difficulties. Consequently, 360 sought to dispose of its leased equipment. The trial judge accepted that, in late January or early February 2001, Caterpillar consented to 360fiber's sale of about 60 of Caterpillar's leased units during the currency of the applicable leases and subsequent retention of the "equity."

[10] On 16 February 2001, 360fiber provided Caterpillar with a list of 66 units that were to be auctioned. The list did not include the six units that are the subject of this appeal.

[11] In April 2001, 360fiber sold units 7 and 8 directly to a U.S. railroad company. The sale proceeds of $231,902.79 (U.S.) were deposited into 360's U.S. bank account on 9 May 2001. At the time of the deposit, the account had a credit balance. However, it went into an overdraft position by the close of business on 29 June 2001.

[12] 360 concedes that the sale of units 7 and 8, and the deposit of the proceeds therefrom into its U.S. account, was in breach of its covenant to pay Caterpillar under the Master Lease Agreement. However, Caterpillar recognizes its inability to trace the sale proceeds because 360 deposited the proceeds into an account that became overdrawn at the material time.

[13] On 12 June 2001, Ritchie Bros. Auctioneers ("Ritchie") wrote two letters to Caterpillar. One letter was from Ritchie in Richmond, B.C., advising Caterpillar that on or about 26 June 2001, it was selling in Canada, the equipment described in two schedules attached to the letter. The letter requested Caterpillar to confirm if it had an interest in any of the pieces of equipment and, if so, to confirm that it would release its interest upon receipt of either a buyout amount indicated by Caterpillar as of 18 July 2001 or the net sale proceeds.

[14] The second letter was from Ritchie in Portland, Oregon, advising Caterpillar that on or about 22 June 2001, Ritchie was selling in the U.S., the equipment

described in the schedule attached to the letter. It similarly requested Caterpillar to confirm if it had an interest in any of the pieces of equipment and, if so, to confirm that it would release its interest upon receipt of either a buyout amount indicated by Caterpillar as of 16 July 2001 or the net sale proceeds.

[15] In faxed responses to Ritchie, Caterpillar indicated a buyout figure beside each description of equipment in which it claimed an interest. Caterpillar indicated that it would release its interest in the equipment upon receipt of the buyout amounts.

[16] Units 1, 3 and 4 were included in the schedule attached to the Canadian letter. Caterpillar failed to quote a figure or otherwise indicate an interest in those units.

[17] Unit 2 was included in the schedule attached to the U.S. letter. Again, Caterpillar failed to quote a figure or otherwise indicate an interest in this unit.

[18] The U.S. auction was held on or about 22 June 2001. The net proceeds, including those from the sale of unit 2, were $863,563.34 (U.S.). On or about 11 July 2001, Ritchie distributed the net sale proceeds by forwarding $760,470 (U.S.) to Caterpillar and $103,093.34 (U.S.) to 360. 360 deposited the cheque into its U.S. current account in Vancouver on 15 August 2001, at which time the account was in an overdraft position.

[19] The Canadian auction was held on or about 26 June 2001. The net proceeds, including those from the sale of units 1, 3 and 4, were $827,365.94. On

or about 13 July 2001, Ritchie distributed the net sale proceeds by forwarding $178,556.89 to another equipment lessor and $648,809.05 to 360. 360 deposited the cheque into its current account in Vancouver on 15 August 2001, at which time the account was in an overdraft position.

360's *CCAA* Proceedings

[20] During the period 360 was disposing of the leased equipment, it was also planning to restructure its affairs under the ***CCAA***. On 28 June 2001 (the "Filing Date"), 360 commenced proceedings under the ***CCAA***. The initial stay order was obtained on the Filing Date. The confirmation order granted on 20 July 2001 contained, *inter alia*, a stay of all proceedings against 360. Most significantly, the initial stay order and the confirmation order restricted 360 to payment of obligations incurred only after the Filing Date to persons who advance or supply goods after the Filing Date. 360 could make no payments on account of amounts owed by it to its creditors as of the Filing Date.

[21] Approximately one year later, on 24 July 2002 (the strongest candidate for the "Plan Filing Date"), the trial judge (who managed the case from the commencement of the ***CCAA*** proceedings) granted the procedural order that authorized 360 to file a plan of arrangement (the "Plan") substantially in the form of a plan dated 18 July 2002 and that set out the mechanisms for the filing of proofs of claim by creditors, the disallowance of claims by 360, and appeals from disallowances.

[22] Caterpillar submitted its proof of claim on or about 19 September 2002 and when 360 disallowed the claim, Caterpillar appealed the disallowance.

[23] On 27 August 2002, the requisite majorities of 360's creditors approved the Plan. The Supreme Court sanctioned the Plan on 4 September 2002.

[24] The Plan contained numerous conditions precedent, including the resolution of Caterpillar's claims. It established two classes of creditors: the Senior Lenders and the General Creditors. The Senior Lenders, of which JPMorgan Chase Bank was the agent, were to receive $135 million in cash, new secured notes in the amount of $215 million, and 80.5% of the equity of 360networks corporation. The Senior Lenders underwrote the ***CCAA*** proceedings by providing funding to 360 during the restructuring process. The amount owed to the Senior Lenders as of the Filing Date was $1.176 billion (U.S.). The Plan specified that it did not affect or compromise the claims of certain specified creditors, including:

> 3.3 Unaffected Creditors
>
> This Plan does not affect or compromise the Claims of the following Creditors and other Persons:
>
> (a) Post-Filing Claims of any Person;
>
> …
>
> (g) Claims of Secured Creditors (including Lien Creditors but excluding the Senior Lenders) to the extent that the Charge of such Secured Creditors against any affected assets, property and undertaking of any one of the Canadian Companies <u>was properly registered or perfected on the Filing Date, up to the realizable value of such assets as determined pursuant to the Procedural Order</u>, except to the extent provided for in section 3.4 hereof.
>
> [Emphasis added.]

[25] Section 3.4 of the Plan reads:

> 3.4 Affected Claims of Secured Creditors
>
> Secured Creditors other than Senior Lenders shall have no Voting Claim or Distribution Claim, except to the extent of any Deficiency Claim to which they may be entitled, in respect of the realizable value of the collateral for which a Charge has been properly registered or perfected by them, which value shall be determined by agreement between the Canadian Companies and such Secured Creditors, or by Order of the Court. The Canadian Companies shall satisfy their obligations to the Secured Creditors (other than in respect of that portion of the obligation which constitutes a Deficiency Claim) in accordance with the terms of the relevant security agreement …

[26] Certain definitions from the Plan are relevant to this appeal:

> "Charge" means a valid and enforceable security interest, lien, charge, pledge, encumbrance, … on any assets, property or proceeds of sale of any of the Canadian Companies or a right of ownership on any equipment which was leased by any of the Canadian Companies.
>
> "Claim" means any right or claim of any Person against any one or more of the Canadian Companies whatsoever, … in connection with any indebtedness, liability or obligation of any kind of the Canadian Companies, which indebtedness, liability or obligation is in existence at the Filing Date and which is not a Post-Filing Claim, and any interest that may accrue thereon up to and including the Filing Date where there is an obligation to pay such interest, pursuant to the terms of any contract with such Person by operation of law or in equity, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, perfected, unperfected, present, future, …based in whole or in part on facts which exist on or before the Filing Date, together with any other claims that would have been claims provable in bankruptcy had the Canadian companies become bankrupt on the Filing Date including, without restriction, a claim arising after the Filing Date as a result of the termination of an executory contract or lease by any of the Canadian

> Companies as part of the restructuring of the business of the Canadian Companies.
>
> “Creditor” means any Person having a Claim or a Post-Filing Claim against any one of the Canadian Companies …
>
> “Deficiency Claim” means that portion of the Claim of a Secured Creditor for which there would be no realizable value on liquidation of the Charge held by such Secured Creditor and which constitutes a General Creditor Claim under the Plan.
>
> “Plan Filing Date” means the date upon which this Plan is first filed with the Court in the CCAA Proceedings.
>
> “Secured Creditors” means any Creditor asserting a Charge, including the Senior Lenders and the Lien Creditors.

[27] The Plan essentially provided that Secured Creditors’ security agreements would be honoured as long as the realizable value of the assets covered by the security agreement was equal to or greater than the amount due under the security agreement. If the realizable value was less than the amount owed under the security agreement, the Plan treated the creditor as an unsecured creditor for the amount of the shortfall or deficiency and as a secured creditor to the extent of the realizable value of the assets.

[28] A significant flaw in the procedural order of 24 July 2002 was the absence of a mechanism for determining the realizable value of assets. Further, the order was silent as to the date on which that determination was to be made: this date came to have critical importance.

[29] If the relevant date was the Filing Date (28 June 2001), the proceeds of sale of the units were traceable and exceeded the amounts owed by 360 under the lease

agreements. In this scenario, Caterpillar would not have a Deficiency Claim in respect of any of the units and would be entitled to payment in full.

[30] However, if the relevant date was the Plan Filing Date (24 July 2002), the sale proceeds, having been deposited into bank accounts that were either overdrawn or became overdrawn by 24 July 2002, were no longer traceable and the realizable value of Caterpillar's collateral in the units was zero. In this scenario, Caterpillar would have a Deficiency Claim in the full amounts owed under the lease, which would be compromised under the Plan.

[31] The Plan clarified that the treatment of claims was final and binding on all creditors.

The Trial Judgment

[32] Caterpillar appealed from 360's disallowance of its claims in the ***CCAA*** proceeding. In addition, Caterpillar was granted leave to commence a separate action in which it claimed, *inter alia*, that it had a constructive trust over all the sale proceeds of the units.

[33] The trial judge heard both actions at the same time. He framed the issues as follows at para. 34 of his reasons ((2004), 4 C.B.R. (5^{th}) 4, 35 B.C.L.R. (4^{th}) 145 (S.C.)):

> [34] The issues raised in the CCAA appeal and Action No. LO32238, as framed by counsel for Caterpillar but in my words, are as follows:
>
> (a) is Caterpillar a Secured Creditor under the Plan entitled to payment under its lease agreements

covering the Units (the "Lease Agreements") pursuant to section 3.4 of the Plan?

(b) does Caterpillar have Post-Filing Claims under the Plan as a result of breaches of constructive trusts after the Filing Date?

(c) what is the amount owed to Caterpillar in respect of the Units which was not compromised by the Plan?

[34] As the trial judge noted, Caterpillar abandoned its claim that it was entitled to a trust over all of 360's assets or that it could trace the proceeds from the sales of the units.

[35] The trial judge concluded as follows:

(a) Caterpillar fell within the definition of "Secured Creditor" as defined by the Plan. However, the full amounts owing under the lease agreements were compromised by the Plan as Deficiency Claims. This conclusion was premised on the trial judge's determination that the date for ascertaining the realizable value of Caterpillar's collateral was the Plan Filing Date (24 July 2002).

(b) Caterpillar was not entitled to a declaration of constructive trust over the sale proceeds from units 1, 2 and 3, but was entitled to such a declaration to the extent of the buyout amounts under the relevant lease agreements in respect of units 4, 7 and 8. The trial judge noted that 360 improperly sold <u>the units themselves</u>, as opposed to <u>its rights in any units</u>. Further, the trial judge concluded that there were two independent juristic reasons for 360's enrichment in respect of units 1, 2 and 3. The first concerned Caterpillar's general agreement that 360 could sell equipment and retain the “equity”. The second concerned the Senior Lenders’ priority in respect of units 1, 2 and 3 by reason of Caterpillar’s failure to perfect its security in units 2 and 3, and its failure to register a financing change statement in respect of unit 1. Consequently, Caterpillar’s claim for unjust enrichment applied only to units 4, 7 and 8.

(c) The breach of trust relating to the sale proceeds from unit 4 constituted a Post-Filing Claim that was not compromised by the Plan. This conclusion rested on the trial judge’s determination as to when the breach of trust occurred. The trial judge decided that in respect of units 7 and 8, it was at one of two dates: either when 360 received the proceeds and deposited them into its bank account without remitting the buyout amounts to Caterpillar (9 May 2001) or when the funds were no longer available to 360 to reduce its indebtedness to others. Although the trial judge favoured the first date, he found it unnecessary to decide the issue because in either case, the breach occurred before the Filing Date (28 June 2001). He therefore concluded that the claims in respect of units 7 and 8 were pre-filing claims that were compromised by the Plan. In contrast, because the proceeds from the sale of unit 4 were deposited into 360’s overdrawn bank account on 15 August 2001, it constituted a Post-Filing Claim.

ISSUES

[36] Caterpillar alleges that the trial judge erred:

(a) in law, in relation to Caterpillar's claim for payment in full as a Secured Creditor under the Plan, in finding that the date for determination of the realizable value of the sale proceeds of the Units was to be a date after the proceeds had been wrongfully used by 360 to reduce its own indebtedness.

(b) in law, in relation to Caterpillar's claim for a constructive trust over the sale proceeds of Units 1, 2 and 3, in finding that the priority of the general security held by 360's bankers was (a) relevant to a Post Filing Claim and (b) properly a factor to be considered in determining whether to declare the constructive trust.

(c) in law, in relation to Caterpillar's claim for damages for breach of the constructive trust declared by the court over the proceeds of sale of Units 7 and 8, in finding that the only acts relevant to the claim of breach of trust occurred before the Filing Date.

(d) in law, further in relation to Caterpillar's claim for damages for breach of the constructive trust declared by the court over the proceeds of sale of Units 7 and 8, in finding that it was the act of writing the cheques on the trust funds' bank account which constituted the breach of trust, rather than the actual withdrawal of funds.

[37] Caterpillar's grounds of appeal are conveniently divided into two categories: those that relate to its claims as a Secured Creditor (ground (a)) and those that relate to its claims under constructive trust principles (grounds (b), (c) and (d)).

DISCUSSION

Secured Creditor Claim

[38] As I have noted, the trial judge found that Caterpillar was a Secured Creditor as defined by the Plan. Caterpillar agrees with this finding. Conversely, while 360 agrees with the final outcome, it takes issue with this finding.

[39] In any event, Caterpillar submits that the Plan could have simply specified that the court determine the priorities of competing security interests prior to paying the Secured Creditors. Caterpillar contends that the Senior Lenders, by approving

the Plan, agreed to forego priority battles and essentially allowed each Secured Creditor to be paid according to the Plan.

[40] Caterpillar thus argues that priority issues have no place in ***CCAA*** proceedings. 360, on the other hand, argues that priority issues are central to this case.

[41] At this point, it is instructive to consider the purpose of the ***CCAA*** regime. This Court in ***Chef Ready Foods Ltd. v. HongKong Bank of Canada*** (1990), 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) at paras. 10 and 22 stated:

> [10] The purpose of the C.C.A.A. 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.
> …
>
> [22] The C.C.A.A. was enacted by Parliament in 1933 when the nation and the world were in the grip of an economic depression. When a company became insolvent liquidation followed because that was the consequence of the only insolvency legislation which then existed - the *Bankruptcy Act* and the *Winding-up Act*. Almost inevitably liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

[42] While it might be suggested that ***CCAA*** proceedings may require those with a financial stake in the company, including shareholders and creditors, to compromise some of their rights in order to sustain the business, it cannot be said that the priorities between those with a financial stake are meaningless. The right of creditors to realize on any security may be suspended pending the final approval of

the court, but this does not render their potential priority nugatory. Priorities are always in the background and influence the decisions of those who vote on the plan.

[43] In "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Canadian Bar Rev. 587 at 595-97, the learned author Stanley E. Edwards explains the necessity of considering priorities in ***CCAA*** proceedings:

> In order to make an equitable redistribution of the securities of a company and the other claims against it, it is important to classify the creditors and shareholders according to their contract rights. Most important will be their respective rights of participation in the distribution of the company's income while it is operating, and its assets on liquidation. <u>Included also will be the power which secured creditors would have but for the C.C.A.A. to realize upon the property by foreclosure in priority to other claimants</u>. I would suggest that the aspect of these rights to be first considered should be not their face or nominal value, but rather what they would in reality be worth if the company had been liquidated rather than reorganized. This would entail a valuation and estimate of what the assets would bring at a public sale, or be worth to the secured creditors upon foreclosure. There can hardly be a dispute as to the right of each of the parties to receive under the proposal at least as much as he would have received if there had been no reorganization…
>
> …<u>The United States Supreme Court</u> by adopting the absolute priority doctrine as a "fixed principle", <u>has in effect compelled the full recognition in a plan of all of the former nominal participation rights of senior claimants in priority to any rights of junior creditors or stockholders</u>. It has held that although the requirements of feasibility may preclude giving senior claimants the same type of participation as they had before, they may be compensated for giving up seniority or a high interest rate by giving them a larger face value of inferior securities or some other concession. This rule…may well necessitate the exclusion of some of the junior classes from any participation in the reorganized company…
>
> In England, on the other hand, the courts will sanction any scheme if the formal statutory requirements have been satisfied and <u>if the senior classes obtain at least what they would be entitled to on liquidation</u>, regardless of how the increase in value resulting from the reorganization is distributed…
>
> …it would seem to me that considerations of policy point to the desirability of adopting the American rule… [Emphasis added.]

[44] According to Edwards (at 603), priorities are also relevant in the classification of creditors under the ***CCAA***:

> [T]he court should examine the nature of the claims of the creditors in order to classify them properly. For example, no two secured creditors should be grouped together unless their security is on the same or substantially the same property and <u>in equal priority</u>. Further divisions may be made on the basis of other legal preferences or according to whether the claim is liquidated or unliquidated, absolute or contingent. [Emphasis added.]

[45] In ***Re Stelco Inc.*** (2005), 204 O.A.C. 205, 78 O.R. (3d) 241 (C.A.), the court articulated relevant principles in determining "commonality of interest" for ***CCAA*** classification purposes. The court stated as follows at para. 23:

> In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 12 (Alta. Q.B.), Paperny J. nonetheless extracted a number of principles to be considered by the courts in dealing with the commonality of interest test. At para. 31 she said:
>
>> In summary, the cases establish the following principles applicable to assessing commonality of interest:
>> …
>> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>> …

[46] The Ontario Court of Appeal's decision in ***Re 1078385 Ontario Ltd.*** (2004), 206 O.A.C. 17, 16 C.B.R. (5th) 152 [***Bob-Lo Island***] suggests that secured creditors may assume a leadership role in a restructuring process that has traditionally been directed by debtor companies to the company's general benefit. Further, the decision appears to create an opportunity for secured creditors to use the ***CCAA*** as an efficacious shortcut to enforce their security. Ultimately, ***Bob-Lo Island***

represents the evolution of the role of secured creditors under the ***CCAA***, and the use of the statute as a flexible and advantageous restructuring tool for secured creditors. The Ontario Court of Appeal, in dismissing a motion for leave to appeal a decision of the Ontario Superior Court of Justice, held that the fact that a plan of arrangement under the ***CCAA*** is put forth by a secured creditor, which plan vests all of the debtor company's assets into a non-arm's length purchaser and operates exclusively for the benefit of secured creditors, does not, in and of itself, negate the fairness and reasonableness of such a plan where it can be shown that, even outside of the plan, the assets of the debtor company will not generate any recovery for unsecured creditors. In response to the argument that the plan was a shortcut in the realization of assets without regard to traditional means of enforcing security, the Superior Court noted at para. 125: "To a certain extent, that is true, but I think that is the nature of the CCAA" ((2004), 16 C.B.R. (5^{th}) 144).

[47] As I have said, Caterpillar agrees with the trial judge's finding that it was a Secured Creditor as defined by the Plan. However, Caterpillar contends that the trial judge erred in finding that the date for determining realizable value was the Plan Filing Date (24 July 2002).

[48] The dispute arises because, contrary to s. 3.3(g) of the Plan, the procedural order did not contain a mechanism for determining the realizable value of assets. The trial judge resolved the issue as follows at paras. 43-47:

> [43] The Plan does not provide any clear assistance by specifying the date on which the realizable value of secured assets should be determined. Clause (g) of section 3.3 refers to the realizable value of the assets "as determined pursuant to the Procedural Order", which, as

mentioned above, does not contain a mechanism other than the proof of claim process. Section 3.4 provides that the value is to be "determined by agreement between the Canadian Companies and such Secured Creditors, or by Order of the Court".

[44] It is my view that, in the absence of a specific date being identified, the effective date of the valuation of the assets should be the date on which the Plan was formerly [sic] issued (namely, the Plan Filing Date). As was stated at section 4.13 of The Interpretation of Contracts 2nd ed. (London: Sweet & Maxwell, 1997):

> Since a contract must be interpreted as at the date when it was made, words must be given the meaning which they bore at that date …

In referring to the realizable value of the assets, the Plan must be taken to mean the current realizable value. It would not make sense for 360 to pay more for the asset than it was worth at the time 360 issued the Plan. Put in the context of the present circumstances, it would not make sense for 360 to agree to make payments under leases when it did not intend to use the leased equipment in its future operations.

[45] If it had been the intention that the realizable value of assets was to be determined as of a date other than the current date, it would have been very easy to specify an earlier date. For example, the requirement in clause (g) of section 3.3 for the proper registration or perfection of the Charge was that it be "registered or perfected on the Filing Date". The very next phrase in clause (g) makes reference to the realizable value of the assets but does not contain the same words "on the Filing Date". The drafter's mind had been directed to the "Filing Date" when drafting clause (g) and the absence of those words to modify the phrase "the realizable value of such assets" suggests that it was not the intention to have the assets valued as at the Filing Date.

[46] Support for this interpretation is found in the definition of "Equipment Lessor", which was defined to mean a Creditor holding a title interest in relation to equipment in the possession of the Canadian Companies at the Filing Date "which remains in the possession of the Canadian Companies on the Plan Filing Date". Caterpillar does not actually fall within this definition because the units were not in the possession of 360fiber at the Filing Date, but it is instructive of the Plan's treatment of equipment lessors generally.

[47] The term "Equipment Lessor" was used in the definition of "General Creditor" ("… in the case of an Equipment Lessor, any arrears outstanding as at the Filing Date"). General Creditors were the

> creditors whose claims were compromised under the Plan. The Plan demonstrates that it was the intention to require 360 to make payments on leases only if it would be using the leased equipment in its future operations (but excluding arrears owing on the Filing Date, which would be treated as an unsecured or general claim). The manner in which the definition of "Equipment Lessor" was drafted suggests that the full amounts owing under leases of equipment no longer in the possession of 360 on the Plan Filing Date would be compromised under the Plan.

[49] Caterpillar submits that since the drafters of the Plan omitted to articulate a mechanism for determining realizable value, the Plan itself should be of no use in making such determination. Ultimately, Caterpillar proposes that the proper date for valuation is the date on which the assets were "used" by 360 to reduce its indebtedness to others.

[50] In my opinion, Caterpillar's arguments cannot succeed. In the absence of a specified date for calculating realizable value, the trial judge considered all other reasonable sources for determining that critical date. To suggest that the Plan should not be considered in making this determination is unreasonable. It is true that the Plan contemplated that the procedural order would specify a mechanism for determining realizable value. However, the fact that the expectation was never realized does not render the Plan barren of meaning in this regard.

[51] Caterpillar's proposition – that the proper date for valuation of the assets is the date on which they were "used" by 360 contrary to the lease agreements or, if they were not "used" and hence still in existence, the date of the Plan (by which I assume Caterpillar to mean the Filing Date) – ignores the necessity of orderliness in ***CCAA*** proceedings, which the trial judge was obviously at pains to impose in the

case at bar. It would make little practical sense to determine realizable value before the Plan had been authorized to be put to creditors unless, of course, the Plan or procedural order so specified. Further, the alternative date proposed by Caterpillar (i.e. when the assets were used by the debtor to reduce its indebtedness to others) would yield unnecessary complexity and uncertainty. When could it be said that assets were "used"? Even if one could define when an asset was so "used", this formula would result in different valuation dates depending on when each asset was used.

[52] There can be no doubt that Caterpillar's security position was eroded between the Filing Date and the Plan Filing Date. However, Caterpillar had knowledge that 360 intended to sell Caterpillar's collateral. Conceivably, Caterpillar could have acted promptly to protect its position. It had sufficient opportunity to demand payment prior to the Filing Date. After the Filing Date, 360 was prohibited by the terms of the initial order to make any payments to creditors holding a pre-filing claim. Ultimately, Caterpillar's inaction contributed to the risk that materialized.

[53] In these circumstances, I am not persuaded that the trial judge erred in finding that the proper date for determining the realizable value of the assets was the Plan Filing Date (24 July 2002). Accordingly, it is unnecessary to decide whether, as 360 contends, the trial judge was in error in concluding that Caterpillar was a Secured Creditor as defined by the Plan.

Constructive Trust Issues

Units 1, 2 and 3

[54] First, Caterpillar contends that the trial judge erred in relation to its claim for a constructive trust over the sale proceeds of units 1, 2 and 3 in finding that the priority of the general security held by 360's bankers was relevant to a Post-Filing Claim and properly a factor to be considered in determining whether to declare a constructive trust.

[55] The trial judge applied the well-known test for unjust enrichment articulated in ***Pettkus v. Becker***, [1980] 2 S.C.R. 834, 34 N.R. 384 at para. 38. The test features three elements: first, an enrichment; second, a corresponding deprivation; and third, an absence of any juristic reason for the enrichment. 360 conceded that Caterpillar, in not receiving the sale proceeds from the units, suffered a deprivation. The trial judge found an enrichment by 360 in the form of a reduction in its indebtedness. However, as I have noted, the trial judge found two independent juristic reasons for the deprivation. First, Caterpillar agreed to 360's sale of the leased equipment and subsequent retention of the "equity". Second, the Senior Lenders enjoyed priority over Caterpillar in respect of units 1, 2 and 3 because of the failure of the latter to perfect its security over these units.

[56] Caterpillar's argument rests on its assertion that constructive trust claims must be analyzed as Post-Filing Claims as defined by the Plan:

> … any right or claim of any person against the Canadian Companies … arising from or caused by, directly or indirectly, any action taken by

> the Canadian Companies from and after the Filing Date [28 June 2001].

[57] However, this analysis ignores the essential question of when the claim to any constructive trust arose. There is no Post-Filing Claim if the right to assert the claim arose prior to the Filing Date. In my opinion, Caterpillar's argument is unsustainable because it rests on a logical fallacy. Caterpillar prematurely assumes the existence of a constructive trust. The proper approach is to determine whether a constructive trust arises <u>before</u> characterizing it as a Post-Filing Claim.

[58] 360 opposes the imposition of a common law constructive trust as being inconsistent with the priority provisions of the ***PPSA***. In support of its contention, 360 relies on s. 68(1) of the ***PPSA:***

> The principles of the common law, equity and the law merchant, <u>except insofar as they are inconsistent with the provisions of this Act</u>, supplement this Act and continue to apply. [Emphasis added.]

360 thus argues that Caterpillar is prevented from correcting its own defective registration and perfection in units 1, 2 and 3 by asserting a constructive trust.

[59] I recognize that Caterpillar's loss did not, strictly speaking, arise from its failure to <u>register or perfect</u> its security. Rather, Caterpillar's loss was the product of its failure to <u>protect</u> its security upon receiving notice that 360 intended to sell the units. The leases merely permitted 360 to sell its <u>rights</u> to the units. Thus, the sales intended, and in fact carried out, by 360 constituted a blatant breach of the leases.

[60] The trial judge addressed this issue at paras. 53 and 54:

> [53] The second reason proffered by counsel for 360 (as well as counsel for the Senior Lenders) relates to the criterion of an absence of juristic reason as well as the criterion of an enrichment. Counsel for 360 and the Senior Lenders relies upon the following passage from Luscar Ltd. v. Pembina Resources Ltd. (1994), 162 A.R. 35 (C.A.):
>
>> Where there exists a contract under which parties are governed, and one party gains by a breach of the same, that party is not truly enriched, because the breaching party takes that gain subject to its liability for breach of contract. If the other party does not sue within the time set out in the Limitations Act, then, without more, there is a juristic reason for the gain because the breaching party is entitled to rely on the intended limitation. (¶ 117)
>
> In my opinion, this passage does not apply to the present circumstances. 360fiber already had the contractual obligation to pay the amounts owing under the Lease Agreements prior to the sale of the Units. Its sale of the Units, and retention of the sale proceeds, was not subject to any consequential liability under the Lease Agreements. It was enriched without any new offsetting liability.
>
> [54] In addition, I do not believe that the sale of the Units by 360fiber was merely a breach of the Lease Agreements. It was prohibited by the terms of the Lease Agreements from selling its rights in any Unit, but it did more than simply sell its rights. It sold the Units themselves, including Caterpillar's ownership interests, as a result of an auctioneer's ability to convey title to purchasers. The sale of the Units constituted a wrong which cannot be properly characterized solely as a breach of contract. 360fiber did not have the right to sell the Units because Caterpillar owned them, not because the Lease Agreements prohibited the sale of the Units (what the Lease Agreements prohibited was the sale by 360fiber of its rights in the Units). It is true that I have found that Caterpillar gave a general consent to sales of its equipment by 360fiber. However, the consent was subject to the condition that Caterpillar would be paid the buyout amounts under each lease agreement, and this condition was never satisfied in relation to the Units.

[61] The availability of a remedial constructive trust in the commercial context has been the subject of considerable academic and judicial debate: see e.g. ***Re Ellingsen*** (2000), 142 B.C.A.C. 26, 190 D.L.R. (4^{th}) 47; ***Atlas Cabinets & Furniture Ltd. v. National Trust Co.*** (1990), 45 B.C.L.R. (2d) 99, 68 D.L.R. (4^{th}) 161 (C.A.);

British Columbia v. National Bank of Canada (1994), 52 B.C.A.C. 180, [1995] 2 W.W.R. 305. In particular, the existence of a contractual relationship between the plaintiff and defendant may preclude the imposition of a constructive trust. The general principle is stated by David M. Paciocco in "The Remedial Constructive Trust: A Principled Basis for Priorities and over Creditors", (1989) 68 Canadian Bar Rev. 315 at 341-42:

> There is widespread agreement that a party who has accepted the role of a general creditor should be denied proprietary relief. The decision in *Sinclair v. Brougham* is often used to make the point. There the depositors of the bank entered into their transactions with the expectations that they would be unsecured creditors of the bank. Allowing them to trace therefore gave them proprietary protection which was never expected. Only an out of court settlement with the other general creditors of the bank and the condition imposed by the court that the depositors recognize the claims of the shareholders prevented this from producing an unwarranted priority. It has therefore been suggested that:
>
> > As a general principle, … people who willingly choose to become unsecured creditors of an eventual bankrupt ought not to be given priority over other unsecured creditors through the extended use of the constructive trust remedy.
>
> There are two kinds of case where a claimant can be considered, every bit as much as the general creditors can, to have accepted the risk of the defendant's insolvency: where there are contractual dealings between the plaintiff and defendant which anticipate that the plaintiff will assume the status of a general creditor; and where the plaintiff's claim rests on a *quantum meruit* or *quantum valebat* basis in situations where there has been no reasonable expectation by the plaintiff of acquiring a proprietary interest.

[62] The application of this principle to the circumstances at bar is far from straightforward. Nonetheless, it is clear that when Caterpillar entered into the leases, it intended to secure the obligations owed by 360 by retaining title to the units. Pursuant to the ***PPSA***, Caterpillar could perfect its security by registration.

The failure to register or perfect its security meant that, as between Caterpillar and any third parties, Caterpillar was a general creditor in respect of units 2 and 3. Although Caterpillar had negotiated with 360 to be a secured creditor, it ultimately failed to protect its status as a secured creditor under the ***PPSA***. As such, Caterpillar must be taken to have accepted the risk posed by 360's eventual insolvency. In my view, Caterpillar should not be able to invoke constructive trust principles to alter its reduced creditor status.

[63] The trial judge instead adopted the analysis of the Supreme Court of Canada in ***Garland v. Consumers' Gas Co.***, [2004] 1 S.C.R. 629, 237 D.L.R. (4th) 385 at paras. 44-46:

> [44] The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reasons analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvas in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), … and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> [45] The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

> [46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

[64] Under either analysis, Caterpillar appears to be employing the remedy of a constructive trust to vault its security position in respect of units 1, 2 and 3, contrary to the provisions of the ***PPSA*** and the general framework of the ***CCAA***.

[65] In any event, I am unable to say that the trial judge erred in his analysis. Caterpillar satisfied the initial burden of showing there was no established category of juristic reason to defeat its claim. However, the trial judge proceeded to find two other juristic reasons, one of which was Caterpillar's failure to perfect its interest and the Senior Lenders' ensuing priority over Caterpillar with respect to units 1, 2 and 3.

[66] Further, I respectfully agree with the trial judge's alternative reason for refusing to declare a constructive trust in respect of units 1, 2 and 3 (at para.68):

> [68] If I am mistaken and the priority of the Senior Lenders over the security interest of Caterpillar in Units 1, 2 and 3 is not a juristic reason to prevent the declaration of a constructive trust, the rights of the Senior Lenders must still be taken into account before a constructive trust is declared. Lambert J.A. said the following in the Ellingsen decision:
>
> > A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances

> where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties. (¶ 71)

> If the priority of the Senior Lenders over Caterpillar is not a juristic reason and Caterpillar would have met the criteria of unjust enrichment in respect of Units 1, 2 and 3, I would exercise my discretion to decline to order a constructive trust over the proceeds from the sales of Unit 1, 2 and 3 as a result of the priority of the Senior Lenders over Caterpillar with respect to these proceeds.

[67] Before leaving this ground of appeal, I note that while Caterpillar concedes its failure to file a name change under s. 51 of the ***PPSA*** for unit 1, it cites ***Re Hewstan*** (1996), 42 C.B.R. (3d) 186, 12 P.P.S.A.C. (2d) 36 (B.C.S.C. Chambers) at para. 31 to support its assertion that perfection is undisturbed.

[68] Subsection 51(2) addresses the scenario in which a security interest is perfected by registration, but there is a subsequent change in the debtor’s name and the secured party knows of the change of name. The subsection places an obligation on the secured party to either amend the registration by registering a financing change statement disclosing the new name of the debtor or perfect its security by taking possession of the collateral. One of these measures must be taken within the time specified.

[69] The failure to comply with the requirement has different priority consequences depending on the type of interest in competition with the security interest. First, the security interest is subordinate to <u>any interest</u>, <u>other than a competing security</u>

interest, arising after the expiry of 15 days from the date the secured party acquired knowledge as to the debtor's new name. Second, the security interest is subordinate to a security interest that is registered or perfected after the expiry of 15 days from the date the secured party acquired knowledge as to the new name of the debtor. Finally, the security interest is subordinate to a security interest that is registered or perfected after the secured party acquired knowledge of the new name of the debtor and before the section has been complied with. However, if the secured party complies with the section or takes possession of the collateral before the expiry of the aforementioned 15-day period, but after the competing security interest is registered or perfected, the perfected status of its security interest remains unaffected.

[70] The underlying purpose of s. 51 is to preserve the integrity and utility of the registry when the debtor's name has changed. This change impacts the ability of a searching party to discover the existence of a security interest. Unless the secured party is obliged to amend its registration to reflect the debtor's name change, a search result obtained on the basis of the name of the person in possession or legal control of the property will fail to disclose the registration.

[71] ***Re Hewstan*** concerns the narrow issue of whether a trustee in bankruptcy qualifies as a person who has an "interest" in collateral. In contrast, the instant case does not deal with the issue of a trustee in bankruptcy's interest pursuant to s. 51(2)(c). It centers on s. 51(2)(d): the priority of Caterpillar in relation to that of a competing security interest. In ***Re Hewstan***, the chambers judge properly noted that s. 51(2) does not render a security interest "unperfected". Failure to file a notice of

name change does not undermine the validity of registration of a security interest. It solely impacts priority. Application of s. 51(2) of the ***PPSA*** results in Caterpillar's perfected security interest with respect to Unit 1 being subordinate to the Senior Lenders' perfected security interest.

[72] For the foregoing reasons, I am not persuaded that there is any merit in Caterpillar's second ground of appeal.

Units 7 and 8

[73] As I have already noted, the trial judge declared constructive trusts in favour of Caterpillar over the proceeds of sale of units 4, 7 and 8, to the extent of the buyout amounts under the lease. The trial judge found that the breach of trust claim over the sale proceeds from unit 4 constituted a Post-Filing Claim that was not released by the Plan. The trial judge awarded Caterpillar damages in a sum equal to the buyout amount for unit 4. Counsel for 360 advised us that he did not have instructions to appeal that order, which appears to have a monetary value approximating $32,000.

[74] However, the trial judge found that the breach of trust relating to the sale of units 7 and 8 was not a Post-Filing Claim. As such, it was compromised and released by the Plan. This finding hinged on the timing of the breach.

[75] The trial judge found that the breach of trust occurred at one of two times: first, when 360 received the sale proceeds and deposited them into its account without remitting the buyout amounts to Caterpillar (9 May 2001); or second, when

360 could no longer use the sale proceeds to pay Caterpillar because 360 had used the funds for other purposes. The trial judge found that, under the second scenario, the breach occurred no later than 27 June 2001. The trial judge concluded that the breach did not occur when the bank account balance fell below the sale proceeds from units 7 and 8 (28 June 2001). Rather, it occurred when 360 made withdrawals or issued cheques on the account which resulted in the account entering an overdraft position. The cheques that were posted to the account on 28 June 2001 dated from 6 June 2001 to 25 June 2001. They were date-stamped by the drawee bank on 27 June 2001. The trial judge rejected Caterpillar's submission that 360's omission to place stop payments on the cheques constituted an independent breach of trust.

[76] Caterpillar argues that the trial judge erred in finding that the only acts relevant to the breach occurred before the Filing Date (28 June 2001) and that the mere writing of a cheque would necessarily result in the payment of funds contrary to the trust. In furtherance of the latter assertion, Caterpillar maintains that it was open to 360 to issue a stop payment on the cheques or otherwise prevent the funds from being used prior to the Filing Date.

[77] Both Caterpillar and 360 agree that the holding of funds without Caterpillar's authorization – specifically, 360's failure to remit the buyout amounts to Caterpillar – constitutes a breach of trust. 360 improperly treated the money as its own rather than that of Caterpillar's.

[78] The crux of Caterpillar's argument is as follows. If the date of breach is 9 May 2001, Caterpillar's damages would be limited to the cost of wrongful holding; namely, interest or opportunity cost. Caterpillar acknowledges that a claim for those damages is compromised by the Plan.

[79] However, Caterpillar emphasizes that its claim is for the entirety of the sale proceeds. It contends that only after the Filing Date (28 June 2001) did 360 render the sale proceeds unavailable to Caterpillar. Caterpillar identifies this later breach of trust as a Post-Filing Claim.

[80] In my opinion, Caterpillar's arguments cannot succeed. Essentially, Caterpillar seeks to impose the date most favourable to its position in the ***CCAA*** reorganization. This is exemplified by the fact that Caterpillar concedes that 360's initial holding of the sale proceeds without remittance to Caterpillar constituted a breach of trust and yet it seeks to impose a subsequent (and in my opinion, completely uncertain) date for what it describes as a later breach of trust. In my view, this line of argument ignores the true nature of the breach. 360 was in breach from the moment it retained the sale proceeds without either remitting them to Caterpillar or Caterpillar's authorization. This breach continued until Caterpillar's claim was either satisfied or compromised by the Plan.

[81] I agree with 360's submission that the ***CCAA*** does not accord a creditor wide discretion to characterize its claim as a means of elevating its status. Caterpillar, after acknowledging that there was a breach of trust prior to the Filing Date, cannot

identify a post-Filing Date event – the actual withdrawal of trust funds – to convert its entire claim to a Post-Filing Claim.

[82] In my view, it was the act of writing cheques and delivering them to the payee that constituted the breach of trust. That act is identifiable and unambiguous: it is the active commission of a wrongful act. In contrast, the date on which funds are withdrawn is uncertain: is it when the account is actually reduced by the amount of the trust funds or when the drawee bank irrevocably loses its right to return the cheque through the clearing process?

[83] Wherever possible, the law should favour certainty. In my opinion, the trial judge did not err in fixing the date of the breach to be when the breach was being actively committed, as opposed to when it was allegedly being committed by omission.

CONCLUSION

[84] For all of the above reasons, I would dismiss Caterpillar's appeal.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Prowse'

I agree:

"The Honourable Madam Justice Saunders"

TAB 8

Date: 20170421
Docket: BK 14-01-03541
(Winnipeg Centre)
Indexed as: CIBC Wood Gundy Inc. v. BDO Canada Ltd.
Cited as: 2017 MBQB 71

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: THE BANKRUPTCY OF ROBERT ELIAS, OF THE CITY OF WINNIPEG, IN THE PROVINCE OF MANITOBA

BETWEEN:	**APPEARANCES:**
CIBC WOOD GUNDY INC., A DIVISION OF CIBC WORLD MARKETS INC., applicant,	Sherri Walsh and Kevin Toyne for the applicant CIBC Wood Gundy Inc.
- and -	
BDO CANADA LTD., TRUSTEE OF THE ESTATE IN BANKRUPTCY OF ROBERT ELIAS, respondent.	Andrew Loewen for the respondent BDO Canada Ltd.

AND BETWEEN:	
BDO CANADA LIMITED, applicant,	Andrew Loewen for the applicant BDO Canada Limited
- and -	
ROBERT ELIAS, respondent.	Victoria Lehman for the respondent Elias
	Judgment delivered: April 21, 2017

breached his duties and obligations to the Trustee respecting the agreed surplus income of $712 per month. Fifth, I have no doubt that Mr. Elias was fully aware of his obligations once he entered into bankruptcy proceedings in October 2013 and has acted willfully in breaching those obligations.

[20] As to the legal analysis, there is no dispute of the court's jurisdiction to deal with this application (s. 183(1)(f)), nor of CIBC's ability to bring the application (s. 37). And, the parties agree that this situation engages the interpretation and application of the rule in ***Ex Parte James*** (***Re: Condon*** (1874), 9 Ch. App. 609).

[21] As explained in Houlden, Morawetz and Sarra's ***The 2016 Annotated Bankruptcy and Insolvency Act***, (Toronto: Carswell, 2016) at p. 423, the rule in ***Ex Parte James*** generally applies where money has been remitted to a Trustee in bankruptcy under a mistake in law or equity. Depending on the situation, even if a Trustee has the legal right to property, the court will not permit the exercise of that right if it would be inconsistent with natural justice to do so, but rather may order the money be returned to the payor because the Trustee, as an officer of the court, should do the fullest equity. "The rule is a prerogative of mercy reposing in the bankruptcy court to alleviate cases of unusual hardship in which adherence to strict legal or equitable rights would work a manifest injustice …." (p. 423). Further, the authors summarize at p. 423:

> For the rule to apply, the following conditions must be met:

> (1) The bankrupt estate must have been enriched or could be enriched at the expense of the person making the claim ….
>
> (2) In most cases, the claimant must not be in a position to file a proof of claim in the bankruptcy ….
>
> (3) To allow the trustee to retain the enrichment would be unfair and unjust. The court will not lend assistance to or encourage the trustee in bankruptcy in any transaction that would result in a dishonest or unjust advantage being obtained by the bankrupt estate that would be inconsistent with natural justice….

Here the second criterion is not in dispute, while the first and third are nuanced.

[22] What makes this case unique from other cases where the rule in ***Ex Parte James*** has been considered is primarily the notion that, as initially proposed by CIBC, Mr. Elias would be entitled to the monies returned to CIBC by the Trustee. But allowing that would benefit Mr. Elias in circumstances where he has utterly failed to comply with his bankruptcy obligations to remit the inheritance property and surplus income to the Trustee in an amount that far exceeds the amount that CIBC claims. Further, it would effectively sideline the Trustee's right and duty to claim surplus income from all of the restricted share monies. Instinctively, this does not make sense. However, CIBC's position as a party requiring relief for its mistake is founded on several good grounds.

[23] One, the relationships between the parties are important. CIBC is an independent party with their own peculiar interests. They are not a proxy for Mr. Elias and they are not trying to facilitate an advantage for him. They now recognize that once they repossess the funds they mistakenly paid they have no further interest in what happens to the funds provided they receive a court order as to how to deal with the funds.

TAB 9

COURT FILE NO.: 08-CL-7840
DATE: 20091014

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF an Application under section 47(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.43, as amended

B E T W E E N:	)	
BANK OF MONTREAL, as agent for BANK OF MONTREAL, THE BANK OF NOVA SCOTIA and ALBERTA TREASURY BRANCHES Applicant	)	**Douglas O. Smith**, for the Applicant **Jonathan F. Lancaster**, for ADP Canada Co.
- and -	)	**John A. MacDonald** for the Interim Receiver
GRAFIKOM LIMITED PARTNERSHIP, GRAFIKOM GENERAL PARTNER INC., GRAFIKOM SPEEDFAST LIMITED and GRAFIKOM GRENVILLE LIMITED Respondents	)	
	)	**HEARD:** June 8, 2009 and October 1, 2009

Hoy J.

REASONS FOR DECISION

[1] Within hours after RSM Richter Inc. (the “Receiver”) was appointed by the court as interim receiver and receiver manager of all of the assets and undertakings of Grafikom. Speedfast Limited (“Speedfast”) at the behest of Bank of Montreal (“BMO”), Phillip Healey, a former Speedfast employee retained by the Receiver to perform a specified task, triggered the payment of Speedfast’s payroll by ADP Canada Co. (“ADP”), Speedfast’s payroll services provider. Pursuant to the payroll services agreement made between ADP and

Speedfast, ADP paid Speedfast's employees, and immediately sent a corresponding debit instruction to Speedfast's bank. Speedfast was unable to pay ADP as required by that agreement.

[2] Mr. Healey had not been retained, authorized or directed, by the Receiver to trigger the payment and the Receiver was unaware that he had done so.

[3] ADP seeks an order requiring the Receiver to pay it the amount that it is out-of-pocket as a result of ADP's breach of the agreement, allegedly $118,593.20. Such a payment would reduce the distribution to BMO, Speedfast's first secured creditor, by a corresponding amount. BMO opposes ADP's motion. It is not disputed that if ADP had not paid Speedfast's employees, the Receiver would have been required to pay each of the employees up to $2,000 out of Speedfast's current assets before paying any other creditors, secured or unsecured, pursuant to s. 81.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). The amounts available for distribution to BMO would have been reduced accordingly.

[4] At my request, the Receiver provided a report regarding its dealings with Speedfast's employees and containing additional background information. The Receiver's position is that the payroll payment by ADP partially discharged its obligation to pay employee claims under the Wage Earner Protection Program (the "WEPP").

[5] There are two[1] issues:

1. Did Mr. Healey triggering payment of the payroll after the Receiver was appointed amount to an implied affirmation by the Receiver of the agreement between Speedfast and ADP, with the result that the Receiver is obligated to pay ADP, and the amount at issue forms part of the Receiver's charge?

2. If not, does the rule in *Ex Parte James* apply, and should the Receiver nonetheless be required to make payment to ADP out of the funds in its hands, in priority to BMO?

[6] For the reasons that follow, the answer to both of these questions is "no".

The Background

[7] Under the agreement effective October 24, 2005 between ADP and Speedfast, ADP paid Speedfast's employees out of ADP's own funds, either by direct deposit into their respective bank accounts or by cheque issued by ADP. Speedfast agreed to maintain sufficient cleared funds in its bank account to cover the amount paid to its employees, and authorized ADP to debit Speedfast's account at BMO to fund payroll payments. The agreement required Speedfast to notify ADP if it would not have sufficient funds to satisfy its obligations to ADP and of any material adverse change in its financial position.

---

[1] ADP specifically confirmed that contrary to what appears to be suggested in its factum it does not argue that it may assert the Speedfast employees' claims under section 81.4 of the *Bankruptcy and Insolvency Act* by subrogation. Nor does it advance a claim of unjust enrichment.

Receiver did not expect or intend ADP to pay the payroll, and in fact intended to make the payments under the BIA. The amounts available for distribution to BMO, as Speedfast's first secured creditor, would have been reduced accordingly.

[50] ADP argues that it is not fair for the Receiver to permit BMO to profit in this manner, and that, relying on the principle in *Ex Parte James*, *Re Condon* (1874), L.R. 9 Ch. App., as extended and applied by subsequent decisions, referred to below, the court should require the Receiver, an officer of the court, to do the high-minded thing and pay ADP's invoice even if it is not legally required to do so. ADP argues that the fact that the "windfall" has arisen as a result of someone ADP argues is an employee of the Receiver weighs in favour of the application of the rule in *Ex Parte James*.

[51] BMO argues that the principle in *Ex Parte James* is not applicable in this case because ADP is not an innocent or aggrieved party and there is no unusual hardship for the court to alleviate, as the funding of the payroll by ADP was due to ADP's: (a) acceptance of commercial risk by funding payroll without verification that Speedfast was in funds; and (b) failure to rescind the Push following Ms. Coros' call on November 10, 2008.

[52] Counsel for ADP refers me to the early cases establishing the rule in *Ex Parte James*, and several cases in which it has been applied to afford relief, in support of its argument that the rule should be applied in this case.

[53] In *Ex Parte James*, money was voluntarily paid to a trustee in bankruptcy by an execution creditor under mistake of law. While, at law, money paid under mistake of law could not be recovered, the court held that a trustee of bankruptcy, as an officer of the court, ought to set an example. It ordered the trustee in bankruptcy to pay the money to the person really entitled to it.

[54] In *Ex Parte Simmonds* (1885), 16 Q.B.D. 308 at 312, the court, in ordering the repayment of money paid to a trustee in bankruptcy under mistake of law, explained the rationale for the rule in *Ex Parte James*: "although the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so."

[55] A subsequent decision, *Re Tyler*, *Ex p. Official Receiver*, [1907] 1 K.B. 865 held that the rule in *Ex Parte James* was a rule of general application, and not restricted to money paid under mistake of law. The court described the rule as a "prerogative of mercy reposing in the court to alleviate cases of unusual hardship in which a regard to the strict legal or equitable rights only would work a manifest injustice....". There, the bankrupt had assigned an insurance policy on his own life as security. The wife of the bankrupt paid one premium on the bankrupt's life insurance policy before the commencement of the bankruptcy, and continued to pay the premiums on the insurance policy during the life of the bankrupt. The court, applying the principle in *Ex Parte James*, ordered the trustee to repay the premiums paid by the wife.

[56] In *Re Thellusson*, [1919] 2 K.B. 735 at 746 (C.A.), a receiving order was made against a debtor without his knowledge. The next day, before becoming aware of the receiving order, the debtor borrowed money. The creditor was similarly unaware of the

receiving order. Applying the rule in *Ex Parte James*, the court ordered the trustee in bankruptcy to repay the creditor the money loaned to the bankrupt debtor.

[57] In *Re MacDonald*, [1972] 1 O.R. 363 (H.C.J.), the bankrupt died owing $1.00 under his conditional discharge order. Approximately seven months before his death, he had sent two cheques sufficient to pay the amounts due to the trustee. One of the cheques was dated, and was cashed by the trustee. The second cheque, for the sum of $1.00, was undated and sent under cover of a letter from the bankrupt indicating that it could be applied, "at any other time". The bankrupt did this because of concerns about having a final notice of discharge published. Houlden J. concluded that it was an appropriate case to apply the rule in *Ex Parte James* and exercise the "prerogative of mercy". He ordered the trustee in bankruptcy to pay the life insurance proceeds to the bankrupt's executor.

[58] In *Re Springer and Higgins Co. Ltd.* (1979), 24 O.R. (2d) 411(Div. Ct.) the rule in *Ex Parte James* was applied to a liquidator appointed under the *Business Corporations Act*, R.S.O. 1970, c. 53. There, a liquidator agreed, with the consent of the company's four shareholders, to pay a commission on the sale of land owned by the company. One of the shareholders subsequently objected to the payment, on the basis that the commission was not permitted by applicable legislation. While the payment was indeed not permitted by applicable legislation, the court ordered the liquidator to do "the high minded thing" and pay it.

[59] Counsel for BMO refers me to the discussion of the rule in *Ex Parte James* in L.W. Houlden, G.B. Morawetz & J.P. Sarra, *The 2009 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2008) ("Houlden & Morawetz"). At para. F31, Houlden & Morawetz indicates, citing a number of cases, some of which I refer to below, that three conditions must be met for the rule to apply in a bankruptcy context: (1) the bankrupt estate must be enriched or could be enriched at the expense of the person making the claim; (2) in most cases, the claimant must not be in a position to file a proof of claim in the bankruptcy; and (3) to allow the trustee to retain the enrichment would be unfair and unjust. Houlden & Morawetz also indicates that when the rule does apply, it applies only to the extent necessary to nullify the enrichment of the bankrupt estate and does not necessarily restore the claimant to the *status quo* ante.

[60] The above principles were summarized by Walton J. in *Re Clark (A Bankrupt)*; *Ex p. Trustee v. Texaco Ltd.*, [1975] 1 W.L.R. 559 at pp. 563-564, which was cited with approval by the Court of Appeal in *Re Appleby Estates Ltd.*, [1984] O.J. No. 3337.

[61] With respect to the second condition, Walton J. commented, in *Re Clark*, "The rule is not to be used merely to confer a preference on an otherwise unsecured creditor, but to provide relief for a person who would otherwise be without any." In *Re Gozzett*, [1936] 1 All E.R. 79, 80 Sol. Jo. 146 (C.A.) the court declined to apply the rule in *Ex Parte James* because the parties seeking relief, "were simply unsecured creditors and their position was due to their failure to take the precautions of securing any sort of charge on the property." *Park City Products Ltd.* (2001), 27 C.B.R. (4th) 314 (Man. Q.B.); affirmed (2002), 33 C.B.R. (4th) 79 (Man. Q.B.) indicates that the logic for not applying the rule in *Ex Parte James* if the applicant is in a position to file a proof of claim is that the application of the rule would

relied upon by the payroll supplier was the British Columbia *Employment Standards Act*. The British Columbia Court of Appeal concluded, as the Ontario Court of Appeal subsequently did in *CEEI Safety*, that a benefit had not been conferred on the director, and that even if one had, there was juristic reason to deny the payroll supplier's claim. The claim was a novel one and not within the reasonable expectation of the payroll supplier or the director it sued. Moreover, public policy grounds (those adopted in *CEEI Safety* and referred to above) provided a strong reason to deny the payroll supplier's claim. It noted, "ADP's loss was a foreseeable commercial risk, recognized in the contract."

[67] In *Ceridian Canada Ltd. v. Labreque* (2008), 2008 Carswell Que. 10388 (S.C.) ("*Ceridian*"), the payroll supplier processed the payroll at 12:00 a.m. on the same day that the corporate supplier filed an assignment in bankruptcy. The payroll supplier's claims of unjust enrichment and subrogation under the *Canada Business Corporations Act*, R.S., 1985, c. C-44 against the directors failed for essentially the same reasons as articulated in *CEEI Safety*. Claims advanced by the payroll supplier on a number of other bases similarly failed. The court expressed the view that the payroll supplier suffered its loss as a result of its own negligence and its failure to use the provisions of its standard form payroll service agreement to its own benefit.

[68] Neither party has provided a case to me where the rule in *Ex Parte James* was applied to a court-appointed receiver. It is clear, however, that a court appointed receiver is an officer of the court. The rule, therefore, can apply.

[69] In this case, the Receiver was clearly enriched at the expense of ADP. At the time of its appointment, the Receiver knew the payroll had not been paid, intended that it not be paid and intended to instead pay the employees' priority claims under the BIA. Upon its appointment the Receiver obtained, and therefore had at the time that ADP made the payment, possession of Speedfast's current assets and was directly and primarily liable for the employees' claims under s. 181.4 of the BIA. But for ADP's payment, the Receiver would have been required to pay those priority claims. The Receiver's position is different from that of the directors against whom payroll suppliers' claims of unjust enrichment failed in the payroll cases.

[70] While the Receiver was enriched at the expense of ADP when ADP paid the payroll, ADP is in a position to file a claim as an unsecured creditor. Moreover, in my view, it would not be unfair and unjust to permit the Receiver to retain the enrichment, which will ultimately flow to a secured creditor. As highlighted in the payroll cases, because ADP chose not to take security for its payroll advances, or to ensure that it was in funds from Speedfast before it issued the payroll, its loss was a foreseeable commercial risk. Having regard to the payroll cases, ADP was very clearly aware of the risk of continuing to structure its affairs in the manner it did. While ADP acted in good faith on the direction of the person from whom Speedfast had told it to accept directions, having regard to its commercial risk one would expect that upon hearing that Speedfast was in receivership it would have immediately contacted the Receiver to ensure that the payroll was funded. The Receiver's website was operational by November 10, 2008. The failure to take precautions and obtain security was recognized in *Re Gozzett* as a reason for declining to apply the rule in *Ex Parte James*. The logic in *Re Clark* and *Re Gozzett* is even more compelling in the era of the *Personal Property*

Security Act, R.S.O. 1990, c. P.10. It seems to me that, in the interests of commercial certainty, the court should be reluctant to apply the principle in *Ex Parte James* when to do so would effectively alter the priorities between unsecured and secured creditors.

[71] In the result, I conclude that the rule in *Ex Parte James* should not be applied in this case.

[72] Given that the payroll direction to ADP was (i) done without the Receiver's knowledge, direction or authority; (ii) outside the terms of the Mr. Healey's retainer; and (iii) contrary to the Receiver's advice to Mr. Healey that payroll arrears were not being paid, my conclusion would have been the same, even if I had concluded that Mr. Healey was an employee of the Receiver at the time he triggered the payroll.

Costs

[73] If the parties are unable to agree on costs, BMO shall provide brief written submissions to me within 14 days, and ADP shall provide brief written submissions within 10 days thereafter. There shall be no reply submissions without leave.

Hoy J.

Released: October 14, 2009

COURT FILE NO.: 08-CL-7840
DATE: 20091014

IN THE MATTER OF an Application under section 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

AND IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.43, as amended

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE BANK OF MONTREAL, as agent for BANK OF MONTREAL, THE BANK OF NOVA SCOTIA and ALBERTA TREASURY BRANCHES

- and -

GRAFIKOM LIMITED PARTNERSHIP, GRAFIKOM GENERAL PARTNER INC., GRAFIKOM SPEEDFAST LIMITED and GRAFIKOM GRENVILLE LIMITED

REASONS FOR DECISION

Hoy J.

Released: October 14, 2009

TAB 10

Date: 20010727
Docket: BK 00-01-58529
Indexed as: Bankruptcy of Park City Products Ltd.
Cited as: 2001 MBQB 200ci 00-01-
(Winnipeg Centre)

COURT OF QUEEN'S BENCH OF MANITOBA
IN BANKRUPTCY

IN THE MATTER OF:

THE BANKRUPTCY OF: PARK CITY PRODUCTS LTD.

Appearances:

Douglas G. Ward, Q.C.
and Dayna S. Anderson
(for TaxSave Consultants Ltd.)

Ted E. Bock
(for Canada Safeway Ltd.)

D. Wayne Leslie
(for BDO Dunwoody Ltd.)

Decision delivered:
July 27, 2001

SENIOR REGISTRAR GOLDBERG

[1] Counsel for Park City Products Ltd.'s trustee in bankruptcy is in possession of a substantial tax refund which is being held in trust pending the disposition of the claims of Canada Safeway Ltd. and TaxSave Consultants Ltd. Both have appealed from the trustee's disallowances of their claims.

Background

[2] Park City Products Ltd. (Park City) manufactured pet food. One of its customers was Canada Safeway Ltd. (Safeway).

approximately $100,000.00. TaxSave's assertion that the trustee wants to provide no compensation to TaxSave whatsoever is inaccurate. The trustee has recognized TaxSave's right to claim as an unsecured creditor, and there is potential for substantial recovery on that basis.

[17] That factor alone distinguishes TaxSave's position from the cases cited by TaxSave in support of its position. In *Re Clark* [1975] 1 All ER 453, Walton, J. held that in order for the rule in *Ex parte James* to apply, in most cases the bankrupt must not be in a position to file a proof of claim in a bankruptcy. The reason is that if the claimant can file a proof of claim, the application of the rule in *Ex parte James* would conflict with the mandatory *pari passu* division of the bankrupt estate among the creditors as required by the bankruptcy legislation.

[18] The cases referred to by TaxSave in support of its appeal are further distinguishable from the case before me in that, in each of the cases relied on by TaxSave, there were factors other than the existence of specific assets preserved or contributed by the claimant. In *Re Tyler* and *Re Hardy*, the court found an element of unfairness in the actions of the trustee. In *Re Giorgio*, the assets were protected by the bailiff on the eve of bankruptcy. In *Stormont,* the mistake made in paying the bankrupt's estate twice provided a substantive basis for a constructive trust with regard to the funds. In *Sefel*, the claimant's situation had been prejudiced by the actions of the U.S. Bankruptcy Court.

[19] None of these factors exist in the case before me. The fact that the bankrupt estate was enriched as a result of TaxSave's effort and at TaxSave's expense is not enough to justify the application of the rule in *Ex parte James*. If it were, any supplier of

inventory would have protection under that rule. TaxSave cannot use the rule in *Ex parte James* to elevate an unsecured claim into a secured claim.

[20] For these reasons, I find that the rule in *Ex parte James* is not applicable. TaxSave's appeal is dismissed.

Canada Safeway's motion to extend the time allowed for the filing of the appeal

[21] The trustee mailed the notice of disallowance of Safeway's proof of claim dated April 30, 1999 to Bruce Taylor, counsel for Safeway, on April 20, 2000. Mr. Taylor received it on April 27, 2000. Safeway's motion to appeal the disallowance was filed on May 26, 2000.

[22] Sec. 135(4) of *The B.I.A.* provides:

> A ...... disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

[23] The trustee's position is that the notice of appeal was not filed within the requisite thirty day period. The trustee argues that:

1) neither the *B.I.A*. nor the rules thereunder provide when service made by mail on April 20, 2000 was effective;
2) therefore, pursuant to Rule 3 of the *B.I.A*. Rules, reference must be made to Manitoba's rules of civil procedure;
3) Manitoba's Queen's Bench Rule 16.06(2) provides that service of a document by mail is effective on the fifth day after the document is mailed;
4) the service of the notice of disallowance on Safeway was therefore effective on April 25, 2000.

Accordingly, the appeal was not filed within the prescribed thirty day period.

[24] Safeway moved for an order extending the time allowed for filing of an appeal of the trustee's disallowance. I find that this motion is not necessary. Rule 113 of the

TAB 11

Gordon Garland *Appellant*

v.

Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited *Respondent*

and

Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited *Interveners*

Indexed as: Garland *v.* Consumers' Gas Co.

Neutral citation: 2004 SCC 25.

File No.: 29052.

2003: October 9; 2004: April 22.

Present: Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Restitution — Unjust enrichment — Late payment penalty — Customers of regulated gas utility claiming restitution for unjust enrichment arising from late payment penalties levied by utility in excess of interest limit prescribed by s. 347 of Criminal Code — Whether customers have claim for unjust enrichment — Defences that can be mounted by utility to resist claim — Whether other ancillary orders necessary.

The respondent gas utility, whose rates and payment policies are governed by the Ontario Energy Board ("OEB"), bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at five percent of the unpaid charges for that month. The LPP is a one-time penalty, and does not compound or increase over time. The appellant and his wife paid approximately $75 in LPP charges between 1983 and 1995. The appellant

Gordon Garland *Appelant*

c.

Enbridge Gas Distribution Inc., auparavant connue sous le nom de Consumers' Gas Company Limited *Intimée*

et

Procureur général du Canada, procureur général de la Saskatchewan, Toronto Hydro-Electric System Limited, Fondation du droit de l'Ontario et Union Gas Limited *Intervenants*

Répertorié : Garland *c.* Consumers' Gas Co.

Référence neutre : 2004 CSC 25.

N[o] du greffe : 29052.

2003 : 9 octobre; 2004 : 22 avril.

Présents : Les juges Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

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

Restitution — Enrichissement sans cause — Pénalité pour paiement en retard — Action en restitution pour enrichissement sans cause intentée par les clients d'une entreprise de distribution de gaz réglementée à la suite de l'infliction, par cette dernière, de pénalités pour paiement en retard représentant un taux d'intérêt supérieur à la limite prescrite par l'art. 347 du Code criminel — L'action pour enrichissement sans cause des clients est-elle fondée? — Moyens de défense que l'entreprise peut opposer à l'action — D'autres ordonnances accessoires sont-elles requises?

L'entreprise de distribution de gaz intimée, dont les tarifs et les politiques de paiement sont régis par la Commission de l'énergie de l'Ontario (« CEO »), envoie chaque mois à ses clients une facture qui fixe une date d'échéance pour le paiement du montant dû. Les clients qui n'ont pas acquitté leur facture à la date d'échéance se voient infliger une pénalité pour paiement en retard (« PPR ») qui correspond à 5 pour 100 du montant en souffrance pour le mois en question. Cette pénalité est calculée une seule fois; elle ne comporte aucun intérêt

Enrichment — Restitution — Absence of Juristic Reason: *Campbell* v. *Campbell*" (2000), 79 *Can. Bar Rev.* 459).

commentateurs ont prétendu qu'en fait la seule différence qui existe entre les critères canadien et anglais est d'ordre sémantique (voir, par exemple, M. McInnes, « Unjust Enrichment — Restitution — Absence of Juristic Reason : *Campbell* v. *Campbell* » (2000), 79 *R. du B. can.* 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

Le professeur Smith fait valoir que, si elle existe vraiment, la façon canadienne d'interpréter le motif juridique pose un problème étant donné qu'elle oblige le demandeur à prouver ce qui n'est pas, c'est-à-dire l'absence de motif juridique. Il ajoute que, puisque cette preuve est presque impossible à faire, il serait préférable que le Canada adopte le modèle anglais qui oblige le demandeur à démontrer de manière positive pourquoi il serait injuste que le défendeur conserve ce dont il s'est enrichi. J'estime cependant qu'il y a une façon proprement canadienne d'interpréter le motif juridique qui doit être maintenue tout en étant susceptible de tenir compte de la critique formulée par Smith.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

Rappelons-nous que le critère applicable à l'enrichissement sans cause est relativement nouveau dans la jurisprudence canadienne. Il exige que les tribunaux aient la souplesse nécessaire pour élargir les catégories de motifs juridiques lorsque les circonstances l'exigent et pour refuser le recouvrement lorsqu'il serait inéquitable de l'autoriser. Comme la juge McLachlin l'a écrit dans l'arrêt *Peel*, précité, p. 788, bien qu'elle procède des catégories traditionnelles de recouvrement, l'interprétation que la Cour donne de l'enrichissement sans cause peut « les déborder de manière à ce que le droit puisse évoluer avec la souplesse qui s'impose pour tenir compte des perceptions changeantes de la justice ». Toutefois, il doit, en même temps, y avoir des lignes directrices qui donnent aux juges de première instance et autres des indications sur les limites de la cause d'action. L'objectif est d'éviter des lignes directrices générales et subjectives qui empêchent toute uniformité.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in

Les parties et les commentateurs ont souligné que la jurisprudence et la doctrine ne règlent pas explicitement cette question. Cependant, tout en rappelant qu'il s'agit d'un recours en equity qui fait nécessairement intervenir un pouvoir discrétionnaire et des questions d'équité, je crois qu'une redéfinition et my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

une reformulation s'imposent. J'estime donc qu'il convient de scinder en deux étapes l'analyse du motif juridique. Le demandeur doit d'abord démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie de refuser le recouvrement. En circonscrivant la liste des catégories que le demandeur doit examiner pour démontrer l'absence de motif juridique, on répond à l'objection soulevée par le professeur Smith voulant que la formulation canadienne du critère oblige à prouver ce qui n'est pas. Parmi les catégories établies susceptibles de constituer un motif juridique, il y a le contrat (*Pettkus*, précité), la disposition légale (*Pettkus*, précité), l'intention libérale (*Peter*, précité) et les autres obligations valides imposées par la common law, l'equity ou la loi (*Peter*, précité). S'il n'existe aucun motif juridique appartenant à une catégorie établie, le demandeur a alors établi une preuve *prima facie* en ce qui concerne le volet « motif juridique » de l'analyse.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

La preuve *prima facie* est cependant réfutable si le défendeur parvient à démontrer qu'il existe un autre motif de refuser le recouvrement. En conséquence, le défendeur a l'obligation *de facto* de démontrer pourquoi il devrait conserver ce dont il s'est enrichi. À cette étape de l'analyse, le défendeur peut donc recourir à une catégorie de moyens de défense résiduels qui permettent aux tribunaux d'examiner toutes les circonstances de l'opération afin de déterminer s'il existe un autre motif de refuser le recouvrement.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and

Lorsque le défendeur tente de réfuter la preuve en question, les tribunaux doivent tenir compte de deux facteurs : les attentes raisonnables des parties et les considérations d'intérêt public. Il se peut qu'en examinant ces facteurs le tribunal découvre qu'une nouvelle catégorie de motifs juridiques est établie. Dans d'autres cas, l'examen de ces facteurs indiquera que, dans les circonstances particulières d'une affaire, il existait un motif juridique qui ne donne toutefois pas naissance à une nouvelle catégorie de motifs juridiques qui devrait s'appliquer dans d'autres circonstances. Dans une troisième catégorie d'affaires, l'examen de ces facteurs amène à conclure qu'aucun motif juridique ne justifiait l'enrichissement. Dans ces cas, il y a lieu d'accueillir la demande de