Court File No. CV-16-11257-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **PRIMUS TELECOMMUNICATIONS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.**

Applicants

BRIEF OF AUTHORITIES OF THE MOVING PARTY, ZAYO CANADA INC.

July 27, 2016

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Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

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

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

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***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the

Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

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

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The

resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

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

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

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

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

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

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

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

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

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be

inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA.* Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA.* The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA.* However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA.*

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA.* However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA.*

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of

both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA.* Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA.*

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA.* Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

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

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing*

Ltd., Re (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA.* Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA.*

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA.* The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA.* In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA.* The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA.* That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA.* Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA.*

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent

of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the

liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> **67** (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA*

deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11**. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and

Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA.* Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA.*

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA.* [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant).* But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA.* Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005, [2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA.*

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act.* That includes the *ETA.* The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA.* Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

11. (1) Powers of court — Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

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

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

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

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

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

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

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

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

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

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

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

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

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

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

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

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

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

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

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

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

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

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

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

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

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

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

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

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be

regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

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

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

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

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

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection

23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:
11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

End of Document

Tab 2

2015 ONCA 570
Ontario Court of Appeal

Grant Forest Products Inc. v. Toronto-Dominion Bank

2015 CarswellOnt 11970, 2015 C.E.B. & P.G.R. 8139 (headnote only), 2015 ONCA 570, [2015] W.D.F.L. 4098, 20 C.C.P.B. (2nd) 161, 256 A.C.W.S. (3d) 269, 26 C.C.E.L. (4th) 176, 26 C.B.R. (6th) 218, 337 O.A.C. 237, 387 D.L.R. (4th) 426, 4 P.P.S.A.C. (4th) 358, 9 E.T.R. (4th) 205

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

In the Matter of a Plan of Compromise or Arrangement of Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP, Applicants and The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security, Respondents

Doherty, E.E. Gillese, P. Lauwers JJ.A.

Heard: February 3, 2015
Judgment: August 7, 2015
Docket: CA C58636

Proceedings: affirming *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* (2013), 7 C.C.P.B. (2nd) 239, 93 E.T.R. (3d) 15, 6 C.B.R. (6th) 1, 2013 ONSC 5933, 2013 CarswellOnt 14057, C.L. Campbell J. (Ont. S.C.J. [Commercial List])

Counsel: Mark Bailey, Deborah McPhail for Appellant, Superintendent of Financial Services
Jane Dietrich for Respondents, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP
John Marshall, Roger Jaipargas for Respondent, West Face Capital Inc.
Alex Cobb for Respondent, Mercer (Canada) Limited
David Byers, Dan Murdoch for Respondent, Ernst & Young Inc.
Andrew J. Hatnay, James Harnum, Adrian Scotchmer for Intervener, Court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Family; Insolvency; Property; Employment

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

Canadian Airlines Corp., Re (2000), 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

Grand River Enterprises v. Burnham (2005), 2005 CarswellOnt 948, 10 C.P.C. (6th) 136, *(*sub nom. *Grand River Enterprises, A Partnership v. Burnham)* 197 O.A.C. 168 (Ont. C.A.) — referred to

Grant Forest Products Inc. v. Toronto-Dominion Bank (2015), 2015 ONCA 192, 2015 CarswellOnt 3726, 23 C.B.R. (6th) 214 (Ont. C.A.) — referred to

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

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Kaska Dena Council v. British Columbia (Attorney General) (2008), 2008 BCCA 455, 2008 CarswellBC 2401, 85 B.C.L.R. (4th) 69, [2009] 1 C.N.L.R. 102, 262 B.C.A.C. 75, 441 W.A.C. 75, 303 D.L.R. (4th) 144, *(*sub nom. *Kaska Dena v. British Columbia (Attorney General))* 181 C.R.R. (2d) 101 (B.C. C.A.) — referred to

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

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28
Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

s. 57(3) — considered

s. 57(4) — considered

Personal Property Security Act, R.S.O. 1990, c. P.10
s. 30(7) — considered

APPEAL by Ontario Superintendent of Financial Services from judgment reported at *Grant Forest Products Inc. v. GE Canada Leasing Services Co.* (2013), 2013 ONSC 5933, 2013 CarswellOnt 14057, 6 C.B.R. (6th) 1, 93 E.T.R. (3d) 15, 7 C.C.P.B. (2nd) 239 (Ont. S.C.J. [Commercial List]), granting secured creditor's motion to lift stay and order debtor companies into bankruptcy.

***E.E. Gillese J.A.*:**

Overview

1 The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

2 The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

3 Ontario's Superintendent of Financial Services (the "*Superintendent*") appeals.

4 During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on wind up of each plan (the "*wind up deemed trust*"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

5 The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("*PBA*") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*").

6 Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

7 The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

8 The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.).

9 For the reasons that follow, I would dismiss the appeal.

The Cast of Characters

10 Grant Forest Products Inc. ("*GFPI*") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

11 GFPI and related companies (the "*Applicants*") brought an application for protection from creditors under the CCAA (the *CCAA Proceeding*"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "*Remaining Applicants*" in the CCAA Proceeding.

12 Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "*Administrator*"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

13 Stonecrest Capital Inc. was appointed the chief restructuring organization (the "*CRO*") by court order dated June 25, 2009.

14 Ernst & Young Inc. was appointed the monitor (the "*Monitor*") by court order dated June 25, 2009.

15 The "*First Lien Lenders*" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

16 The "*Second Lien Lenders*" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

17 The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "*Second Lien Lenders' Agent*").

18 The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

19 West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "*West Face*"), are parties to the *Second Lien Credit Agreement* with the Remaining Applicants. The Second Lien Lenders (including West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

20 Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("*USSC*") in USSC's unrelated proceedings under the CCAA (the "*Intervener*") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

21 By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 192 (Ont. C.A.). Under the terms of that

endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

Background in Brief

Sale of the Applicants' Assets

22 On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

23 The court gave that protection by order dated June 25, 2009 (the "*Initial Order*"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

24 In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

25 GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

26 GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("*Georgia Pacific*"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan, which was the pension plan associated with the assets it had purchased.

27 Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17, 2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

28 Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

29 The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

30 A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

31 As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "*Remaining Funds*").

The Pension Plans

32 GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI - Timmins Plant (the "*Salaried Plan*") and (2) the Pension Plan for Executive Employees of GFPI (the "*Executive Plan*") (together, the "*Plans*").

33 Both of the Plans are defined benefit pension plans under the PBA.

34 The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business".

35 On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator

for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

36 A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

37 The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "*Superintendent's Wind Up Orders*"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

38 As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

39 GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "*Pension Motion*"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

40 When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "*Reserve Funds*").

41 The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

42 On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans. [1]

43 It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

44 On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

45 On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

46 By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

47 The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

48 On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

49 On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

50 When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

51 By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

52 West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

53 By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "*Bankruptcy Motion*").

54 On October 22, 2012, it was submitted [2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "*Motions*"), however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

55 The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

56 The Supreme Court released its decision in *Indalex* on February 1, 2013.

57 On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

58 A further oral hearing on the Motions took place on July 23, 2013.

The Transition Order

59 The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "*Transition Order*"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

60 In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

61 The Superintendent then sought and obtained leave to appeal to this court.

The Decision Below

62 In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

63 The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

64 The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

65 In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

66 The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

67 The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

68 The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

69 The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

70 The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

71 West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

72 Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A Summary of the Parties' Positions On Appeal

The Superintendent

73 The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

74 The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

75 The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

76 The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

77 First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

78 Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

79 Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

80 Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

81 Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

82 The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

83 West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

84 West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

85 Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

86 However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

> 1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;
>
> 2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;
>
> 3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and
>
> 4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

87 The Intervener's position is that:

> 1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

The Issues

88 The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

89 The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

90 West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

91 In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

92 To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions: *Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69 (B.C. C.A.), at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (Ont. C.A.), at para. 10.

93 With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

94 To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?

2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and

3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

The Standard of Review

95 The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]), at para. 29.

96 I would not accept this submission for two reasons.

97 First, in articulating this standard of review, *Resurgence* purported to follow *Royal Bank v. Fracmaster Ltd.*, 244 A.R. 93, 1999 ABCA 178 (Alta. C.A.). However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

98 Second, the applicable standard of review has been established by two decisions of this court: *Air Canada, Re* (2003), 66 O.R. (3d) 257 (Ont. C.A.) and *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.). In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

99 The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

100 Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

Did the CCAA Judge Make a Procedural Error?

101 The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

102 I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

103 It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Ted Leroy Trucking Ltd., Re*, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The CCAA judge must "provide the conditions under which the debtor can attempt to reorganize" (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge "must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors" (para. 60).

104 *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to "be cognizant" of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

105 It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants' assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of

both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced because there would have been even fewer funds available to satisfy their claims.

106 The CCAA judge was also aware that in March 2012 — some three months before the Pension Motion was brought — counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

107 Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

108 That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

109 In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

Did the CCAA Judge Err in Principle or Act Unreasonably in Lifting the Stay and Ordering the Remaining Applicants into Bankruptcy?

110 In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

111 At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

112 In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA — that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> ... The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco*, at paras. 62-63). [Citation excluded.]
>
> . . .
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The CCAA is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the BIA. The court must do so in a manner that does not subvert the scheme of distribution under the BIA. Transition to liquidation requires partially

> lifting the CCAA stay to commence proceedings under the BIA. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

113 Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

114 The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

> 1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?
>
> 2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?
>
> 3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and
>
> 4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

115 Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

116 Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

117 In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

118 As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Québec (Commission de la santé & de la sécurité du travail) c. Banque fédérale de développement*, [1988] 1 S.C.R. 1061 (S.C.C.), at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C. C.A.), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

119 The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

120 I would not accept either submission.

Federal Paramountcy

121 In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

122 As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

123 Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

124 As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

125 In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

126 There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

127 The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

128 A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

129 Both the facts and the issues in *Indalex* differ from those of the present case.

130 There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made - the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

131 Second, the BIA played no part in *Indalex* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding. [3]

132 The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

133 As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

134 Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

135 It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

136 I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an insolvent company GFPI was not obliged to make the payments ... .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

137 I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

138 Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going — the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order permitted, but did not require, GFPI to pay "all outstanding and future ... pension contributions ... incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

139 Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps — such as those suggested by the CCAA judge — to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

140 I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

141 In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A Concluding Comment

142 In my view, this case illustrates the value that a CCAA proceeding - rather than a bankruptcy proceeding - offers for pension plan beneficiaries. Three examples demonstrate this.

143 First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

144 Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. - Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

145 Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

146 I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

Disposition

147 Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

148 If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

***Doherty J.A.*:**

I agree

***P. Lauwers J.A.*:**

I agree

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

> **SERVICE**
>
> 1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.
>
> **CAPITALIZED TERMS**
>
> 2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty- Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

Appeal dismissed.

Footnotes

1 Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

2 The record is unclear as to which party or parties made this submission.

3 See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

End of Document

Tab 3

2016 ONSC 316
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 589, 2016 ONSC 316, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

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

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

G.B. Morawetz R.S.J.

Heard: December 21-22, 2015
Judgment: January 15, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Shawn Irving, Tracy Sandler, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Linda Galessiere, Gus Camelino, for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)
Laura M. Wagner, Mathew P. Gottlieb, for KingSett Capital Inc.
Yannick Katirai, Daniel Hamson, for Eleven Points Logistics Inc.
Daniel Walker, for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited
Jay A. Schwartz, Robin Schwill, for Target Corporation
Miranda Spence, for CREIT
Jay Carfagnini, Jesse Mighton, Alan Mark, Melaney Wagner, for Alvarez & Marsal Canada Inc. in its capacity as Monitor
James Harnum, for Employee
Harvey Chaiton, for Directors and Officers of the Applicants
Stephen M. Raicek, Mathew Maloley, for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada
Vern W. DaRe, for Doral Holdings Limited and 430635 Ontario Inc.
Stuart Brotman, for Sobeys Capital Incorporated
Catherine Francis, for Primaris Reit
Kyla Mahar, for Centerbridge Partners and Davidson Kempner
William V. Sasso, for Pharmacist
Varoujan C. Arman, for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.
Brian Parker, for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.
Roger Jaipargas, for Glentel Inc., Bell Canada and BCE Nexxia
Nancy Tourgis for Issi Inc.

Subject: Insolvency

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Cases considered by *G.B. Morawetz R.S.J.*:

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ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, *(*sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513 (Ont. C.A.) — referred to

Alternative Fuel Systems Inc., Re (2003), 2003 ABQB 745, 2003 CarswellAlta 1262, 46 C.B.R. (4th) 8, 20 Alta. L.R. (4th) 265, [2004] 5 W.W.R. 467, 46 C.B.R. (4th) 17, 20 Alta. L.R. (4th) 264 (Alta. Q.B.) — considered

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Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219, 1992 CarswellBC 502 (B.C. S.C.) — referred to

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 65.2(3) [en. 1992, c. 27, s. 30] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 4 — considered

s. 11 — considered

s. 20(1)(a)(iii) — considered

MOTION to accept joint plan and compromise, to establish class of affected creditors to vote on plan, and authority to hold meeting of those creditors and vote on plan and related procedures, and to set date for hearing of sanction of plan of it was accepted.

***G.B. Morawetz R.S.J.*:**

1 The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

2 On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

3 These are the reasons.

4 The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

5 The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

6 The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

7 The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

8 The Monitor also supports the motion.

9 The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

10 In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

11 By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

12 The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

13 The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

14 Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

15 The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

16 The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

17 In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

18 The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 — Breach of paragraph 19A of the Amended and Restated Order

19 First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

20 Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

21 The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.

22 The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;
>
> > (a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and
> >
> > (b) a fair and reasonable balancing of interests.

23 Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP — it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

24 The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 — Breach of paragraph 55 of the Claim Procedure Order

25 Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

26 The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

27 The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

28 In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

29 In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

30 Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

31 Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

32 Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

33 Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

34 The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

35 Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

36 The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

37 With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

38 Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

39 The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

40 The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

41 If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

42 Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

43 The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, or any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of shareholders of the company, to be summoned in such manner as the court directs.

44 Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.).

45 Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 (N.S. S.C.)).

46 Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

47 Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

48 Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

49 Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

50 The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), affirmed 2008 ONCA 587 (Ont. C.A.), (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

51 Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

52 With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

53 The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

54 As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

55 At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

56 Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

57 The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

58 Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

59 The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

60 With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

61 Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

62 In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp., Re*, 2013 ONSC 823, 2013 CarswellOnt 3043 (Ont. S.C.J. [Commercial List]) . Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

63 In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
>
> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
>
> (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
>
> (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order...

64 With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination

of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc., Re*, 2003 ABQB 745, 20 Alta. L.R. (4th) 264 (Alta. Q.B.), aff'd 2004 ABCA 31, 346 A.R. 28 (Alta. C.A.), where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

65 Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

66 Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

67 In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

68 Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

69 As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

70 Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.); *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at p. 182, aff'd (1989), (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

71 As explained below, the Plan cannot meet the required criteria.

72 It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

73 The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

74 The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

75 The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

76 Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

77 However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

78 Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

79 This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

80 Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 4004, 27 C.B.R. (6th) 134 (Ont. S.C.J.) at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

81 The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

82 The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

83 A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

84 In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

85 It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

86 Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

87 Accordingly, the Plan is not accepted for filing and this motion is dismissed.

88 The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

89 At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Motion dismissed.

Footnotes

1 Capitalized terms not defined herein have the same meaning as set out in the Plan.

End of Document

Tab 4

1990 CarswellOnt 139
Ontario Court of Appeal

Nova Metal Products Inc. v. Comiskey (Trustee of)

1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, 23 A.C.W.S. (3d) 1192, 41 O.A.C. 282

ELAN CORPORATION et al. v. COMISKEY (TRUSTEE OF) et al.

Finlayson, Krever and Doherty JJ.A.

Heard: October 30 and 31, 1990
Judgment: November 2, 1990
Docket: Doc. Nos. CA 684/90 and CA 685/90

Counsel: *F.J.C. Newbould*, Q.C., and *G.B. Morawetz*, for appellant The Bank of Nova Scotia.
John Little, for respondents Elan Corporation and Nova Metal Products Inc.
Michael B. Rotsztain, for RoyNat Inc.
Kim Twohig and *Mel Olanow*, for Ontario Development Corp.
K.P. McElcheran, for monitor Ernst & Young.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

Per Finlayson J.A. (Krever J.A. concurring)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *applied*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35 (S.C.), aff'd (16 September 1988), Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A. (B.C. C.A.) — *considered*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

NsC Diesel Power Inc., Re (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.) — *considered*

Sovereign Life Assurance Co. v. Dodd, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.) — *applied*

Wellington Building Corp., Re, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.) — *applied*

Per Doherty J.A. (dissenting in part)

Alberta Treasury Branches v. Hat Development Ltd. (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.) — *considered*

Avery Construction Co., Re, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.) — *referred to*

Hongkong Bank of Canada v. Chef Ready Foods Ltd., [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84 (C.A.) — *considered*

Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce (1989), 102 A.R. 161 (Q.B.) — *referred to*

Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd., 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) — *referred to*

Metals & Alloys Co., Re (16 February 1990), Houlden J.A. (Ont. C.A.) [unreported] — *considered*

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.) — *referred to*

Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 47 B.C.L.R. (2d) 193 (S.C.) — *referred to*

Reference re Residential Tenancies Act (Ontario), [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — *referred to*

Stephanie's Fashions Ltd., Re (1990), 1 C.B.R. (3d) 248 (B.C.S.C.) — *considered*

United Maritime Fishermen Co-op., Re (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), rev'd (1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253 (C.A.) — *considered*

Statutes considered:

Bank Act, R.S.C. 1985, c. B-1 —

s. 178, as am. R.S.C. 1985 (3d Supp.), c. 25, s. 26

Companies' Creditors Arrangement Act, S.C. 1932-33, c. 36 —

s. 3, en. as s. 2A, S.C. 1952-53, c. 3, s. 2

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

s. 3

s. 4

s. 5

s. 6

s. 6(a)

s. 11

s. 14(2)

Courts of Justice Act, 1984, S.O. 1984, c. 11 —

s. 144(1)

Interpretation Act, R.S.C. 1985, c. I-21 —

s. 12

Municipal Act, R.S.O. 1980, c. 302 —

s. 369

APPEAL from order of Hoolihan J. dated September 11, 1990, allowing application under *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

***FINLAYSON J.A. (KREVER J.A.* concurring) (orally):**

1 This is an appeal by the Bank of Nova Scotia (the "bank") from orders made by Mr. Justice Hoolihan [(11 September 1990), Doc. Nos. Toronto RE 1993/90 and RE 1994/90 (Ont. Gen. Div.)] as hereinafter described. The Bank of Nova Scotia was the lender to two related companies, namely, Elan Corporation ("Elan") and Nova Metal Products Inc. ("Nova"), which commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), for the purposes of having a plan of arrangement put to a meeting of secured creditors of those companies.

2 The orders appealed from are:

(i) An order of September 11, 1990, which directed a meeting of the secured creditors of Elan and Nova to consider the plan of arrangement filed, or other suitable plan. The order further provided that for 3 days until September 14, 1990, the bank be prevented from acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova, and that Elan and Nova could spend the accounts receivable assigned to the bank that would be received.

(ii) An order dated September 14, 1990, extending the terms of the order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990. This order continued the stay against the bank and the power of Elan and Nova to spend the accounts receivable assigned to the bank. Further orders dated September 27, 1990, and October 18, 1990, have extended the stay, and the power of Elan and Nova to spend the accounts receivable that have been assigned to the bank. The date of the meetings of creditors has been extended to November 9, 1990. The application to sanction the plan of arrangement must be heard by November 14, 1990.

(iii) An order dated October 18, 1990, directing that there be two classes of secured creditors for the purposes of voting at the meeting of secured creditors. The first class is to be comprised of the bank, RoyNat Inc. ("RoyNat"), the Ontario Development Corporation ("O.D.C."), the city of Chatham and the village of Glencoe. The second class is to be comprised of persons related to Elan and Nova that acquired debentures to enable the companies to apply under the CCAA.

3 There is very little dispute about the facts in this matter, but the chronology of events is important and I am setting it out in some detail.

4 The bank has been the banker to Elan and Nova. At the time of the application in August 1990, it was owed approximately $1,900,000. With interest and costs, including receivers' fees, it is now owed in excess of $2,300,000. It has a first registered charge on the accounts receivable and inventory of Elan and Nova, and a second registered charge on the land, buildings and equipment. It also has security under s. 178 of the *Bank Act*, R.S.C. 1985, c. B-1, as am. R.S.C. 1985 (3rd Supp.), c. 25, s. 26. The terms of credit between the bank and Elan as set out in a commitment agreement provide that Elan and Nova may not encumber their assets without the consent of the bank.

5 RoyNat is also a secured creditor of Elan and Nova, and it is owed approximately $12 million. It holds a second registered charge on the accounts receivable and inventory of Elan and Nova, and a first registered charge on the land, buildings and equipment. The bank and RoyNat entered into a priority agreement to define with certainty the priority which each holds over the assets of Elan and Nova.

6 The O.D.C. guaranteed payment of $500,000 to RoyNat for that amount lent by RoyNat to Elan. The O.D.C. holds debenture security from Elan and secure the guarantee which it gave to RoyNat. That security ranks third to the bank and RoyNat. The O.D.C. has not been called upon by RoyNat to pay under its guarantee. O.D.C. has not lent any money directly to Elan or Nova.

7 Elan owes approximately $77,000 to the City of Chatham for unpaid municipal taxes. Nova owes approximately $18,000 to the Village of Glencoe for unpaid municipal taxes. Both municipalities have a lien on the real property of the respective companies in priority to every claim except the Crown under s. 369 of the *Municipal Act*, R.S.O. 1980, c. 302.

8 On May 8, 1990, the bank demanded payment of all outstanding loans owing by Elan and Nova to be made by June 1, 1990. Extensions of time were granted and negotiations directed to the settlement of the debt took place thereafter. On August 27, 1990, the bank appointed Coopers & Lybrand Limited as receiver and manager of the assets of Elan and Nova, and as agent under the bank's security to realize upon the security. Elan and Nova refused to allow the receiver and manager to have access to their premises, on the basis that insufficient notice had been provided by the bank before demanding payment.

9 Later on August 27, 1990, the bank brought a motion in an action against Elan and Nova (Court File No. 54033/90) for an order granting possession of the premises of Elan and Nova to Coopers & Lybrand. On the evening of August 27, 1990, at approximately 9 p.m., Mr. Justice Saunders made an order adjourning the motion on certain conditions. The order authorized Coopers & Lybrand access to the premises to monitor Elan's business, and permitted Elan to remain in possession and carry on its business in the ordinary course. The bank was restrained in the order, until the motion could be heard, from selling inventory, land, equipment or buildings or from notifying account debtors to collect receivables, but was not restrained from applying accounts receivable that were collected against outstanding bank loans.

10 On Wednesday, August 29, 1990, Elan and Nova each issued a debenture for $10,000 to a friend of the principals of the companies, Joseph Comiskey, through his brother Michael Comiskey as trustee, pursuant to a trust deed executed the same day. The terms were not commercial and it does not appear that repayment was expected. It is conceded by counsel for Elan that the sole purpose of issuing the debentures was to qualify as a "debtor company" within the meaning of s. 3 of the CCAA. Section 3 reads as follows:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

11 The debentures conveyed the personal property of Elan and Nova as security to Michael Comiskey as trustee. No consent was obtained from the bank as required by the loan agreements, nor was any consent obtained from the receiver. Cheques for $10,000 each, representing the loans secured in the debentures, were given to Elan and Nova on Wednesday, August 29, 1990, but not deposited until 6 days later on September 4, 1990, after an interim order had been made by Mr. Justice Farley in favour of Elan and Nova staying the bank from taking proceedings.

12 On August 30, 1990 Elan and Nova applied under s. 5 of the CCAA for an order directing a meeting of secured creditors to vote on a plan of arrangement. Section 5 provides:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

13 The application was heard by Farley J. on Friday, August 31, 1990, at 8 a.m. Farley J. dismissed the application on the grounds that the CCAA required that there be more than one debenture issued by each company. Later on the same say, August 31, 1990, Elan and Nova each issued two debentures for $500 to the wife of the principal of Elan through her sister as trustee. The debentures provided for payment of interest to commence on August 31, 1992. Cheques for $500 were delivered that day to the companies but not deposited in the bank account until September 4, 1990. These debentures conveyed the personal property in the assets of Elan and Nova to the trustee as security. Once again it is conceded that the debentures were issued for the sole purpose of meeting the requirements of s. 3 of the CCAA. No consent was obtained from the bank as required by the loan terms, nor was any consent obtained from the receiver.

14 On August 31, 1990, following the creation of the trust deeds and the issuance of the debentures, Elan and Nova commenced new applications under the CCAA which were heard late in the day by Farley J. He adjourned the applications to September 10, 1990, on certain terms, including a stay preventing the bank from acting on its security and allowing Elan to spend up to $321,000 from accounts receivable collected by it.

15 The plan of arrangement filed with the application provided that Elan and Nova would carry on business for 3 months, that secured creditors would not be paid and could take no action on their security for 3 months, and that the accounts receivable of Elan and Nova assigned to the bank could be utilized by Elan and Nova for purposes of its day-to-day operations. No compromise of any sort was proposed.

16 On September 11, 1990, Hoolihan J. ordered that a meeting of the secured creditors of Elan and Nova be held no later than October 22, 1990, to consider the plan of arrangement that had been filed, or other suitable plan. He ordered that the plan of arrangement be presented to the secured creditors no later than September 27, 1990. He made further orders effective for 3 days until September 14, 1990, including orders:

> (i) that the companies could spend the accounts receivable assigned to the bank that would be collected in accordance with a cash flow forecast filed with the Court providing for $1,387,000 to be spent by September 30, 1990; and
>
> (ii) a stay of proceedings against the bank acting on any of its security or paying down any of its loans from accounts receivable collected by Elan and Nova.

17 On September 14, 1990, Hoolihan J. extended the terms of his order of September 11, 1990, to remain in effect until the plan of arrangement was presented to the Court no later than October 24, 1990 for final approval. This order continued the power of Elan and Nova to spend up to $1,387,000 of the accounts receivable assigned to the bank in accordance with the projected cash flow to September 30, 1990, and to spend a further amount to October 24, 1990, in accordance with a cash flow to be approved by Hoolihan J. prior to October 1, 1990. Further orders dated September 27 and October 18 have extended the power to spend the accounts receivable to November 14, 1990.

18 On September 14, 1990, the bank requested Hoolihan J. to restrict his order so that Elan and Nova could use the accounts receivable assigned to the bank only so long as they continued to operate within the borrowing guidelines contained in the terms of the loan agreements with the bank. These guidelines require a certain ratio to exist between bank loans and the book value of the accounts receivable and inventory assigned to the bank, and are designed in normal circumstances to ensure that there is sufficient value in the security assigned to the bank. Hoolihan J. refused to make the order.

19 On October 18, 1990, Hoolihan J. ordered that the composition of the classes of secured creditors for the purposes of voting at the meeting of secured creditors shall be as follows:

(a) The bank, RoyNat, O.D.C., the City of Chatham and the Village of Glencoe shall comprise one class.

(b) The parties related to the principal of Elan that acquired their debentures to enable the companies to apply under the CCAA shall comprise a second class.

20 On October 18, 1990, at the request of counsel for Elan and Nova, Hoolihan J. further ordered that the date for the meeting of creditors of Elan and Nova be extended to November 9, 1990, in order to allow a new plan of arrangement to be sent to all creditors, including unsecured creditors of those companies. Elan and Nova now plan to offer a plan of compromise or arrangement to the unsecured creditors of Elan and Nova as well as to the secured creditors.

21 There are five issues in this appeal.

(1) Are the debentures issued by Elan and Nova for the purpose of permitting the companies to qualify as applicants under the CCAA debentures within the meaning of s. 3 of the CCAA?

(2) Did the issue of the debentures contravene the provisions of the loan agreements between Elan and Nova and the bank? If so, what are the consequences for CCAA purposes?

(3) Did Elan and Nova have the power to issue the debentures and make application under the CCAA after the bank had appointed a receiver and after the order of Saunders J.?

(4) Did Hoolihan J. have the power under s. 11 of the CCAA to make the interim orders that he made with respect to the accounts receivable?

(5) Was Hoolihan J. correct in ordering that the bank vote on the proposed plan of arrangement in a class with RoyNat and the other secured creditors?

22 It is well established that the CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Such a resolution can have significant benefits for the company, its shareholders and employees. For this reason the debtor companies, Elan and Nova, are entitled to a broad and liberal interpretation of the jurisdiction of the Court under the CCAA. Having said that, it does not follow that in exercising its discretion to order a meeting of creditors under s. 5 of the CCAA that the Court should not consider the equities in this case as they relate to these companies and to one of its principal secured creditors, the bank.

23 The issues before Hoolihan J. and this Court were argued on a technical basis. Hoolihan J. did not give effect to the argument that the debentures described above were a "sham" and could not be used for the purposes of asserting jurisdiction. Unfortunately, he did not address any of the other arguments presented to him on the threshold issue of the availability of the CCAA. He appears to have acted on the premise that if the CCAA can be made available, it should be utilized.

24 If Hoolihan J. did exercise any discretion overall, it is not reflected in his reasons. I believe, therefore, that we are in a position to look at the uncontested chronology of these proceedings and exercise our own discretion. To me, the

significant date is August 27, 1990 when the bank appointed Coopers & Lybrand Limited as receiver and manager of the undertaking, property and assets mortgaged and charged under the demand debenture and of the collateral under the general security agreement, both dated June 20, 1979. On the same date, it appointed the same company as receiver and manager for Nova under a general security agreement dated December 5, 1988. The effect of this appointment is to divest the companies and their boards of directors of their power to deal with the property comprised in the appointment: Raymond Walton, *Kerr on the Law and Practice as to Receivers*, 16th ed. (London: Sweet & Maxwell, 1983), p. 292. Neither Elan nor Nova had the power to create further indebtedness, and thus to interfere with the ability of the receiver to manage the two companies: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd (1989), 65 Alta. L.R. (2d) 374 (C.A.).

25 Counsel for the debtor companies submitted that the management powers of the receiver were stripped from the receiver by Saunders J. in his interim order, when he allowed the receiver access to the companies' properties but would not permit it to realize on the security of the bank until further order. He pointed out that the order also provided that the companies were entitled to remain in possession and "to carry on business in the ordinary course" until further order.

26 I do not agree with counsel's submission covering the effect of the order. It certainly restricted what the receiver could do on an interim basis, but it imposed restrictions on the companies as well. The issue of these disputed debentures in support of an application for relief as insolvent companies under the CCAA does not comply with the order of Saunders J. This is not carrying on business in the ordinary course. The residual power to take all of these initiatives for relief under the CCAA remained with the receiver, and if trust deeds were to be issued, an order of the Court in Action 54033/90 was required permitting their issuance and registration.

27 There is another feature which, in my opinion, affects the exercise of discretion, and that is the probability of the meeting achieving some measure of success. Hoolihan J. considered the calling of the meeting at one hearing, as he was asked to do, and determined the respective classes of creditors at another. This latter classification is necessary because of the provisions of s. 6(a) of the CCAA, which reads as follows:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company.

28 If both matters had been considered at the same time, as in my view they should have been, and if what I regard as a proper classification of the creditors had taken place, I think it is obvious that the meeting would not be a productive one. It was improper, in my opinion, to create one class of creditors made up of all the secured creditors save the so-called "sham" creditors. There is no true community of interest among them, and the motivation of Elan and Nova in striving to create a single class is clearly designed to avoid the classification of the bank as a separate class.

29 It is apparent that the only secured creditors with a significant interest in the proceeding under the CCAA are the bank and RoyNat. The two municipalities have total claims for arrears of taxes of less than $100,000. They have first priority in the lands of the companies. They are in no jeopardy whatsoever. The O.D.C. has a potential liability in that it can be called upon by RoyNat under its guarantee to a maximum of $500,000, and this will trigger default under its debentures with the companies, but its interests lie with RoyNat.

30 As to RoyNat, it is the largest creditor with a debt of some $12 million. It will dominate any class it is in because, under s. 6 of the CCAA, the majority in a class must represent three-quarters in value of that class. It will always have

a veto by reason of the size of its claim, but requires at least one creditor to vote for it to give it a majority in number (I am ignoring the municipalities). It needs the O.D.C.

31 I do not base my opinion solely on commercial self-interest, but also on the differences in legal interest. The bank has first priority on the receivables referred to as the "quick assets", and RoyNat ranks second in priority. RoyNat has first priority on the buildings and realty, the "fixed assets", and the bank has second priority.

32 It is in the commercial interests of the bank, with its smaller claim and more readily realizable assets, to collect and retain the accounts receivable. It is in the commercial interests of RoyNat to preserve the cash flow of the business and sell the enterprise as a going concern. It can only do that by overriding the prior claim of the bank to these receivables. If it can vote with the O.D.C. in the same class as the bank, it can achieve that goal and extinguish the prior claim of the bank to realize on the receivables. This it can do, despite having acknowledged its legal relationship to the bank in the priority agreement signed by the two. I can think of no reason why the legal interest of the bank as the holder of the first security on the receivables should be overridden by RoyNat as holder of the second security.

33 The classic statement on classes of creditors is that of Lord Esher M.R. in *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573, [1891-4] All E.R. 246 (C.A.), at pp. 579-580 [Q.B.]:

> The Act [*Joint Stock Companies Arrangement Act, 1870*] says that the persons to be summoned to the meeting (all of whom, be it said in passing, are creditors) are persons who can be divided into different classes — classes which the Act of Parliament recognises, though it does not define them. This, therefore, must be done: they must be divided into different classes. What is the reason for such a course? It is because the creditors composing the different classes have different interests; and, therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

34 The *Sovereign Life* case was quoted with approval by Kingstone J. in *Re Wellington Building Corp.*, [1934] O.R. 653, 16 C.B.R. 48, [1934] 4 D.L.R. 626, [1934] O.W.N. 562 (S.C.), at p. 659 [O.R.]. He also quoted another English authority at p. 658:

> In *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.*, [1891] 1 Ch. 213, a scheme and arrangement under the Joint Stock Companies Arrangement Act (1870), was submitted to the Court for approval. Lord Justice Bowen, at p. 243, says:
>
> > Now, I have no doubt at all that it would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation. The object of this section is not confiscation ... Its object is to enable compromises to be made which are for the common benefit of the creditors as creditors, or for the common benefit of some class of creditors as such.

35 Kingstone J. set aside a meeting where three classes of creditors were permitted to vote together. He said at p. 660:

> It is clear that Parliament intended to give the three-fourths majority of any class power to bind that class, but I do not think the Statute should be construed so as to permit holders of subsequent mortgages power to vote and thereby destroy the priority rights and security of a first mortgagee.

36 We have been referred to more modern cases, including two decisions of Trainor J. of the British Columbia Supreme Court, both entitled *Re Northland Properties Ltd.* One case is reported in (1988), 73 C.B.R. (N.S.) 166, 31 B.C.L.R. (2d) 35, and the other in the same volume at p. 175 [C.B.R.]. Trainor J. was upheld on appeal on both judgments. The first judgment of the British Columbia Court of Appeal is unreported (16 September, 1988) [Doc. No. Vancouver CA009772, Taggart, Lambert and Locke JJ.A.]. The judgment in the second appeal is reported at 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122.

37 In the first *Northland* case, Trainor J. held that the difference in the terms of parties to and priority of different bonds meant that they should be placed in separate classes. He relied upon *Re Wellington Building Corp.*, supra. In the second *Northland* case, he dealt with 15 mortgagees who were equal in priority but held different parcels of land as security. Trainor J. held that their relative security positions were the same, notwithstanding that the mortgages were for the most part secured by charges against separate properties. The nature of the debt was the same, the nature of the security was the same, the remedies for default were the same, and in all cases they were corporate loans by sophisticated lenders. In specifically accepting the reasoning of Trainor J., the Court of Appeal held that the concern of the various mortgagees as to the quality of their individual securities was "a variable cause arising not by any difference in legal interests, but rather as a consequence of bad lending, or market values, or both" (p. 203).

38 In *Re NsC Diesel Power Inc.* (1990), 79 C.B.R. (N.S.) 1, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.), the Court stressed that a class should be made up of persons "'whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'" (p. 8 [of C.B.R.]).

39 My assessment of these secured creditors is that the bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the Court declining to exercise its discretion in favour of the debtor companies.

40 For all the reasons given above, the application under the CCAA should have been dismissed. I do not think that I have to give definitive answers to the individual issues numbered (1) and (2). They can be addressed in a later case, where the answers could be dispositive of an application under the CCAA. The answer to (3) is that the combined effect of the receivership and the order of Saunders J. disentitled the companies to issue the debentures and bring the application under the CCAA. It is not necessary to answer issue (4), and the answer to (5) is no.

41 Accordingly, I would allow the appeal, set aside the three orders of Hoolihan J., and, in their place, issue an order dismissing the application under the CCAA. The bank should receive its costs of this appeal, the applications for leave to appeal, and the proceedings before Farley and Hoolihan JJ., to be paid by Elan, Nova and RoyNat.

42 Ernst & Young were appointed monitor in the order of Hoolihan J. dated September 14, 1990, to monitor the operations of Elan and Nova and give effect to and supervise the terms and conditions of the stay of proceedings in accordance with Appendix "C" appended to the order. The monitor should be entitled to be paid for all services performed to date, including whatever is necessary to complete its reports for past work, as called for in Appendix "C".

DOHERTY J.A. **(dissenting in part):**

I Background

43 On November 2, 1990, this Court allowed the appeal brought by the Bank of Nova Scotia (the "bank") and vacated several orders made by Hoolihan J. Finlayson J.A. delivered oral reasons on behalf of the majority. At the same time, I delivered brief oral reasons dissenting in part from the conclusion reached by the majority and undertook to provide further written reasons. These are those reasons.

44 The events relevant to the disposition of this appeal are set out in some detail in the oral reasons of Finlayson J.A. I will not repeat that chronology, but will refer to certain additional background facts before turning to the legal issues.

45 Elan Corporation ("Elan") owns the shares of Nova Metal Products Inc. ("Nova Inc."). Both companies have been actively involved in the manufacture of automobile parts for a number of years. As of March 1990, the companies had total annual sales of about $30 million, and employed some 220 people in plants located in Chatham and Glencoe, Ontario. The operation of these companies no doubt plays a significant role in the economy of these two small communities.

46 In the 4 years prior to 1989, the companies had operated at a profit ranging from $287,000 (1987) to $1,500,000 (1986). In 1989, several factors, including large capital expenditures and a downturn in the market, combined to produce an operational loss of about $1,333,000. It is anticipated that the loss for the year ending June 30, 1990, will be about $2.3 million. As of August 1, 1990, the companies continued in full operation, and those in control anticipated that the financial picture would improve significantly later in 1990, when the companies would be busy filling several contracts which had been obtained earlier in 1990.

47 The bank has provided credit to the companies for several years. In January 1989, the bank extended an operating line of credit to the companies. The line of credit was by way of a demand loan that was secured in the manner described by Finlayson J.A. Beginning in May 1989, and from time to time after that, the companies were in default under the terms of the loan advanced by the bank. On each occasion, the bank and the companies managed to work out some agreement so that the bank continued as lender and the companies continued to operate their plants.

48 Late in 1989, the companies arranged for a $500,000 operating loan from RoyNat Inc. It was hoped that this loan, combined with the operating line of $2.5 million from the bank, would permit the company to weather its fiscal storm. In March 1990, the bank took the position that the companies were in breach of certain requirements under their loan agreements, and warned that if the difficulties were not rectified the bank would not continue as the company's lender. Mr. Patrick Johnson, the president of both companies, attempted to respond to these concerns in a detailed letter to the bank dated March 15, 1990. The response did not placate the bank. In May 1990, the bank called its loan and made a demand for immediate payment. Mr. Spencer, for the bank, wrote: "We consider your financial condition continues to be critical and we are not prepared to delay further making formal demand." He went on to indicate that, subject to further deterioration in the companies' fiscal position, the bank was prepared to delay acting on its security until June 1, 1990.

49 As of May 1990, Mr. Johnson, to the bank's knowledge, was actively seeking alternative funding to replace the bank. At the same time, he was trying to convince the union which represented the workers employed at both plants to assist in a co-operative effort to keep the plants operational during the hard times. The union had agreed to discuss amendment of the collective bargaining agreement to facilitate the continued operation of the companies.

50 The June 1, 1990 deadline set by the bank passed without incident. Mr. Johnson continued to search for new financing. A potential lender was introduced to Mr. Spencer of the bank on August 13, 1990, and it appeared that the bank, through Mr. Spencer, was favourably impressed with this potential lender. However, on August 27, 1990, the bank decided to take action to protect its position. Coopers & Lybrand was appointed by the bank as receiver-manager under the terms of the security agreements with the companies. The companies denied the receiver access to their plants. The bank then moved before the Honourable Mr. Justice E. Saunders for an order giving the receiver possession of the premises occupied by the companies. On August 27, 1990, after hearing argument from counsel for the bank and the companies, Mr. Justice Saunders refused to install the receivers and made the following interim order:

> 1. THIS COURT ORDERS that the receiver be allowed access to the property to monitor the operations of the defendants but shall not take steps to realize on the security of The Bank of Nova Scotia until further Order of the Court.
>
> 2. THIS COURT ORDERS that the defendants shall be entitled to remain in possession and to carry on business in the ordinary course until further Order of this Court.
>
> 3. THIS COURT ORDERS that until further order the Bank of Nova Scotia shall not take steps to notify account debtors of the defendants for the purpose of collecting outstanding accounts receivable. This Order does not restrict The Bank of Nova Scotia from dealing with accounts receivable of the defendants received by it.
>
> 4. THIS COURT ORDERS that the motion is otherwise adjourned to a date to be fixed.

51 The notice of motion placed before Saunders J. by the bank referred to "an intended action" by the bank. It does not appear that the bank took any further steps in connection with this "intended action."

52 Having resisted the bank's efforts to assume control of the affairs of the companies on August 27, 1990, and realizing that their operations could cease within a matter of days, the companies turned to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), in an effort to hold the bank at bay while attempting to reorganize their finances. Finlayson J.A. has described the companies' efforts to qualify under that Act, the two appearances before the Honourable Mr. Justice Farley on August 31, 1990, and the appearances before the Honourable Mr. Justice Hoolihan in September and October 1990, which resulted in the orders challenged on this appeal.

II The Issues

53 The dispute between the bank and the companies when this application came before Hoolihan J. was a straightforward one. The bank had determined that its best interests would be served by the immediate execution of the rights it had under its various agreements with the companies. The bank's best interest was not met by the continued operation of the companies as going concerns. The companies and their other two substantial secured creditors considered that their interests required that the companies continue to operate, at least for a period which would enable the companies to place a plan of reorganization before its creditors.

54 All parties were pursuing what they perceived to be their commercial interests. To the bank, these interests entailed the "death" of the companies as operating entities. To the companies, these interests required "life support" for the companies through the provisions of the Act to permit a "last ditch" effort to save the companies and keep them in operation.

55 The issues raised on this appeal can be summarized as follows:

(i) Did Hoolihan J. err in holding that the companies were entitled to invoke the Act?

(ii) Did Hoolihan J. err in exercising his discretion in directing that a meeting of creditors should be held under the Act?

(iii) Did Hoolihan J. err in directing that the bank and RoyNat Inc. should be placed in the same class of creditors for the purposes of the Act?

(iv) Did Hoolihan J. err in the terms of the interim orders he made pending the meeting of creditors and the submission to the court of a plan of reorganization?

III The Purpose and Scheme of the Act

56 Before turning to these issues, it is necessary to understand the purpose of the Act, and the scheme established by the Act for achieving that purpose. The Act first appeared in the midst of the Great Depression (S.C. 1932-33, c. 36). The Act was intended to provide a means whereby insolvent companies could avoid bankruptcy and continue as ongoing concerns through a reorganization of their financial obligations. The reorganization contemplated required the cooperation of the debtor companies' creditors and shareholders: *Re Avery Construction Co.*, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act" (1947) 25 Can. Bar Rev. 587, at pp. 592-593; David H. Goldman, "Reorganizations Under the Companies' Creditors Arrangement Act (Canada)" (1985) 55 C.B.R. (N.S.) 36, at pp. 37-39.

57 The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy- or creditor-initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

58 The purpose of the Act was artfully put by Gibbs J.A., speaking for the British Columbia Court of Appeal, in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, an unreported judgment released October 29, 1990 [Doc. No. Vancouver CA12944, Carrothers, Cumming and Gibbs JJ.A., now reported [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84], at pp. 11 and 6 [unreported, pp. 91 and 88 B.C.L.R.]. In referring to the purpose for which the Act was initially proclaimed, he said:

> 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. ['the Act'], 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.

59 In an earlier passage, His Lordship had said:

> 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.

60 Gibbs J.A. also observed (at p. 13) that the Act was designed to serve a "broad constituency of investors, creditors and employees." Because of that "broad constituency", the Court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. That interest is generally, but not always, served by permitting an attempt at reorganization: see S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at p. 593.

61 The Act must be given a wide and liberal construction so as to enable it to effectively serve this remedial purpose: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, supra, at p. 14 [unreported, p. 92 B.C.L.R.].

62 The Act is available to all insolvent companies, provided the requirements of s. 3 of the Act are met. That section provides:

> 3. This Act does not apply in respect of a debtor company unless
>
> (a) the debtor company has outstanding an issue of secured or unsecured bonds of the debtor company or of a predecessor in title of the debtor company issued under a trust deed or other instrument running in favour of a trustee; and
>
> (b) the compromise or arrangement that is proposed under section 4 or 5 in respect of the debtor company includes a compromise or an arrangement between the debtor company and the holders of an issue referred to in paragraph (a).

63 A debtor company, or a creditor of that company, invokes the Act by way of summary application to the Court under s. 4 or s. 5 of the Act. For present purposes, s. 5 is the relevant section:

> 5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

64 Section 5 does not require that the Court direct a meeting of creditors to consider a proposed plan. The Court's power to do so is discretionary. There will no doubt be cases where no order will be made, even though the debtor company qualifies under s. 3 of the Act.

65 If the Court determines that a meeting should be called, the creditors must be placed into classes for the purpose of that meeting. The significance of this classification process is made apparent by s. 6 of the Act:

> 6. Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy Act* or is in the course of being wound up under the *Winding-up Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

66 If the plan of reorganization is approved by the creditors as required by s. 6, it must then be presented to the Court. Once again, the Court must exercise a discretion, and determine whether it will ap prove the plan of reorganization. In exercising that discretion, the Court is concerned not only with whether the appropriate majority has approved the plan at a meeting held in accordance with the Act and the order of the Court, but also with whether the plan is a fair and reasonable one: *Re Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 at 182-185 (S.C.), aff'd 73 C.B.R. (N.S.) 195, [1989] 3 W.W.R. 363, 34 B.C.L.R. (2d) 122 (C.A.).

67 If the Court chooses to exercise its discretion in favour of calling a meeting of creditors for the purpose of considering a plan of reorganization, the Act provides that the rights and remedies available to creditors, the debtor company, and others during the period between the making of the initial order and the consideration of the proposed plan may be suspended or otherwise controlled by the Court.

68 Section 11 gives a court wide powers to make any interim orders:

> 11. Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (a) make an order staying, until such time as the court may prescribe or until any further order, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (b) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (c) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

69 Viewed in its totality, the Act gives the Court control over the initial decision to put the reorganization plan before the creditors, the classification of creditors for the purpose of considering the plan, conduct affecting the debtor company pending consideration of that plan, and the ultimate acceptability of any plan agreed upon by the creditors. The Act envisions that the rights and remedies of individual creditors, the debtor company and others may be sacrificed, at least temporarily, in an effort to serve the greater good by arriving at some acceptable reorganization which allows the debtor company to continue in operation: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 at p. 165 (Q.B.).

IV Did Hoolihan J. Err in Holding that the Debtor Companies were Entitled to Invoke the Act?

70 The appellant advances three arguments in support of its contention that Elan and Nova Inc. were not entitled to seek relief under the Act. It argues first that the debentures issued by the companies after August 27, 1990, were "shams" and did not fulfil the requirements of s. 3 of the Act. The appellant next contends that the issuing of the debentures by the companies contravened their agreements with the bank, in which they undertook not to further encumber the assets of the companies without the consent of the bank. Lastly, the appellant maintains that once the bank had appointed a receiver-manager over the affairs of the companies on August 27, 1990, the companies had no power to create further indebtedness by way of debentures or to bring an application on behalf of the companies under the Act.

(i) Section 3 and "Instant" Trust Deeds

71 The debentures issued in August 1990, after the bank had moved to install a receiver-manager, were issued solely and expressly for the purpose of meeting the requirements of s. 3 of the Act. Indeed, it took the companies two attempts to meet those requirements. The debentures had no commercial purpose. The transactions did, however, involve true loans in the sense that moneys were advanced and debt was created. Appropriate and valid trust deeds were also issued.

72 In my view, it is inappropriate to refer to these transactions as "shams." They are neither false nor counterfeit, but rather are exactly what they appear to be, transactions made to meet jurisdictional requirements of the Act so as to permit an application for reorganization under the Act. Such transactions are apparently well known to the commercial Bar: B. O'Leary, "A Review of the Companies' Creditors Arrangement Act" (1987) 4 Nat. Insolvency Rev. 38, at p. 39; C. Ham, " 'Instant' Trust Deeds Under the C.C.A.A." (1988) 2 Commercial Insolvency Reporter 25; G.B. Morawetz, "Emerging Trends in the Use of the Companies' Creditors Arrangement Act" (1990) Proceedings, First Annual General Meeting and Conference of the Insolvency Institute of Canada.

73 Mr. Ham writes, at pp. 25 and 30:

> Consequently, some companies have recently sought to bring themselves within the ambit of the C.C.A.A. by creating 'in stant' trust deeds, i.e., trust deeds which are created solely for the purpose of enabling them to take advantage of the C.C.A.A.

74 Applications under the Act involving the use of "instant" trust deeds have been before the Courts on a number of occasions. In no case has any court held that a company cannot gain access to the Act by creating a debt which meets the requirements of s. 3 for the express purpose of qualifying under the Act. In most cases, the use of these "instant" trust deeds has been acknowledged without comment.

75 The decision of Chief Justice Richard in *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44, 84 N.B.R. (2d) 415, 214 A.P.R. 415 (Q.B.), varied on reconsideration (1988), 68 C.B.R. (N.S.) 170, 87 N.B.R. (2d) 333, 221 A.P.R. 333 (Q.B.), at 55-56 [67 C.B.R.], speaks directly to the use of "instant" trust deeds. The Chief Justice refused to read any words into s. 3 of the Act which would limit the availability of the Act depending on the point at which, or the purpose for which, the debenture or bond and accompanying trust deed were created. He accepted [at p. 56 C.B.R.] the debtor company's argument that the Act:

> does not impose any time restraints on the creation of the conditions as set out in s. 3 of the Act, nor does it contain any prohibition against the creation of the conditions set out in s. 3 for the purpose of obtaining jurisdiction.

76 It should, however, be noted that in *Re United Maritime Fishermen Co-op.*, supra, the debt itself was not created for the purpose of qualifying under the Act. The bond and the trust deed, however, were created for that purpose. The case is therefore factually distinguishable from the case at Bar.

77 The Court of Appeal reversed the ruling of the Chief Justice ((1988), 69 C.B.R. (N.S.) 161, 51 D.L.R. (4th) 618, 88 N.B.R. (2d) 253, 224 A.P.R. 253) on the basis that the bonds required by s. 3 of the Act had not been issued when the application was made, so that on a precise reading of the words of s. 3 the company did not qualify. The Court did not

go on to consider whether, had the bonds been properly issued, the company would have been entitled to invoke the Act. Hoyt J.A., for the majority, did, however, observe without comment that the trust deeds had been created specifically for the purpose of bringing an application under the Act.

78 The judgment of MacKinnon J. in *Re Stephanie's Fashions Ltd.*, unreported, Doc. No. Vancouver A893427, released January 24, 1990 (B.C. S.C.) [now reported 1 C.B.R. (3d) 248], is factually on all fours with the present case. In that case, as in this one, it was acknowledged that the sole purpose for creating the debt was to effect compliance with s. 3 of the Act. After considering the judgment of Chief Justice Richard in *Re United Maritime Fishermen Co-op.*, supra, MacKinnon J. held, at p. 251:

> The reason for creating the trust deed is not for the usual purposes of securing a debt but, when one reads it, on its face, it does that. I find that it is a genuine trust deed and not a fraud, and that the petitioners have complied with s. 3 of the statute.

79 *Re Metals & Alloys Co.* (16 February 1990) is a recent example of a case in this jurisdiction in which "instant" trust deeds were successfully used to bring a company within the Act. The company issued debentures for the purpose of permitting the company to qualify under the Act, so as to provide it with an opportunity to prepare and submit a reorganization plan. The company then applied for an order, seeking, inter alia, a declaration that the debtor company was a corporation within the meaning of the Act. Houlden J.A., hearing the matter at first instance, granted the declaration request in an order dated February 16, 1990. No reasons were given. It does not appear that the company's qualifications were challenged before Houlden J.A.; however, the nature of the debentures issued and the purpose for their issue was fully disclosed in the material before him. The requirements of s. 3 of the Act are jurisdictional in nature, and the consent of the parties cannot vest a court with jurisdiction it does not have. One must conclude that Houlden J.A. was satisfied that "instant" trust deeds suffice for the purposes of s. 3 of the Act.

80 A similar conclusion is implicit in the reasons of the British Columbia Court of Appeal in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. In that case, a debt of $50, with an accompanying debenture and trust deed, was created specifically to enable the company to make application under the Act. The Court noted that the debt was created solely for that purpose in an effort to forestall an attempt by the bank to liquidate the assets of the debtor company. The Court went on to deal with the merits, and to dismiss an appeal from an order granting a stay pending a reorganization meeting. The Court could not have reached the merits without first concluding that the $50 debt created by the company met the requirements of s. 3 of the Act.

81 The weight of authority is against the appellant. Counsel for the appellant attempts to counter that authority by reference to the remarks of the Minister of Justice when s. 3 was introduced as an amendment to the Act in the 1952-53 sittings of Parliament (House of Commons Debates, 1-2 Eliz. II (1952-53), vol. II, pp. 1268-1269). The interpretation of words found in a statute, by reference to speeches made in Parliament at the time legislation is introduced, has never found favour in our Courts: *Reference Re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 138, at 721 [S.C.R.], 561 [D.L.R.]. Nor, with respect to Mr. Newbould's able argument, do I find the words of the Minister of Justice at the time the present s. 3 was introduced to be particularly illuminating. He indicated that the amendment to the Act left companies with complex financial structures free to resort to the Act, but that it excluded companies which had only unsecured mercantile creditors. The Minister does not comment on the intended effect of the amendment on the myriad situations between those two extremes. This case is one such situation. These debtor companies had complex secured debt structures, but those debts were not, prior to the issuing of the debentures in August 1990, in the form contemplated by s. 3 of the Act. Like Richard C.J.Q.B. in *Re United Maritime Fishermen Co-op.*, supra, at pp. 52-53, I am not persuaded that the comments of the Minister of Justice assist in interpreting s. 3 of the Act in this situation.

82 The words of s. 3 are straightforward. They require that the debtor company have, at the time an application is made, an outstanding debenture or bond issued under a trust deed. No more is needed. Attempts to qualify those words are not only contrary to the wide reading the Act deserves, but can raise intractable problems as to what qualifications

or modifications should be read into the Act. Where there is a legitimate debt which fits the criteria set out in s. 3, I see no purpose in denying a debtor company resort to the Act because the debt and the accompanying documentation was created for the specific purpose of bringing the application. It must be remembered that qualification under s. 3 entitles the debtor company to nothing more than consideration under the Act. Qualification under s. 3 does not mean that relief under the Act will be granted. The circumstances surrounding the creation of the debt needed to meet the s. 3 requirement may well have a bearing on how a court exercises its discretion at various stages of the application, but they do not alone interdict resort to the Act.

83 In holding that "instant" trust deeds can satisfy the requirements of s. 3 of the Act, I should not be taken as concluding that debentures or bonds which are truly shams, in that they do not reflect a transaction which actually occurred and do not create a real debt owed by the company, will suffice. Clearly, they will not. I do not, however, equate the two. One is a tactical device used to gain the potential advantages of the Act. The other is a fraud.

84 Nor does my conclusion that "instant" trust deeds can bring a debtor company within the Act exclude considerations of the good faith of the debtor company in seeking the protection of the Act. A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors: see Lawrence J. Crozier, "Good Faith and the Companies' Creditors Arrangement Act" (1989) 15 Can. Bus. L.J. 89.

(ii) Section 3 and the Prior Agreement with the Bank Limiting Creation of New Debt

85 The appellant also argues that the debentures did not meet the requirements of s. 3 of the Act because they were issued in contravention of a security agreement made between the companies and the bank. Assuming that the debentures were issued in contravention of that agreement, I do not understand how that contravention affects the status of the debentures for the purposes of s. 3 of the Act. The bank may well have an action against the debtor company for issuing the debentures, and it may have remedies against the holders of the debentures if they attempted to collect on their debt or enforce their security. Neither possibility, however, negates the existence of the debentures and the related trust deeds. Section 3 does not contemplate an inquiry into the effectiveness or enforceability of the s. 3 debentures, as against other creditors, as a condition precedent to qualification under the Act. Such inquiries may play a role in a judge's determination as to what orders, if any, should be made under the Act.

(iii) Section 3 and the Appointment of a Receiver-Manager

86 The third argument made by the bank relies on its installation of a receiver-manager in both companies prior to the issue of the debentures. I agree with Finlayson J.A. that the placement of a receiver, either by operation of the terms of an agreement or by court order, effectively removes those formerly in control of the company from that position, and vests that control in the receiver-manager: *Alberta Treasury Branches v. Hat Development Ltd.* (1988), 71 C.B.R. (N.S.) 264, 64 Alta. L.R. (2d) 17 (Q.B.), aff'd without deciding this point (1989), 65 Alta. L.R. (2d) 374 (C.A.). I cannot, however, agree with his interpretation of the order of Saunders J. I read that order as effectively turning the receiver into a monitor with rights of access, but with no authority beyond that. The operation of the business is specifically returned to the companies. The situation created by the order of Saunders J. can usefully be compared to that which existed when the application was made in *Hat Development Ltd.* Forsyth J., at p. 268 C.B.R., states:

> The receiver-manager in this case and indeed in almost all cases is charged by the court with the responsibility of managing the affairs of a corporation. It is true that it is appointed pursuant, in this case, to the existence of secured indebtedness and at the behest of a secured creditor to realize on its security and retire the indebtedness. Nonetheless, this receiver-manager was court-appointed and not by virtue of an instrument. As a court-appointed

> receiver it owed the obligation and the duty to the court to account from time to time and to come before the court for the purposes of having some of its decisions ratified or for receiving advice and direction. *It is empowered by the court to manage the affairs of the company and it is completely inconsistent with that function to suggest that some residual power lies in the hands of the directors of the company to create further indebtedness of the company and thus interfere, however slightly, with the receiver-manager's ability to manage*.

[Emphasis added.]

87 After the order of Saunders J., the receiver-manager in this case was not obligated to manage the companies. Indeed, it was forbidden from doing so. The creation of the "instant" trust deeds and the application under the Act did not interfere in any way with any power or authority the receiver-manager had after the order of Saunders J. was made.

88 I also find it somewhat artificial to suggest that the presence of a receiver-manager served to vitiate the orders of Hoolihan J. Unlike many applications under s. 5 of the Act, the proceedings before Hoolihan J. were not ex parte and he was fully aware of the existence of the receiver-manager, the order of Saunders J., and the arguments based on the presence of the receiver-manager. Clearly, Hoolihan J. considered it appropriate to proceed with a plan of reorganization despite the presence of the receiver-manager and the order of Saunders J. Indeed, in his initial order he provided that the order of Saunders J. "remains extant." Hoolihan J. did not, as I do not, see that order as an impediment to the application or the granting of relief under the Act. Had he considered that the receiver-manager was in control of the affairs of the company, he could have varied the order of Saunders J. to permit the applications under the Act to be made by the companies: *Hat Development Ltd.*, at pp. 268-269 C.B.R. It is clear to me that he would have done so had he felt it necessary. If the installation of the receiver-manager is to be viewed as a bar to an application under this Act, and if the orders of Hoolihan J. were otherwise appropriate, I would order that the order of Saunders J. should be varied to permit the creation of the debentures and the trust deeds and the bringing of this application by the companies. I take this power to exist by the combined effect of s. 14(2) of the Act and s. 144(1) of the *Courts of Justice Act*, 1984, S.O. 1984, c. 11.

89 In my opinion, the debentures and "instant" trust deeds created in August 1990 sufficed to bring the company within the requirements of s. 3 of the Act, even if in issuing those debentures the companies breached a prior agreement with the bank. I am also satisfied that, given the terms of the order of Saunders J., the existence of a receiver-manager installed by the bank did not preclude the application under s. 3 of the Act.

V Did Hoolihan J. Err in Exercising his Discretion in Favour of Directing that a Creditors' Meeting be Held to Consider the Proposed Plan of Reorganization?

90 As indicated earlier, the Act provides a number of points at which the Court must exercise its discretion. I am concerned with the initial exercise of discretion contemplated by s. 5 of the Act, by which the Court may order a meeting of creditors for purposes of considering a plan of reorganization. Hoolihan J. exercised that discretion in favour of the debtor companies. The factors relevant to the exercise of that discretion are as variable as the fact situations which may give rise to the application. Finlayson J.A. has concentrated on one such factor, the chance that the plan, if put before a properly constituted meeting of the creditors, could gain the required approval. I agree that the feasibility of the plan is a relevant and significant factor to be considered in determining whether to order a meeting of creditors: S.E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act," at pp. 594-595. I would not, however, impose a heavy burden on the debtor company to establish the likelihood of ultimate success from the outset. As the Act will often be the last refuge for failing companies, it is to be expected that many of the proposed plans of reorganization will involve variables and contingencies which will make the plan's ultimate acceptability to the creditors and the Court very uncertain at the time the initial application is made.

91 On the facts before Hoolihan J., there were several factors which supported the exercise of his discretion in favour of directing a meeting of the creditors. These included the apparent support of two of the three substantial secured creditors, the companies' continued operation, and the prospect (disputed by the bank) that the companies' fortunes would take a turn for the better in the near future, the companies' ongoing efforts — that eventually met with some success — to find

alternate financing, and the number of people depending on the operation of the company for their livelihood. There were also a number of factors pointing in the other direction, the most significant of which was the likelihood that a plan of reorganization acceptable to the bank could not be developed.

92 I see the situation which presented itself to Hoolihan J. as capable of a relatively straightforward risk-benefit analysis. If the s. 5 order had been refused by Hoolihan J., it was virtually certain that the operation of the companies would have ceased immediately. There would have been immediate economic and social damage to those who worked at the plants, and those who depended on those who worked at the plants for their well-being. This kind of damage cannot be ignored, especially when it occurs in small communities like those in which these plants are located. A refusal to grant the application would also have put the investments of the various creditors, with the exception of the bank, at substantial risk. Finally, there would have been obvious financial damage to the owner of the companies. Balanced against these costs inherent in refusing the order would be the benefit to the bank, which would then have been in a position to realize on its security in accordance with its agreements with the companies.

93 The granting of the s. 5 order was not without its costs. It has denied the bank the rights it had bargained for as part of its agreement to lend substantial amounts of money to the companies. Further, according to the bank, the order has put the bank at risk of having its loans become undersecured because of the diminishing value of the accounts receivable and inventory which it holds as security and because of the ever-increasing size of the companies' debt to the bank. These costs must be measured against the potential benefit to all concerned if a successful plan of reorganization could be developed and implemented.

94 As I see it, the key to this analysis rests in the measurement of the risk to the bank inherent in the granting of the s. 5 order. If there was a real risk that the loan made by the bank would become undersecured during the operative period of the s. 5 order, I would be inclined to hold that the bank should not have that risk forced on it by the Court. However, I am unable to see that the bank is in any real jeopardy. The value of the security held by the bank appears to be well in excess of the size of its loan on the initial application. In his affidavit, Mr. Gibbons of Coopers & Lybrand asserted that the companies had overstated their cash flow projections, that the value of the inventory could diminish if customers of the companies looked to alternate sources for their product, and that the value of the accounts receivable could decrease if customers began to claim set-offs against those receivables. On the record before me, these appear to be no more than speculative possibilities. The bank has had access to all of the companies' financial data on an ongoing basis since the order of Hoolihan J. was made almost 2 months ago. Nothing was placed before this Court to suggest that any of the possibilities described above had come to pass.

95 Even allowing for some overestimation by the companies of the value of the security held by the bank, it would appear that the bank holds security valued at approximately $4 million for a loan that was, as of the hearing of this appeal, about $2.3 million. The order of Hoolihan J. was to terminate no later than November 14, 1990. I am not satisfied that the bank ran any real risk of having the amount of the loan exceed the value of the security by that date. It is also worth noting that the order under appeal provided that any party could apply to terminate the order at any point prior to November 14. This provision provided further protection for the bank in the event that it wished to make the case that its loan was at risk because of the deteriorating value of its security.

96 Even though the chances of a successful reorganization were not good, I am satisfied that the benefits flowing from the making of the s. 5 order exceeded the risk inherent in that order. In my view, Hoolihan J. properly exercised his discretion in directing that a meeting of creditors should be held pursuant to s. 5 of the Act.

VI Did Hoolihan J. Err in Directing that the Bank and RoyNat Inc. Should be Placed in the Same Class for the Purposes of the Act?

97 I agree with Finlayson J.A. that the bank and RoyNat Inc., the two principal creditors, should not have been placed in the same class of secured creditors for the purposes of ss. 5 and 6 of the Act. Their interests are not only different,

they are opposed. The classification scheme created by Hoolihan J. effectively denied the bank any control over any plan of reorganization.

98 To accord with the principles found in the cases cited by Finlayson J.A., the secured creditors should have been grouped as follows:

— Class 1 — The City of Chatham and the Village of Glencoe

— Class 2 — The Bank of Nova Scotia

— Class 3 — RoyNat Inc., Ontario Development Corporation, and those holding debentures issued by the company on August 29 and 31, 1990.

VII Did Hoolihan J. Err in Making the Interim Orders He Made?

99 Hoolihan J. made a number of orders designed to control the conduct of all of the parties, pending the creditors' meeting and the placing of a plan of reorganization before the Court. The first order was made on September 11, 1990, and was to expire on or before October 24, 1990. Subsequent orders varied the terms of the initial order somewhat, and extended its effective date until November 14, 1990.

100 These orders imposed the following conditions pending the meeting:

(a) all proceedings with respect to the debtor companies should be stayed, including any action by the bank to realize on its security;

(b) the bank could not reduce its loan by applying incoming receipts to those debts;

(c) the bank was to be the sole banker for the companies;

(d) the companies could carry on business in the normal course, subject to certain very specific restrictions;

(e) a licensed trustee was to be appointed to monitor the business operations of the companies and to report to the creditors on a regular basis; and

(f) any party could apply to terminate the interim orders, and the orders would be terminated automatically if the companies defaulted on any of the obligations imposed on them by the interim orders.

101 The orders placed significant restrictions on the bank for a 2-month period, but balanced those restrictions with provisions limiting the debtor companies' activities, and giving the bank ongoing access to up-to-date financial information concerning the companies. The bank was also at liberty to return to the Court to request any variation in the interim orders which changes in financial circumstances might merit.

102 These orders were made under the wide authority granted to the court by s. 11 of the Act. L.W. Houlden and C.H. Morawetz, in *Bankruptcy Law of Canada*, 3d ed. (Toronto: Carswell, 1989), at pp. 2-102 to 2-103, describe the purpose of the section:

The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and it creditors. This aim is facilitated by s. 11 of the Act, which enables the court to restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit.

103 A similar sentiment appears in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*. Gibbs J.A., in discussing the scope of s. 11, said at p. 7 [unreported, pp. 88-89 B.C.L.R.]:

> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

104 Similar views of the scope of the power to make interim orders covering the period when reorganization is being attempted are found in *Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Ltd.*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 11 D.L.R. (4th) 576, 53 A.R. 39 (Q.B.) at 114-118 [C.B.R.]; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) at 12-15 [C.B.R.]; *Quintette Coal Ltd. v. Nippon Steel Corp.*, an unreported judgment of Thackray J., released June 18, 1990 [since reported (1990), 47 B.C.L.R. (2d) 193 (S.C.)], at pp. 5-9 [pp. 196-198 B.C.L.R.]; and B. O'Leary, "A Review of the Companies' Creditors Arrangement Act," at p. 41.

105 The interim orders made by Hoolihan J. are all within the wide authority created by s. 11 of the Act. The orders were crafted to give the company the opportunity to continue in operation, pending its attempt to reorganize, while at the same time providing safeguards to the creditors, including the bank, during that same period. I find no error in the interim relief granted by Hoolihan J.

VIII Conclusion

106 In the result, I would allow the appeal in part, vacate the order of Hoolihan J. of October 18, 1990, insofar as it purports to settle the class of creditors for the purpose of the Act, and I would substitute an order establishing the three classes referred to in Part VI of these reasons. I would not disturb any of the other orders made by Hoolihan J.

Appeal allowed.

End of Document

Tab 5

2004 CarswellOnt 870
Ontario Superior Court of Justice [Commercial List]

Air Canada, Re

2004 CarswellOnt 870, [2004] O.J. No. 842, 129 A.C.W.S. (3d) 451, 47 C.B.R. (4th) 189

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

AND IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

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

Farley J.

Heard: February 19, 2004
Judgment: February 22, 2004
Docket: 03-CL-4932

Counsel: David R. Byers, Sean F. Dunphy, Katherine J. Menear for Air Canada
Joseph M. Steiner, Donald Hanna for Greater Toronto Airport Authority
Peter Griffin, Monique Jilesen for Monitor
James C. Tory for Board of Directors
Howard Gorman for Unsecured Creditors Committee
Robert Thornton, Greg Azeff for GECAS
Dan MacDonald, Q.C. for WestJet

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Public; Contracts

Table of Authorities

Cases considered by *Farley J.*:

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to

Skydome Corp., Re (1999), 1999 CarswellOnt 208 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.1 [en. 1997, c. 12, s. 124] — referred to

MOTION by Air Canada against Greater Toronto Airport Authority to enforce terms of earlier order involving terminal access.

***Farley J.*:**

1 As argued, this was a motion by Air Canada (AC) for an Order enforcing paragraphs 6 and 7 of the Amended and Restated Initial Order dated April 1, 2003 (Initial Order) requiring the Greater Toronto Airports' Authority (Authority) not to discontinue, alter or interfere with the right, contract, arrangement, agreement, license or permit to allow AC to relocate its domestic operations (including baggage handling and gating) to Terminal 1 New (NT) and in doing so to have fixed preferential use of all 14 contact gates (bridge gates) in the domestic area of NT during the initial development phase of NT, subject to the terms and conditions of the Memorandum of Understanding between AC and Authority made as of the 31st day of January, 2001 (MOU) and the Terminal Facilities Allocation Protocol (Protocol) as such may evolve from time to time. Apparently the 9 hard stand commuter gates (tarmac gates) are no longer an issue for AC.

2 Paragraphs 6 and 7 of the Initial Order provide:

> 6. **THIS COURT ORDERS** that during the Stay Period, no person, firm, corporation, governmental authority, or other entity shall, without leave, discontinue, fail to renew, alter, interfere with or terminate any right, contract, arrangement, agreement, licence or permit in favour of an Applicant or the Applicants' Property or held by or on behalf of an Applicant, including as a result of any default or non-performance by an Applicant, the making or filing of these proceedings or any allegation contained in these proceedings.
>
> 7. **THIS COURT ORDERS** that, during the Stay Period, (a) all persons, firms, corporations, governmental authorities, airports, airport authority or air navigation authorities or any other entity (including, without limitation, NAV Canada, Office of the Superintendent of Financial Institutions ("OSFI"), IBM Canada Limited and BCE Nexxia Inc.) having written or oral agreements with an Applicant (including, without limitation, leases, pooling or consignment agreements, multilateral interline traffic agreements, codeshare agreements, Tier III Commercial Agreements, gate access agreements, frequent flyer programs or statutory or regulatory mandates) for the supply of goods and/or services (including, without limitation, real property, computer software and hardware, aircraft parts, aircraft maintenance services and related equipment, ground handling services and equipment, catering, office supplies and equipment, reservations, employee uniforms, crew accommodations, meals and commissary, communication and other data services, accounting and payroll servicing, insurance or indemnity, clearing, banking, cash management, credit cards or credit card processing, transportation, utility or other required services), by or to an Applicant or any of the Applicants' Property are hereby restrained until further order of this Court from discontinuing, failing to renew on terms no more onerous than those existing prior to these proceedings, altering, interfering with or terminating the supply of such goods or services so long as the normal prices or charges for such goods and services received after the date of this order are paid in accordance with present payment practices (for greater certainty and notwithstanding the terms of any federal or provincial statute or the terms of any lease or any present payment practices, lessors cannot alter, reconcile or recalculate the amount of any rent, operating, maintenance or other expenses payable by any Applicant so as to recover in whole or in part any amount payable by an Applicant in respect of any period of time prior to April 1, 2003 or to compensate it in whole or in part for not receiving amounts owing to it by any Applicant in respect of any period of time prior to April 1, 2003), or as may be hereafter negotiated from time to time, and (b) subject to Section 11.1 of the CCAA, all persons being party to fuel consortia agreements, or agreements or arrangements for hedging the price of, or forward purchasing of fuel, are hereby restrained from terminating, suspending, modifying, cancelling, or otherwise interfering with such hedging agreements or arrangements, notwithstanding any provisions in such agreements or arrangements to the contrary, provided that nothing herein shall require any bank to accept bankers acceptances issued after April 1, 2003. For greater

> certainty, any reference to "airport authority" made in this order shall include both authorities and any other types of legal entity operating an airport.

3 I have frequently observed in these CCAA proceedings that what is needed amongst all stakeholders and AC in all their various relationships is trust and respect flowing in every direction. I regret to say that I think it a fair observation here that trust and respect does not flow in either direction between AC and Authority. That is unfortunate and in my view completely unnecessary and inappropriate; especially when one considers that AC traffic made up 60% of the traffic which went through the Authority in 2003, and it recognized that AC is building a hub at the Toronto airport so that both sides should recognize the importance of one to the other and considering that AC is attempting to do significant restructuring in these CCAA proceedings. For whatever reasons, it appears that both sides of this equation were content to try to get an edge, even a little edge, on the other in their dealings. Each wishes its own slant on their relationship, but particularly as to how the written word should be interpreted. Suffice it to say that the agreement between AC and Authority is to be interpreted on a common sense, business efficacy/avoidance of commercial absurdity basis and is not to be restricted to the terms of any formal written agreement (as is the case of the settlement documentation as to Terminal One (T1) and Terminal Two (T2) executed between AC and Authority which agreements contain "entire agreement" clauses and which also provide that there is to be a separate agreement as to NT). There is no "entire agreement" clause in the subject documentation between AC and the Authority. Indeed there is no requirement that this relationship re NT be reduced to a written agreement as the T1 and T2 agreements provide that they:

> Shall not be construed as an agreement or understanding between [Authority] and [AC] with respect to any matters relating to [NT] which matters will be dealt with in separate arrangements between [Authority] and [A.C.]

4 John Kaldeway, the Vice President, Transition Programs of Authority wrote AC on May 29, 2003, two months into the CCAA proceedings (in dealing with an Initial Order which Authority has not come back on or as to this aspect appealed), stating in a most reasonable way its general concern that the Authority's operations and particularly its transition to NT would not be impacted adversely by AC's CCAA proceedings:

> The [Authority] assigns air carriers to the various terminals at the Airport in such a manner as to ensure the most efficient use of airport resources. It has been and continues to be our intent to have Air Canada, and its alliance and code-share (SA) partners, as the first occupants of the new terminal (NT). This, of course, assumes both that a successful restructuring by Air Canada has occurred or is continuing with an ongoing operational configuration which would warrant a transfer of operations to the new terminal, as well as the negotiation of the appropriate commercial arrangements.
>
> It is important through the process of [AC's] restructuring and the completion of the construction of the first phase of the new terminal that we maintain full and effective communications on how the restructuring and the final completion of the new terminal will impact and shape our mutual plans. In this regard, this letter will discuss important issues relating to the completion of the construction and the transition of air carrier operations into the new terminal.
>
> . . .
>
> AC and the Authority have entered into an Operating Agreement and Lease in respect of [T2] dated January 31, 2001. As you are aware, upon the completion of the first stage of [NT], the [Authority] must proceed immediately with the construction of Pier-F and the new international hammerhead. Until the opening of Pier-F, we expect that [AC's] domestic operations will be conducted from the terminal while international passenger processing will be conducted in the new terminal with boarding and deplaning to occur at the Infield Terminal to the extent these will not yet be able to be accommodated at the new terminal. Transborder [Transborder being interpreted as trans U.S. border] operations will remain at [T2]. In order to ensure the continued development of [NT] as planned, [AC] and the [Authority] will have to establish an operations protocol to provide for the transfer of operations from

> Gates 202, 203, 204, 205, 206, 208, 210, 212, 214, 216, 218, and 220 to [NT] in November [2003]. These gates serve domestic traffic only.
>
> . . .
>
> Finally, in view of the demands upon [AC's] as it proceeds with its restructuring and the critical phase of our development program, it is imperative that we establish an appropriate and effective line of communication between us that can respond in real time to emerging issues. Please confirm that John Segaert is the individual in Toronto who is able to bind [AC] with respect to these transitional issues. . . .

5 It is interesting to note that this question of the fixed preferential use of the 14 bridge gates being in issue only flared up in January, 2004 although the Authority indicates that there were rumours circulating in December, 2003 as to AC's major domestic competitor WestJet wanting to use NT. I note that apparently there are sufficient facilities in NT to allow for the checking in and baggage handling of SA international flights but that for these flights passengers would have to be bussed to the infield facility. It also appears that similarly domestic non-AC flights could be included at NT although bussing would be either to Terminal Three (T3) or (T2) in that event. Curiously, there seems to be somewhat of a mismatch of resources in that the Authority has built recently more bridge gates at T3 but has not companioned these new gates with check-in and baggage handling facilities.

6 AC filed its motion on February 5, 2004; the Authority responded with its material on February 12th, AC provided a reply affidavit of Monte Brewer (Brewer) on February 17th; the Authority responded with a further affidavit of Howard Bohan (Bohan) the same day; AC then provided a further affidavit of John Segaert (Segaert) on February 18th; and the Authority responded with the last word with a further Bohan affidavit of February 19th, the day of the hearing. The factum of AC is dated February 17, 2004; the factum of the Authority is dated February 18, 2004. There was no cross-examinations on any of the affidavits - either there was not enough time to do so (which is doubtful as to those in the February 5th and responding February 12th motion records or AC and the Authority were both content to live with any statements of the other side (notwithstanding professed disagreement in the latter affidavits), in other words, they were content to live with the ambiguities, as it does not seem that either side had any appetite for cross-examination. It therefore falls to this court to deal with the morass of material and to attempt to determine what is the agreement between AC and the Authority as to the use of the 14 bridge gates in question based on an objective and reasonable view of matters including commercial reasonability and avoidance of absurdity. My conclusion is based upon the foregoing and the balance of probabilities in interpreting the evidence.

7 It is also curious to note that in many instances the affidavits referred to meetings, discussions and other contacts without specifying a precise date. The lack of precise dates for matters such as these would lead me to the reasonable conclusion that the active participants in these situations did not keep a written record of such, but are now only relying upon their memories as to dates. One would have thought that ordinarily matters of this nature would have been either documented in exchanges between the parties or in contemporaneous notes made at the time. That they were not would lead me to the reasonable conclusion that neither AC nor the Authority had the slightest expectation that as to the domestic use of NT during its first phase, the sole user would not be AC, absent unusual circumstances. Certainly AC was the only domestic carrier to be involved in discussions, liaison, planning, co-ordination and trial runs and testing. I would note that WestJet is a very recent new-comer to the NT scene (although it previously had some now existing operations out of T3) as discussions after WestJet's approach to the Authority about moving WestJet's Hamilton based flight operations to NT only happened in December, 2003; one might reasonably question whether WestJet would be able to get up to a co-ordinated speed for operations at NT for an April 18, 2004 start given that it has not been involved in any of this planning and testing over the past several years. WestJet claims that AC's motive in bringing this motion is to avoid the competition; one may similarly question whether WestJet's motives were "innocent".

8 That AC appeared to both AC and to the Authority as the only game in town up to at least December, 2003 would lead one (and it would appear both AC and the Authority as well) to consider that one need not dot all the "i"s

and cross all the "t"s as to the 14 bridge gates. Further it is within that context that one must interpret the Authority's advice that AC and its SA partners would be the first occupants of NT as being that in respect of domestic carriers it was expected between AC and the Authority that AC would be the only domestic carrier in NT during phase one, subject to the "use it or lose it" provision of the Protocol and the provision that if other airline carriers could not be reasonably accommodated at T2 or T3 before phase two at NT came into play. It would be unreasonable to interpret the element of first occupant as being satisfied by AC domestic going in on April 6, 2004 and WestJet going in twelve days later on April 18, 2004, as per WestJet's January 14, 2004 press release. Curiously the Authority does not directly advise AC before its January 28, 2004 letter which indicates that AC gets not the 14 expected bridge gates on a fixed preferential basis, but rather only 8, with the requirement to share the other 6 with WestJet on a common usage basis. The Authority in my view is not the only one to play it cosy and coy; AC states that in late December it came up with a flight schedule that would allow it to have all of its domestic flights gated out of NT but it only advised the Authority of this on January 12, 2004, immediately after Calin Rovinescu of AC (second in command and the Chief Restructuring Officer in the CCAA proceedings) confirmed with Lou Turpen, the CEO of the Authority that the Authority was having discussions with WestJet, the nature of such discussions was not revealed.

9 I think it is fair to observe that one is disappointed with the lack of trust and respect flowing both ways as well as the lack of communication, co-operation and common sense. I say this notwithstanding that I appreciate how difficult running a major airline or a major airport is, particularly as to co-ordinating and accommodating ever changing scheduling. However, apparently the Authority is on record as not wishing to be bothered with interim scheduling advice but rather to be informed as to the schedule for the next season (the summer season) on a finalized basis in late January 2004 (January 31, 2004 being the last IATA date for such schedules). The Authority complains that usually changes made at such late date are only "tweaks", not the types of changes made by AC in mid-January and then as changed on a wholesale basis later in that month. However there does not appear to be any such restriction on magnitude or quality. One should also observe that the Authority during November and even into December 2003 was having meetings with AC at which the Authority was requesting AC to see if it could adjust its domestic schedule so that it would all be gated out of NT with no bussing to T2 (and therefore no bus terminal is to be built there). It may well be that AC was incentivized to re-think its position once it heard rumours of WestJet's interest. I would not find that unusual. I have no doubt that AC thought that it had the luxury of keeping its options open as to having overflow (if any) as to its domestic flights in phase one of the NT accommodated by bussing to T2 (with a new bus terminal to be built by and at the expense of the Authority which would have the extra benefit of accommodating a swing flight plane from domestic to transborder use (or vice versa) at T2; that luxury would not "cost" AC anything so long as its expected position of being the only domestic carrier at NT during phase one was maintained).

10 In Segaert's February 5, 2004 affidavit he states at para. 43:

> 43. In or about September, 2003, I had discussions with Mr. Howard Bohan, General Manager, New Terminal 1 Client Task Force, GTAA, regarding the revisions to version 6 of the TFAP. At the time, we discussed the application of the fixed preferential use gates and common use gates provisions of the TFAP in connection with the opening of phase 1 of T1 New. Our discussions for some time had all been premised on Air Canada moving its domestic operations into T1 New from Terminal 2. Mr. Bohan at that time indicated to me that the 14 domestic contact gates would be designated as fixed preferential use gates including reserved facilities that Air Canada would be in a position to control in the manner prescribed by the TFAP. The 9 hard stand commuter gates in T1 New he indicated would be designated as common use gates with Air Canada Jazz being fully accommodated in these facilities with some potential surplus capacity available. At that time as at all other times up until January 28, 2004, there was never any suggestion or doubt expressed by GTAA in their discussions with me that there would be any other domestic carriers operating out of T1 New from the initial phase until completion of the construction of subsequent phases of the development.

11 Segaert was the liaison decision-maker of AC requested by the Authority in the May 29, 2003 letter.

12 Bohan in his February 12, 2004 affidavit does not deny that but attempts to explain away the impact of same at paragraphs 2-7:

> 2. I have reviewed the affidavit of John Segaert sworn February 5, 2004, and in particular paragraph 43 of that affidavit. Mr. Segaert implies that the GTAA has altered an agreement or arrangement that Air Canada would have the permanent use of all fourteen contact gates at T1New on a fixed preferential basis. This is untrue. The discussions described by Mr. Segaert in paragraph 43 are not accurately described and, taken in conjunction with the balance of Mr. Segaert's affidavit, distort the discussions we had concerning the application of the Terminal Facilities Allocation Protocol ("TFAP") for T1New.
>
> 3. The discussions referred to at paragraph 43 of Mr. Segaert's affidavit took place at a meeting late in May or early June, 2003. At that time, the scheduled opening date for T1New was October 2003. Our discussions centred on the application of the TFAP for the purpose of designating fixed preferential contact gates and common use contact gates, as well as fixed preferential check-in counters and common use counters, at the time of the proposed opening date for T1New.
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> 4. Our discussions at that time were based on version 5 of the TFAP. A copy of the TFAP version 5 is attached as Exhibit "P" to John Kaldeway's affidavit.
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> 5. Under the TFAP methodology, the first step is for the GTAA to determine the number of gates or check-in counters available for allocation on a fixed preferential use basis, under section 4.4.1(ii), which provided:.
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> (ii) Based on the processing standards and the peak gate and Check-in Facility demand analysis, the GTAA will determine the number of Fixed Preferential gates and check-in positions to be allocated from the available gates and Check-in Facilities that have been designated by the GTAA as being available for allocation on a Fixed Preferential Use Basis. For greater certainty, such available gate and Check-in Facilities shall not include any gates and check-in positions that have been designated as GTAA Reserved or common Use Terminal Facilities.
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> 6. Section 8 of the TFAP provides that 10% of the available facilities will be designated GTAA reserve facilities. (Sections 4.4.1(ii) and 8 are unchanged in the current version 7 of the TFAP.)
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> 7. At that time, in late May or June, 2003, the GTAA anticipated Air Canada to be the only domestic carrier that would be operating from T1New at the time of opening. Accordingly, the GTAA then considered that all contact gates at T1New, including 2 GTAA reserved use gates, could be available for allocation on a fixed preferential basis.

13 One should also have regard to the November 23, 2001 Authority Map showing SA domestic (that is AC domestic) as using all gates - and no other carrier. The drawings presented by the Authority are Feb. 10, 11, 2004 and therefore produced only for the hearing.

14 It seems to me that the understanding between AC and the Authority which would have the status and equivalence of the type of agreement contemplated by the subject paragraphs 6 and 7 of the Initial Order under the CCAA was that in the prevailing circumstances and as these parties saw the Protocol (and MOU) playing out during phase one, AC was to have the fixed preferential use of the 14 bridge gates at NT subject to the use it or lose it proviso and the unable to accommodate elsewhere process.

15 Further given this understanding, then if the Authority wished to change course, it is constrained to do so in accord with the MOU and the Protocol in place from time to time. The Protocol is a work in progress and will continue to be so not only in phase one of the NT but during the complete functional life of the NT, unless otherwise replaced.

16 It does not seem to me that the Protocol (or the MOU) can be reasonably interpreted as advanced by the Authority that the Authority has the right and obligation to determine how many common use bridge gates it needs to accommodate

carriers it wishes to place in the NT and that any being left over would be available for fixed preferential use (to a carrier which represented 60% of the traffic in the NT as to any type of flight - domestic, transborder and international collectively which at the present time could only be AC and at anytime could only be one carrier as simple mathematics dictate).

17 Given that Segaert was the AC liaison co-ordinating person as requested by the Authority, I do not see that any advice from anyone even in December, 2003 at the Authority to Rick Leach (Leach) or others at AC would have any legal impact. Given that understanding, I am not so surprised that Leach may not have focussed on what was being suggested to him that AC would only get a certain number of bridge gates on a fixed preferential basis. Further, since these suggestions were made at a time when it was understood that on a practical basis AC was the only domestic carrier for phase one of the NT - understood by both the Authority and AC until the approach to the Authority by WestJet in December and thereafter by AC alone, in permitted ignorance until otherwise advised in January, 2004.

18 I understand that the opening of NT was delayed from the expected date of October, 2003 to April 5, 2004, but that such delay was not occasioned by AC. If matters had progressed without such delay, then it would appear that AC would not only have been allocated all 14 bridge gates on a fixed preferential basis, as indicated and evidenced by the discussion between Bohan and Segaert, but that it would have been functionally operating same. I do not see that the delay or the lack of present functional use gives the Authority any flexibility to change its mind as to AC having these bridge gates on such basis. If the Authority wishes to accommodate WestJet at NT, then it would have to follow the Protocol until either AC loses some or all of the 14 gates on a fixed preferential basis for lack of use or additional gates are built in subsequent phases (it is perhaps curious that phase one of the NT has so few gates relatively speaking although subsequent phases will bring the total to over 100; apparently most of that results from NT being squeezed into a space between T2 and T3 and for the interim having to exist in conjunction with T1 before it is demolished and replaced by runway and new construction of piers at NT).

19 The Authority (and indeed WestJet) stressed that the Authority's mandate was to provide equitable access for all air carriers. However one would observe as has been observed frequently in other CCAA proceedings that equitable treatment does not necessarily mean equal treatment. In these circumstances I do not see that there is anything truly inequitable about following the Protocol if WestJet wishes to be accommodated at the NT through use of any of the bridge gates. I pause to note that WestJet apparently could be accommodated at the NT for check-in and baggage handling if it were content to have its passengers bussed to either T2 or T3. The Authority downplayed to the maximum the inconvenience of such bussing, indicating that it would only involve the same amount of time as it would take a passenger to otherwise walk to the end of one of the piers of NT. One may be sceptical of that assertion but that is the official position of the Authority. I would also be of the view that the Authority has not in any material respect satisfied its obligations to show that it cannot otherwise accommodate WestJet at either T2 or T3, there were no figures as to usage of the check-in and baggage facilities being overloaded at T3 and there are "surplus" gates there; similarly there was no explanation as to the need to "rewire" the computer system as it would seem that under ordinary circumstances the existing cabling could remain intact and only the peripherals of computers would need to be replaced (with their own compatible software programs) and the baggage handling question was not explained as to why it needed to be replaced (or indeed why WestJet could not contract AC to handle this aspect for it at T2). One would also observe that apparently the Authority might be able to accommodate WestJet at NT by using the tarmac gates on a common use basis.

20 I note that AC was willing to accommodate WestJet as to all or part of the computer facilities at T2. Additionally AC indicated that as opposed to leaving the Protocol (as it now exists in version 7) for review after a year of experience to see what, if any, adjustments should be made, it was content to do this after 6 months.

21 I should also note that the Protocol is written without limiting its effect to AC alone. This is appropriate since AC even at the initial stage was not to be the only user as there were to be other international users. But additionally, the Protocol was being developed for use throughout all phases of the NT to and including the end of its functional life.

22 The Authority does not dispute that the usage by AC for its domestic flights as per the last schedule would give the highest use rate of all the terminals at the airport. Having done what the Authority asked it to do up to and including less than a month before WestJet came on the scene, namely put all its domestic flights gated out of NT without the necessity for bussing, I find it passing strange that the Authority would then do its calculations to bring AC below 60% usage as to certain gates by the device of the Authority - not AC - indicating that certain of AC's domestic flights would be bussed to T2.

23 The Authority submits that if I decide in AC's favour on this issue, it will have an impact beyond AC's proposed emergence from CCAA proceedings. All that is required of the Authority is that it respect the MOU and the Protocol in accordance with the internal processing of these documents at least until emergence (one way or the other) from the CCAA proceedings. What the Authority does after that time is up to it, although it would continue to be governed by those documents (in other words I suppose the Authority could decide to breach their provisions, in which case AC could, if it desired, proceed in the ordinary course with litigation, including going for injunctive relief at that time).

24 Bohan notes that the Authority and WestJet negotiated without disclosing same to the public, including carriers at the airport including AC. He observed that the same confidential arrangements were in place as were for AC moving its Tango operations to T3. However he did not comment on the magnitude of that or its relative impact on the other carriers at T3 which is an acknowledged common use facility - with no exclusive gate, check-in or baggage arrangement or anything "in between" as is the fixed preferential use subject to the various aforesaid provisions in place for NT. I note what Brewer states in his February 17th affidavit at paras. 11 and 2 respectively:

> 11. With respect to paragraph 31, I am advised by Mr. Dave Robinson, Senior Director, Corporate Real Estate, Air Canada, and do verily believe that as part of the Settlement in 2001, Air Canada agreed to give up its exclusive use of Terminal 2 despite the fact that Air Canada had made significant investments therein. While the GTAA would not agree to exclusive use of T1 New, the GTAA and Air Canada came up with a business solution and agreed to the concept of "Fixed Preferential Use" of facilities for domestic and transborder operations at T1 New. I am advised by Mr. Robinson and do verily believe that the concept of Fixed Preferential Use was agreed upon to give Air Canada comfort that it would be able to accommodate its entire domestic and transborder operations in T1 New with Fixed Preferential Use of the domestic and transborder facilities in relation to other carriers during the initial phase of T1 New, subject to the "use it or lose it" principle and subject to the GTAA maximizing facilities throughout Pearson Airport before accommodating another carrier at T1 New. I am advised by Mr. Robinson and do verily believe that Air Canada believed that it was protected by the provision in the MOU requiring the GTAA prove that Air Canada wasn't using its gates efficiently and therefore ought to "lose" them and that the GTAA was protected because Air Canada would lose its Fixed Preferential gates if not using them efficiently. I am advised by Mr. Robinson and do verily believe that Fixed Preferential Use of the T1 New was one of the critical components of the Settlement.
>
> 2. The GTAA Affidavits misconstrue statements and concepts from the First A.C. Affidavits. The GTAA Affidavits suggest that Air Canada's position is that it is entitled to "exclusive" use of all gates at T1 New. This is not the position set out in the First A.C. Affidavits. The position of Air Canada is that it was agreed that Air Canada would be the first tenant of the initial phase of the development of T1 New and that it would have the use of all gates in this first phase on a Fixed Preferential Use basis. As set out in the First A.C. Affidavits, all planning for the development and opening of the initial phase of T1 New was based on and consistent with this agreement. Air Canada's position is that it has always been agreed that the allocation of Fixed Preferential Use gates to Air Canada would ensure that it would have first call on as many gates as would reasonably be required to accommodate its operations in T1 New at a reasonable intensity of use subject only to (a) the "use it or lose it" principle enshrined in the MOU; and (b) the provisions enabling new carriers to be introduced to T1 New only when the use of other terminals have been maximized. It was always understood that at the completion of the development of T1 New, there would be sufficient terminal facilities available to accommodate other carriers.

25 It seems to me reasonable in the circumstances prevailing that the contractual relationship between AC and the Authority as to the fixed preferential use of the 14 bridge gates should be interpreted in the overall context of the above.

26 I find that the Authority has committed the 14 bridge gates to AC on a fixed preferential basis pursuant to the Protocol as established and the MOU and that such commitment should be honoured in regard to paragraphs 6 and 7 of the Initial Order.

27 The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests, recognizing that the interest of most parties will be best served by the survival of the applicant debtor corporation: see *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), at pp. 306-7 (Doherty, J.A. dissenting on unrelated grounds). I see no reason why the Authority should not be held to the understanding and agreement which I have found it had with AC in this regard. Where an affected party is in breach of an initial order (which in this case remains intact as to the paragraphs in question and unappealed or otherwise dealt with on a comeback basis by the Authority in this regard), the court may order the breaching entity to comply with the initial order: see *Skydome Corp., Re*, [1999] O.J. No. 221 (Ont. Gen. Div. [Commercial List]) at paras. 2 and 20. In that regard I order the Authority to live up to its commitment to provide AC with the fixed preferential use of the 14 bridge gates at the NT, subject only to the provisos in the Protocol (and MOU). As offered by AC, the Protocol may be revisited after six months' experience.

28 I note that all concerned (including AC, WestJet and the Authority) wanted me to release this decision as quickly as possible with a view to stabilizing the situation and getting on with implementation.

29 Order accordingly.

Motion granted.

End of Document

Tab 6

1984 CarswellAlta 259
Alberta Court of Queen's Bench

Meridian Developments Inc. v. Toronto Dominion Bank

1984 CarswellAlta 259, [1984] 5 W.W.R. 215, [1984] A.W.L.D. 609, [1984] A.W.L.D. 611, 11 D.L.R. (4th) 576, 32 Alta. L.R. (2d) 150, 52 C.B.R. (N.S.) 109, 53 A.R. 39

MERIDIAN DEVELOPMENTS INC. v. TORONTO DOMINION BANK; MERIDIAN DVELOPMENTS INC. v. NU-WEST GROUP LTD.

Wachowich J.

Judgment: May 11, 1984
Docket: Edmonton Nos. 8401-10190, 8301-09096

Counsel: *A.Z. Breitman* and *J.G. Shea*, for Meridian Dev. Ltd.
J.L. MacPherson, Q.C., and *K.J. Martens*, for Toronto Dominion Bank.
P.M. Owen, Q.C., and *C. Bodner*, for Nu-West Group Ltd.

Subject: Corporate and Commercial; Insolvency

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Cases considered:

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Aspen Planners Ltd. v. Commerce Masonry & Forming Ltd. (1979), 7 B.L.R. 102 (Ont. H.C.) — *considered*

A.G. Can. v. A.G. Que., [1934] S.C.R. 659, 16 C.B.R. 1, [1934] 4 D.L.R. 75 — *applied*

Can. Credit Men's Trust Assoc. v. Edmonton, 5 C.B.R. 589, 21 Alta. L.R. 160, [1925] 1 W.W.R. 747, [1925] 2 D.L.R. 525 (C.A.) — *considered*

East Girard Savings Assn. v. Citizens Nat. Bank and Trust Co. of Bagtown (1979), 593 F. (2d) 598 (U.S.C.A.) — *applied*

Gray v. Wentworth Canning Co., 58 Man. R. 459, 31 C.B.R. 182, [1950] 2 W.W.R. 1285 (K.B.) — *considered*

Hansard Spruce Mills Ltd., Re, [1954] 1 D.L.R. 326 (B.C.S.C.) — *referred to*

Keyworth, Re; Ex parte Banner (1874), 9 Ch. App. 379 (L.J.) — *referred to*

Lee v. Armstrong, 13 Alta. L.R. 160, [1917] 3 W.W.R. 889, 37 D.L.R. 738 (C.A.) — *considered*

Owen (Edward) Enrg. Ltd. v. Barclay's Bank Int. Ltd., [1978] 1 All E.R. 976, [1978] 1 Lloyd's Rep. 166 (C.A.) — *considered*

Page v. First Nat. Bank of Maryland, U.S. Dist. Ct., Dist. of Columbia, 30th March 1982 (not yet reported) — *applied*

Perkins Beach Lead Mining Co., Re (1877), 7 Ch. D. 371 — *considered*

Regina Steam Laundry Ltd. v. Sask. Govt. Ins. Office, [1971] 1 W.W.R. 96, 15 D.L.R. (3d) 121 (Sask. C.A.) — *referred to*

Wynden Can. Inc. v. Gaz Metro. Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. — *applied*

Statutes considered:

Alberta Business Corporations Act, 1981 (Alta.), c. B-15.

Companies Act, 1862 (25 & 26 Vict.), c. 89, s. 85.

Companies' Creditors Arrangment Act, R.S.C. 1970, c. C-25, s. 11.

Law of Property Act, R.S.A. 1980, c. L-8, ss. 40(2), (3).

Authorities considered:

Black's Law Dictionary, 5th ed. (1979), "proceeding".

3 Hals. (4th) 100, 102, paras. 132, 133.

Words and Phrases Legally Defined, 2nd ed. (1969), vol. 4, p. 182, "proceedings".

Words and phrases considered:

proceeding

Application for advice and directions concerning obligation of bank to honour letter of credit.

***Wachowich J.*:**

1 The applicant Meridian Developments Inc. (hereinafter called "Meridian") is an Alberta corporation which has recently been continued under the Alberta Business Corporations Act, 1981 (Alta.), c. B-15. Previously it was known as Meridian Developments Ltd. and it was in that name that Meridian sold land by agreement for sale to 233995 Alberta Ltd. on 16th March 1981. Nu-West Group Ltd. (hereinafter called "Nu-West") is the beneficial owner of all of the shares of 233995 Alberta Ltd. and on 16th March 1981 executed under seal an unconditional guarantee in favour of Meridian Developments Ltd. whereby Nu-West unconditionally guaranteed to Meridian the amounts due from 233995 Alberta Ltd. at the times and in the manner set forth in the agreement for sale.

2 It was a term of the guarantee that if default occurred under the agreement, Nu-West would forthwith on demand pay all of the purchase moneys owed.

3 By cl. 5 of this guarantee it was agreed that Meridian would not be bound to exhaust other resources or to act on other securities before proceeding against Nu-West.

4 On 15th March 1983, 233995 Alberta Ltd. defaulted on the agreement for sale. On 18th March 1983 demand was made to Nu-West as was required under the terms of the guarantee.

5 Nu-West failed to pay the amount owing on demand and, thereafter, Meridian issued a statement of claim on 31st March 1983. Nu-West did not defend this action and, as a result, Meridian obtained default judgment on 3rd May 1983 in the amount of $928,989.33 plus costs. A writ of execution was duly filed on 11th May 1983 and Meridian instructed the sheriff to seize sufficient assets of Nu-West to satisfy the judgment. Seizure of a number of pieces of furniture and office machines was effected on 16th May 1983.

6 Nu-West then made application by notice of motion for a declaration that Meridian was not at liberty to make execution against Nu-West until it had sold the land in question because of the provisions of s. 40(2) and (3) of the Law of Property Act, R.S.A. 1980, c. L-8. This application was dismissed by order of Kirby J. on 24th May 1983. Part of the debt was then paid but execution on the balance of $463,329.33 was stayed pending Nu-West's appeal of Kirby J.'s order. The stay of execution granted was subject to the following conditions:

7 1. That Nu-West post an irrevocable letter of credit issued by the Toronto-Dominion Bank in favour of Meridian Developments Ltd. in the amount of the unpaid balance of $463,239.33 with interest at 11 $^{1}/_{2}$ per cent per annum calculated thereon from 4th May 1983 to the date of payment.

8 2. That Meridian's solicitors were to hold the letter on the trust conditions imposed in correspondence from solicitors for the defendant to the solicitors for the plaintiff dated 6th June 1983.

9 3. That the defendant would promptly prosecute the appeal of the order.

10 The appeal was subsequently launched on 20th June 1983 and heard on 12th October 1983. The appeal was dismissed with written reasons on 29th March 1984 [31 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 97 (C.A.)].

11 The irrevocable letter of credit was held in trust by solicitors for Meridian throughout the period between Kirby J.'s first order and the dismissal of the appeal. During this period several new orders were made by consent each of which had the effect of continuing the terms and conditions of the original order. The amount of the letter of credit was increased during this period in order to account for the interest on the principal which accrued during the period. The order that was in effect when the decision of the Court of Appeal was released was made by Hetherington J. on 30th January 1984.

12 The letter of credit would have probably been honoured on presentation after 29th March were it not for the ex parte order obtained from myself by Nu-West under the Companies' Creditors Arrangement Act, R.S.C. 1970, c. C-25, as amended. This order was made as a result of Nu-West's insolvency and provided, inter alia, in cl. 2 that:

> further proceedings in any action, suit or proceeding against the Petitioner be restrained until July 31, 1984

and in clause 3 that:

> until July 31, 1984 no suit, action, or other proceeding be proceeded with or commenced against the Petitioner, except with leave of this Court.

As a result of the bank's knowledge of this order, it has not honoured the letter of credit and has, instead, brought interpleader proceedings.

13 Meridian has brought action against the bank alleging breach of contract in their failure to honour the letter of credit.

14 Application for advice and directions was also made by Meridian to entitle them to present the letter of credit for payment and to determine that my order of 21st March 1984 does not enjoin and restrain Meridian from presenting the letter of credit or the bank from honouring it.

15 From this the following issues come before me in this application:

16 1. Is payment of the letter of credit a "proceeding" within the meaning of cl. 2 or 3 of the 21st March order?

17 2. If so, is it a proceeding "against the Petitioner" [Nu-West] so as to be restrained by cl. 2 or 3 of that order?

18 3. If it is found to be a "proceeding", should the court in any case give leave to Meridian in the circumstances to obtain payment of the letter of credit?

19 These are difficult issues to resolve as counsel agree that the law in the area is unclear and the cases cannot all be reconciled. Further, there are good policy arguments to be made for both sides.

20 In order to resolve the issues raised in this application I must consider the scope and intent of my 21st March ex parte order under the Companies' Creditors Arrangement Act. This Act, though little used, is one of a number of federal statutes dealing with insolvency. In common with the various other statutes, it envisages the protection of creditors and the orderly administration of the debtor's affairs or assets: *Wynden Can. Inc. v. Gaz Metro Inc.* (1982), 44 C.B.R. (N.S.) 285 (C.S. Que.). In the words of Duff C.J.C. who spoke for the court in *A.G. Can. v. A.G. Que.*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75:

> ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation.

21 The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

22 This aim is facilitated by s. 11 of the Act which enables the court to:

> ... restrain further proceedings in any action, suit or proceeding against the company upon such terms as the court sees fit, and the court may also make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

It was pursuant to this section that on 21st March I granted the order that restrained "further proceedings in any action, suit, or proceeding" against Nu-West and enjoined creditors and others from proceeding with or commencing any "suit, action, or proceeding".

23 This order is in accord with the general aim of the Companies' Creditors Arrangement Act. The intention was to prevent any manoeuvres for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed.

24 The order was obviously intended to cast a wide net and catch all creditors. Therefore Meridian can only succeed if it can establish that the payment of the letter of credit is not a "proceeding" against Nu-West as contemplated by the order.

25 As both counsel have frankly admitted, there are no cases directly on point. One of the few cases which does deal with the meaning of the word "proceeding" in the Companies' Creditors Arrangements Act is *Gray v. Wentworth Canning Co.*, 58 Man. R. 459, 31 C.B.R. 182, [1950] 2 W.W.R. 1285, a decision of the Manitoba Court of King's Bench. In that case Kelly J. determined that the relevant statute section gave the court complete discretion to determine the kinds of proceedings it would restrain. Although because of the wording in the particular order there at issue, Kelly J. determined that it was meant to catch only proceedings, suits, or actions which had not yet been instituted, it is clear from his judgment that he sees the section as allowing orders of much wider range. He points out, in fact, that it is because the draftsman of the order did not see fit to follow the exact words of what was then s. 10 of the Companies' Creditors Arrangement Act, 1932-33 (Can.), c. 36, that the order as given must be seen as restraining only those proceedings commenced after the order was given.

26 A similar provision to s. 11 may be found in the English Companies Act, 1862 (25 & 26 Vict.), c. 89, s. 85, which allowed a court at any time after the presentation of a winding-up petition to:

> ... restrain further Proceedings in any Action, Suit, or Proceeding against the Company, upon such Terms as the Court sees fit; the Court may also make an order that no Suit, Action or other Proceeding shall be proceeded with or commenced against the Company except with the Leave of the Court and subject to such Terms as the Court imposes.

27 Several cases which have interpreted this provision are useful in determining the scope of the term "proceeding". Jessel M.R. in *Re Artistic Colour Printing Co.* (1880), 14 Ch. D. 502, determined that an order made under this section could restrain the sheriff from selling goods already in his possession after seizure on the judgment of a judgment creditor. At p. 505 he concluded: "The word 'proceeding' in both sections of course includes execution under a judgment in an action." *Re Perkins Beach Lead Mining Co.* (1877), 7 Ch. D. 371, is to the same effect.

28 Counsel for Meridian admits that "proceeding" may have a very general meaning but submits that we must confine ourselves here to proceedings which necessarily involve a court or a court official. There is certainly authority for this proposition. Black's Law Dictionary, 5th ed. (1979), defines the term in the following manner:

> *Proceeding.* In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like.
>
> An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right. All the steps or measures adopted in the prosecution or defense of an action. *Statter v. U.S.* (1933), 66 F. (2d) 819 (Alaska C.C.A.) . The word may be used synonymously with "action" or "suit" to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace all matters that occur in its progress judicially.
>
> Term "proceeding" may refer not only to a complete remedy but also to a mere procedural step that is part of a larger action or special proceeding. *Rooney v. Vermont Invt. Corp.* (1973), 10 Cal. (3d) 351, 110 Cal. Rptr. 353, 515 P. (2d) 297 (Cal. S.C.). A "proceeding" includes action and special proceedings before judicial tribunals as well as proceedings pending before quasi-judicial officers and boards. *State ex rel. Johnson v. Independent Sch. Dist. No. 810, Wabasha County* (1961), 260 Minn. 237, 109 N.W. (2d) 596 (Minn. S.C.).

29 Words and Phrases Legally Defined, 2nd ed. (1969), vol. 4, p. 182, similarly restricts the definition to actions before a court or other judicial body:

Proceedings

The term "proceeding" is frequently used to note a step in an action, and obviously it has that meaning in such phrases as "proceeding in any cause or matter". When used alone, however, it is in certain statutes to be construed as synonymous with, or including "action" (1 Hals. (3rd) 4-5, paras. 5, 6).

"By s. 89 of the Judicature Act of 1873 (36 & 37 Vict.), c. 66 [repealed; see now Supreme Court of Judicature (Consolidation) Act, 1925, (15 & 16 Geo. 5), c. 49, s. 202] ... it is said that every inferior court 'shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court, such relief, redress, or remedy' in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice ... It can do so 'in any proceeding'. Now what is the meaning there of 'in any proceeding'? ... Now, although if s. 89 stood by itself, there might be some difficulty in determining what is the meaning of the word 'proceeding', yet it seems to me to be clear what is its meaning in s. 90 [repealed; see now Supreme Court of Judicature (Consolidation) Act, 1925, s. 203], and that 'proceeding' in that section is a general word meant to cover every step in an action, and is equivalent to the word 'action'." *Pryor v. City Offices Co.* (1883), 10 Q.B.D. 504 (C.A.), *per* Brett, M.R., at pp. 507, 508.

"Anything that precedes the final judgment or order is, in my opinion, a 'proceeding' in the action." *Blake v. Summersby*, [1889] W.M. 39, *per* Kay, J. at p. 39.

30 Although this last mentioned definition indicated *Blake v. Summersby* restricts the proceedings to steps in an action preceding judgment, there is ample authority, cited by both counsel, to indicate that the term must be taken to include execution steps taken after judgment. As I indicated earlier, counsel for Meridian would restrict "execution proceedings" to those involving a court or court official. Those cases cited by Nu-West which indicate that an order restraining proceedings restrains a sheriff from conducting a sale following seizure, I am satisfied are in accord with this view inasmuch as the sheriff is an officer of the court. Further, counsel for Meridian cites *Can. Credit Men's Trust Assn. v. Edmonton*, 5 C.B.R. 589, 21 Alta. L.R. 160, [1925] 1 W.W.R. 747, [1925] 2 D.L.R. 525, where the Alberta Appellate Division found that a distress was not a "process against property" within the meaning of s. 11 of the Bankruptcy Act, 1919 (Can.), c. 36. He also cites another Alberta Appellate Division decision, that of *Lee v. Armstrong*, 13 Alta. L.R. 160, [1917] 3 W.W.R. 889, 37 D.L.R. 738, where the court found that the noting on the title by the registrar of a writ of execution was not a "proceeding" within the meaning of the phrase "no proceedings shall be had or taken in respect of any execution already issued on any personal judgment ... until sale of the land mortgaged" as found in the Land Titles Act, 1906 (Alta.), c. 24, s. 62(2) [am. 1917, c. 3, s. 40(2)].

31 Meridian argues further on the basis of the ejusdem generis rule that the interpretation of "other proceeding" in s. 11 of the Companies' Creditors Arrangement Act is limited to proceedings which would fall within the genus indicated by the words "suit" and "action". This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve either a court or court official.

32 These arguments are persuasive. Nonetheless, I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors are being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to restrict the term "proceedings" to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act. I must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary to find that such a distress constitutes a "proceeding" in terms of s. 11 in some future situations. As a result, in the absence of a clear indication from Parliament of an intention to restrict "proceedings" to "proceedings which involve either a court or court official", I cannot find that

the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal".

33 Nor is there anything within the provisions of the order given on 21st March to indicate any intention to so limit the meaning of the word. I conclude, therefore, that payment of a letter of credit drawn on the account of an insolvent company could well come within the meaning of the word "proceeding" in the order.

34 Here, we are dealing with a payment which remains contingent at the date of the order. It awaited the judgment of the Court of Appeal on 21st March and thus, did involve a court or court official. Even if, therefore, I were to accept that payment of a letter of credit is not a proceeding under the Act, it seems clear that a payment which awaits a decision of the court is a proceeding as contemplated by the Act.

35 It must be noted, however, that by the terms of the 21st March 1984 order it is only "further proceedings in any action, suit, or proceeding against the Petitioner" that are restrained. Unless the payment of the letter of credit is a "proceeding against the Petitioner" (Nu-West) it was not restrained by this order. I agree with counsel for Meridian that the payment of the letter of credit cannot be termed a proceeding against Nu-West unless the money to be paid is Nu-West's property.

36 The ownership of the funds represented by the letter of credit is dependent upon the judicial nature of the commercial instrument in question. The nature of a letter of credit has been extensively considered. 3 Hals. (4th) states at p. 100, para. 132 that letters of credit:

> ... create binding contract to accept or pay bills on the specified conditions, enforeable against the banker by any person to whom the letter has been shown by the grantee, and who has acted on the faith of it.

In para. 133 at p. 102 the authors continue:

> The contract thus created between the seller and the banker is separate from, although ancillary to, the original contract between the buyer and the seller, by reason of the banker's undertaking to the seller, which is absolute.

37 The nature of a letter of credit has been explored in both English and Canadian cases. In *Aspen Planners Ltd. v. Commerce Masonry & Forming Ltd.* (1979), 7 B.L.R. 102 at 107 (Ont. H.C.) Henry J. quotes with approval from the English Court of Appeal [who are quoting from *Malas (Hamzch) v. Sons & British Imex Indust.*, [1958] 2 Q.B. 127, [1958] 1 All E.R. 262 at 263, [1958] 2 W.L.R. 100, [1957] 2 Lloyd's Rep. 549 (C.A.)] in *Edward Owen Enrg. Ltd. v. Barclay's Bank Int.*, [1978] 1 All E.R. 976 at 981, [1978] 1 Lloyd's Rep. 166 (C.A.):

> " '.. it seems to be plain that the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes on the banker an absolute obligation to pay, irrespective of any dispute which there may be between the parties on the question whether the goods are up to the contract or not. An elaborate commercial system has been built up on the footing that bankers' confirmed credits are of that character, and, in my judgment it would be wrong for this court in the present case to interfere with that established practice.' "

38 *Aspen Planners Ltd.*, supra, deals with a situation in which the plaintiffs arranged irrevocable letters of credit to a contractor to ensure payment of a building contract. They later alleged that the contractor had defaulted on the contract and sought to obtain an injunction restraining payment under the letter of credit. The Ontario court refused, citing the irrevocable nature of the bank's obligation to pay the contractor.

39 This case, as do the English cases cited by counsel, exemplifies the more traditional use of the letter to guarantee payment in commercial transactions where goods and services are bought and sold.

40 Here, however, a more novel use has been made of the letter of credit as a security device and to determine whether this use affects the nature of the document we must turn to the American cases where the use of letters of credit, particularly in the way one was used here, is much more prevalent.

41 The nature of a letter of credit was explored in numerous cases relied upon by counsel for Meridian. *East Girard Savings Assn. v. Citizens Nat. Bank and Trust Co. of Bagtown* (1979), 593 F. (2d) 598, a decision of the U.S. Court of Appeals, Fifth Circuit, sets out the nature of the letter of credit at p. 601:

> ... a letter of credit typically involves three separate contracts. First, the issuing bank enters into a contract with its customer to issue the letter of credit. Second, there is a contract between the issuing bank and the party receiving the letter of credit. Third, the customer who procured the letter of credit signs a contract with the person receiving it, usually involving the sale of goods or the provision of some service. *Barclays Bank D.C.O. v. Mercantile Nat. Bank* (1973), 481 F. (2d) 1224, 1239 n.21, cert. dismissed 414 U.S. 1139, 94 S.Ct. 888, 39 L.Ed. (2d) 96; Verkuil, "Bank Solvency and Guaranty Letters of Credit," 25 Stan. L. Rev. 716 at 719.
>
> In recent years, letters of credit have been used for a variety of commercial transactions, Harfield, *The Increasing Domestic Use of the Letter* (1972), 4 U.C.C.L.J. 251. The guaranty letter of credit is one of these recent innovations. The guaranty letter of credit is designed to ensure that one or more parties to a contract will perform their duties under it. In a typical guaranty situation, the future owner of a building requires that the building contractor give him a completion bond providing for the payment of a certain sum of money if the building is not completed on schedule.

At p. 602 the court continues:

> Regardless of which form of letter of credit is used, upon compliance with the conditions contained in the letter, the recipient is entitled to full payment. This entitlement is independent of collateral obligations which may exist under the other underlying contracts. *Pringle-Assoc. Mtge. Corp. v. Southern Nat. Bank of Hattiesburg, Miss.*, 571F. (2d) 871 (Miss. C.A.); *Barclays Bank*, supra, at 1238-39; Vernons Texas Codes, Annotated, 2 Tex. Bus. & Com. Code (1968), p. 534, s. 5.114(a).

At p. 603 the court concludes:

> If the letter of credit is to retain its utility as a commercial instrument, the rights and duties of the issuer, the beneficiary, and the procurer must remain clear. Parties to commercial transactions must be able to rely on the fact that as soon as the conditions contained in a particular letter are satisfied, payment is due.

42 This case, and others cited by counsel for Meridian, clearly indicate that the nature of a letter of credit has not been changed by its use in a greater variety of commercial transactions, notably as a guarantee. It exists as an independent contract between the bank and the person cashing or negotiating the draft and, if it is irrevocable, the bank is bound to honour it.

43 Because of the independent contractual nature of a letter of credit, the analogy which Nu-West attempts to make between money held in court following seizure and a letter of credit cannot be maintained. Money paid into court may well remain the property of the defendants as the Saskatchewan Court of Appeal determined in *Regina Steam Laundry Ltd. v. Sask. Govt. Ins. Office*, [1971] 1 W.W.R. 96, 15 D.L.R. (3d) 121 , although I note that there is also authority to the contrary: *Re Keyworth; Ex parte Banner* (1874), 9 Ch. App. 379 (L.S.); *Re Hansard Spruce Mills Ltd.*, [1954] 1 D.L.R. 326 (B.C.S.C.). Security in the form of an irrevocable letter of credit is not the property of the party arranging the letter of credit. Indeed, I would go so far as to say that it has never been his money. He has contracted with his bank to require the bank to pay out a specific amount of money to a third party on the occurrence of certain events. In return he has promised to repay the bank for the funds so expended. The customer of the bank has, in my view, never had "ownership" of any funds represented by the letter of credit. He can lay claim only to the debt that has been thereby created.

44 Thus, it is my view that even if the payment out of a letter of credit could be termed a "proceeding", as this term is used in s. 11 of the Companies' Creditors Arrangement Act, it cannot be termed "a proceeding against the Petitioner" so as to be caught by the order of 21st March.

45 I am fortified in my view by a recent unreported American case cited by Meridian which seems right on point. The case is *Page v. First Nat. Bank of Maryland*, U.S. Dist. Ct., Dist. of Columbia, 30th March 1982 (not yet reported).

46 The facts are very similar to those found here. Westinghouse Credit Corporation ("W.C.C.") was the beneficiary of a letter of credit drawn on the First National Bank of Maryland ("bank"). The bank was enjoined from payment out on this letter after Page and Associates, a limited partnership and Virginia Page ("Page") its sole general partner, filed voluntary petitions in bankruptcy. W.C.C. was a substantial creditor of Page, holding among its forms of security the letter of credit issued on the bank. W.C.C. presented its letter of credit for payment four days after the petition was filed. Page sought an injunction the next day which was granted on the ground that to pay the letter would be a transfer in violation of the Bankruptcy Code, 11 U.S.C., s. 362(3) or (4). These subsections provide:

> [A] petition [under Title 11] operates as a stay, applicable to all entities, of ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> (4) any act to create, perfect or enforce any lien against property of the estate.

W.C.C. appealed the decision to grant the injunction and this appeal was allowed. The court found that cashing the letter of credit was not the type of act contemplated by the provisions of the statute since neither the letter of credit nor its proceeds are the "property of the estate" under the Bankruptcy Code.

47 At p. 4 of the decision the court stated:

> In issuing the letter of credit the bank entered into an independent contractual obligation to pay W.C.C. out of its own assets. Although cashing the letter will immediately give rise to a claim by the bank against the debtors pursuant to the latter's indemnification obligations, that claim will not divest the debtors of any property since any attempt to enforce that claim would be subject to an automatic stay pursuant to 11 U.S.C., para. 362(4).

48 In my view the Toronto-Dominion Bank is in the same position. It is obliged to honour its contract with Meridian even though the cashing of the letter of credit will increase Nu-West's debt to the bank and even though the bank has no method of enforcing its claim against Nu-West because of the 21st March order.

49 It makes no difference that the letter of credit was held in trust by Meridian's solicitors and that the condition precedent for presentation had not been met on 21st March. If the moneys secured were not Nu-West property on 21st March, the order did not affect them. The letter of credit became negotiable when the condition precedent was fulfilled on 29th March with the rendering of the Court of Appeal's decision in Meridian's favour. The bank should be directed to honour it on presentation on the terms and conditions specified in the letter and it is so ordered.

Directions given.

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Tab 7

2015 BCSC 1204
British Columbia Supreme Court

Veris Gold Corp., Re

2015 CarswellBC 1949, 2015 BCSC 1204, [2015] B.C.W.L.D. 4800, 256 A.C.W.S. (3d) 765, 26 C.B.R. (6th) 310

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

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

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

In the Matter of Veris Gold Corp., Queenstake Resources Ltd.,
Ketza River Holdings, and Veris Gold USA, Inc., Petitioners

Fitzpatrick J.

Heard: May 28, 2015
Judgment: July 10, 2015
Docket: Vancouver S144431

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C. Brousson, J. Bradshaw (A/S) for NV Energy
J. Porter for Government of Yukon
K. Siddall for AIG
S. Ross for Linde LLC

Subject: Insolvency; International

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

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Chapter 15 — referred to

s. 365(b)(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(1) [en. 2005, c. 47, s. 128] — considered

s. 11.3(2) [en. 2005, c. 47, s. 128] — considered

s. 11.3(3) — considered

s. 11.3(4) — considered

s. 11.3(5) [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

s. 36(3) — considered

APPLICATION by monitor for order approving and completing asset sale agreement.

***Fitzpatrick J.*:**

Introduction

1 This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The assets of the petitioner companies (collectively, "Veris Gold") principally comprise a gold mine in the State of Nevada, United States of America and mining properties in Yukon, Canada.

2 There has been no shortage of effort in these proceedings to restructure the considerable debt or monetize the assets of Veris Gold for the benefit of the stakeholders. However, in the face of considerable operational setbacks and disappointing refinancing and sale results, those stakeholders now face two stark options: (i) allow the interim lender to deal with the assets in a receivership or liquidation scenario; or (ii) allow an orderly transfer of the assets to that interim lender by way of a credit bid which would allow operations in the U.S. to continue.

3 The court-appointed monitor, Ernst & Young Inc., (the "Monitor") now applies to complete the sale to a new entity created by the interim lender, which is said to provide the best result achievable in less than desirable circumstances.

Background Facts

4 Much of the history of these proceedings was set out in my reasons for judgment issued earlier this year: *Veris Gold Corp., Re*, 2015 BCSC 399 (B.C. S.C.) . For the purposes of this application, I will summarize that history as follows.

5 On June 9, 2014, this Court granted an initial order. This filing was necessary in light of the imminent steps that were to be taken by Veris Gold's major secured creditor, Deutsche Bank A.G. ("DB") to collect its debt of approximately US$90 million.

6 The Canadian filing was immediately followed by the Monitor commencing proceedings in Nevada pursuant to Chapter 15 of the *United States Bankruptcy Cod*e, 11 U.S.C. §§ 101-1532 (the "*Bankruptcy Code*").

7 Arising from orders granted in both the Canadian and Nevada proceedings and the agreements reached between Veris Gold and DB, matters were stabilized. Those orders and agreements allowed Veris Gold to continue its efforts to restructure its debt and equity with the assistance of Raymond James & Associates. In addition, firm milestone dates were put in place to conclude any refinancing and also to commence a sales process if those refinancing efforts were not successful.

8 In October 2014, this Court approved interim financing to be obtained from WBox 2014-1 Ltd. ("WBox") in the amount of US $12 million.

9 On November 18, 2014, this Court approved a detailed sale and solicitation process to be conducted by Moelis and Company ("Moelis"), again with firm deadlines for such matters as receipt of qualified bids. Although certain of the deadlines under the sales process were extended, no qualified bids were received by the extended bid deadline, January 30, 2015.

10 Following these disappointing sale results, the Monitor engaged in discussions with Veris Gold and the two stakeholders who appeared to have the only economic interest remaining in the assets, being DB and WBox. What was critical at this time was allowing Veris Gold to continue to operate in the ordinary course while these stakeholders considered their next steps.

11 In mid-February 2015, DB issued various notices of default under its security and the agreements reached earlier with Veris Gold. This also resulted in an immediate default under the interim financing agreements between Veris Gold and WBox. With a view to securing greater oversight over the continued operations of Veris Gold, DB later applied for and was granted an order expanding the powers of the Monitor on February 23, 2015. That order was later recognized by the U.S. court in the Chapter 15 proceedings on March 2, 2015.

12 By late March 2015, both DB and WBox were continuing to consider their options, including the possibility of making a credit bid for the assets. WBox conducted due diligence of the assets toward that possibility. The Monitor reported at that time that, absent a credit bid from DB, a credit bid from WBox was the only viable alternative.

13 Accordingly, on March 30, 2015, this Court granted an order extending the stay of proceedings to April 7, 2015 to enable completion of discussions in relation to a credit bid transaction whereby certain of Veris Gold's assets would be transferred to a nominee of WBox.

14 On April 2, 2015, Veris Gold suffered yet another operational setback when a fire occurred at the processing plant, causing an estimated shutdown of one week. The already tenuous cash problems were therefore exacerbated by the deferral of revenue of approximately US$4 million as a result of the shutdown. The timing of this difficulty was unfortunate, in that by this time, the Monitor had negotiated an agreement in principle with WBox for the purchase of the assets and an increase in the interim funding to allow operations to continue to the closing date.

15 Not surprisingly, the fire and ensuing difficulties caused WBox to delay any credit bid and the provision of further financing while it considered, among other things, the impact on the cash requirements of continuing operations. In addition, in light of what the Monitor described as the "mounting challenges", the Monitor and WBox moved to a consideration of liquidation scenarios. Preliminary work on various shutdown options, including care and maintenance, indicated that significant monies would have to be expended even before the assets could be transferred on an orderly basis to environmental regulators.

16 On April 7, 2015, this Court extended the stay of proceedings to April 24, 2015 in order to enable WBox and other interested parties to assess their options and to allow the Monitor time to have further discussions with the environmental regulators. During this extension of the stay period, WBox renewed discussions with the Monitor in respect of a potential transaction that would involve the equity participation of a financial partner. It was discussed that this partner could participate in WBox's nominee, which would be the entity to hold and operate Veris Gold's mining assets.

17 Discussions were also ongoing at this time whereby WBox would provide increased financing to Veris Gold in order to allow further time to finalize a transaction.

18 On April 24, 2015, this Court granted an order extending the stay of proceedings to June 12, 2015. In addition, at the request of the Monitor, an order was granted increasing the interim funding from WBox by US$3 million to US $15 million, which would allow Veris Gold's operations to continue. WBox approved a cash flow forecast and it was agreed that WBox would maintain control over payments made from this further facility. On April 29, 2015, the U.S. court approved this amendment to the interim financing facility.

19 On May 28, 2015, Veris Gold entered into an asset sale agreement (the "Agreement") with WBVG, LLC ("WBVG"). WBVG is an entity wholly owned by WBox although, as anticipated, WBox sought and obtained the future participation of another equity partner. The transaction provides that WBox will transfer a majority interest in WBVG to 2176423

Ontario Ltd., a company owned by Eric Sprott. Mr. Sprott was already involved in Veris Gold, having a 20% equity interest and also having a royalty interest in the Nevada mining properties.

20 The salient terms of the Agreement are as follows:

> a) WBVG will purchase all tangible and intangible assets of Veris Gold, subject to certain defined excluded assets;
>
> b) the Monitor is to continue efforts to sell the Ketza assets in Yukon over a 60-day period with any sale proceeds being payable to WBVG. If no sale occurs, then those assets will be transferred to WBVG;
>
> c) WBVG is to assume certain obligations arising under assumed contracts, including all bonds, and also pay any "cure costs" relating to such assumed contracts, limited to US$10 million;
>
> d) WBVG will assume the amounts owing to WBox under the interim lending facility and will pay certain of the court-ordered charges, such as the administration charges, having priority over the interim lender's charge in favour of WBox to a maximum of US$1.8 million;
>
> e) WBVG will not assume any liabilities for pre-closing obligations;
>
> f) all employees of Veris Gold are to be terminated on closing and WBVG may offer employment to some or all of them; and
>
> g) a "DIP Financing Cash Reserve" fund estimated in the amount of US$3.1 million is to be established to pay certain post-filing obligations that will be outstanding as of the closing date, including employee wages and amounts due to suppliers and contractors for the supply of goods and services. Any funds remaining in the DIP Financing Cash Reserve after these payables have been satisfied shall be returned to WBVG.

21 The Agreement is still conditional in that it is subject to approval by both this Court and the U.S. court. Further conditions relate to obtaining an assignment of certain critical contracts, such as bonding agreements and other arrangements with the Nevada environmental regulators.

Statutory Framework

22 The authority of this Court to approve the sale is found in s. 36 of the *CCAA*. Section 36(3) of the *CCAA* sets out a list of non-exhaustive factors to be considered by the court:

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

23 A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *White Birch Paper Holding Co.,*

Re, 2010 QCCS 4915 (C.S. Que.) at para. 49, (2010), 72 C.B.R. (5th) 49 (C.S. Que.), leave to appeal ref'd 2010 QCCA 1950 (C.A. Que.).

24 In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are helpful in considering whether to approve a sale:

> 1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
>
> 2. The interests of all parties;
>
> 3. The efficacy and integrity of the process by which offers were obtained; and
>
> 4. Whether there has been any unfairness in the sales process.

25 Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) at para. 13; *White Birch Paper Holding Co., Re* at para. 50; *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 3367 (Ont. S.C.J. [Commercial List]) at para. 54.

Discussion

(a) CCAA Factors

26 I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

27 I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales process. That process, which took place over many months, unfortunately did not yield any realistic offers, despite an extension of the bid deadline.

28 The Monitor did receive a non-binding expression of interest from a party on May 8, 2015. Some of the persons behind this expression of interest had been involved in the unsuccessful sales process. However, despite the purchase price being slightly above the WBox borrowings (US$20 million), the Monitor's view was that it would not be pursued by reason of the numerous significant conditions and the reality that the delay in pursuing any offer would place Veris Gold's operations at significant risk given its precarious financial (cash) condition. On May 13, 2015, this indicative offer was increased to US$23 million but that increase did not elicit any support from either WBox or the Monitor.

29 In response to the concerns of WBox and the Monitor, this party submitted a non-binding indicative offer on May 22, 2015 with additional materials indicating that financing had been tentatively obtained. Even so, the Monitor supported WBox's continued position that this offer should not be pursued further given the risk and delay in doing so. DB did not challenge this assessment.

30 It should be noted that, with the possible exception of DB, no one was more interested in obtaining an offer to purchase the assets than WBox in terms of seeing some recovery under the interim financing. In large part, WBVG's offer is made somewhat reluctantly by WBox as the only real alternative to obtaining some value from the assets secured under its court-ordered charge.

31 The Monitor has been extensively involved throughout these proceedings and the sales efforts, particularly given the Monitor's role in brokering the peace between Veris Gold and DB that allowed the refinancing and sale efforts to continue without much controversy. To that extent, the Monitor was very much involved in fashioning the sales process that was eventually approved by the court on November 18, 2014.

32 At this time, the stark reality is that no other viable options exist other than this sale or a receivership and liquidation, with the latter providing considerable uncertainty in terms of future operations. That uncertainty has justifiably caused some concern with the regulators, both in Nevada and Yukon, who must necessarily address any environmental issues that might precipitously arise from a failure to continue operations.

33 In my view, the process leading to this transaction was fair and reasonable in the circumstances. No person has suggested that these efforts were insufficient or inadequate.

34 Needless to say, the Monitor, being the applicant, is in favour of the transaction with WBVG and recommends its approval by the court. The Monitor has been involved in the negotiations and finalization of the asset sale agreement throughout.

35 The reasons to approve the sale to WBVG and to do so quickly are outlined in the Monitor's sixteenth report to the court dated May 25, 2015. The portions of the report that highlight those reasons are:

> [Veris Gold] would unlikely be able to recover from a further significant interruption of operations. The result would likely be the commencement of a liquidation process with the resultant loss of jobs, supply chain benefits and heightened environmental risks related to the need to transition care and maintenance activities to the Nevada environmental regulators on an extremely short timeline.
>
> . . .
>
> The [transaction] is essentially a realization process by [WBox], which has no viable alternatives. The operations continue on borrowed time, and prolonging any process results, in the Monitor's view, in significant risk to numerous stakeholders - [WBox], employees, suppliers of goods and services, and the environmental regulators.
>
> . . .
>
> [I]t is urgent to have an expedited resolution to these proceedings. ... The alternative, which would involve facilitating due diligence by the EOI Party or other late emerging parties, together with the related purchase agreement negotiations and discussions with the environmental regulators, translates into an extended timeframe and a higher risk of non-completion or future operational disruption. The party exposed to the risk of loss in the event on non-completion is [WBox].

36 There has obviously been extensive consultation with WBox throughout these proceedings since the interim financing was initially approved in October 2014.

37 Since February 2015, when it was clear that no sales had materialized, DB's interest in these proceedings has undoubtedly lessened. This is largely due to the realization that there was likely no value beyond what was owed to WBox under its interim financing, which stands in priority to the secured debt of DB. In essence, DB's lack of opposition to this sale is in recognition that it will obtain no recovery of the substantial debt owed by Veris Gold to it in excess of US$90 million.

38 Other creditors junior in priority to DB have not been consulted; however, it has been abundantly clear since January 2015 that DB stood little chance of collecting even a portion of its debt, let alone realize a refinancing or sale that would see these junior creditors recover from any excess. Therefore, the proposed transaction will have no material effect on these other creditors.

39 It has also necessarily been the case that the various parties, and in particular the Monitor, WBox, Mr. Sprott and WBVG, have been in extensive discussions with the environmental regulators throughout these proceedings and specifically regarding the proposed transaction with WBVG. Discussions were held with the Nevada Division of Environmental Protection and the U.S. Forest Service in connection with the proposed transaction and any alternative

scenarios. Those regulators were either in support or not opposed to the relief sought on this application, having secured terms in the proposed court order to address any concerns on their part.

40 While the outcome for DB and other pre-filing creditors is complete non-recovery, the benefits for various other stakeholders, being WBox, the employees, suppliers and the environmental regulators, is evident enough. It is these stakeholders who will suffer in the event that Veris Gold's operations do not continue and the environmental regulators in Nevada are left with the significant care and maintenance responsibilities for the mine site in a liquidation scenario. This transaction will see a continuation of Veris Gold's operations in Nevada. Accordingly, I agree with the Monitor that this is the best outcome for these operational stakeholders.

41 The operations in Yukon have been dormant for some time. Discussions between the Monitor and the Yukon regulators are continuing at this time toward a potential purchase of the Ketza assets by Yukon and a relinquishment of Veris Gold's mineral claims and mining leases there. The Agreement contemplates that these discussions will continue, hopefully toward a satisfactory conclusion.

42 The Monitor and WBox have also addressed in part concerns expressed by the court concerning the ongoing supply of goods and services and the uncertainty of payment for those goods and services while the Agreement was being negotiated. As noted above, upon the closing of the transaction, employees and suppliers to the Nevada mine site will be paid by Veris Gold for goods and services supplied up to the time of closing. As it relates to the employees, this addresses the requirement in the *CCAA*, s. 36(7) in that the court is satisfied that employee-related claims will be paid. Additional benefits will also redound to all of these stakeholders by either the potential of continued employment with WBVG or the continuation of many of the supply contracts which are to be assumed by WBVG post-closing.

43 I also conclude that the history of these proceedings, as outlined above, demonstrates that the consideration to be received for Veris Gold's assets is reasonable and fair, taking into account their market value. While no appraisals of the assets have been obtained, that fair market value is reflected in the market response to the extensive sales efforts undertaken.

44 No one misunderstands that if the transaction is not approved WBox will withdraw funding and Veris Gold will almost certainly have to commence an orderly wind down of its operations and liquidation of its assets to satisfy the debt owed to WBox. It is more than likely that WBox will suffer a shortfall in a liquidation scenario. A liquidation scenario will also likely result in the Nevada environmental regulators taking over care and maintenance of the mine site on an expedited basis, at significant expense and with the possibility of environmental damage resulting from a surrender of the mine site without the lead time needed by the regulators.

45 In all the circumstances, a consideration of all the factors in s. 36 of the *CCAA* supports the conclusions that the proposed transaction is fair and reasonable and that the Agreement should be approved.

(b) Assignment of Contracts

46 The asset sale agreement provides that WBVG will be assigned the "Assigned Contracts", which are defined as meaning "all Designated Seller Contracts" and also described as "Required Assigned Contracts". All of these contracts are listed in a schedule attached to the purchaser disclosure schedule delivered by WBVG to Veris Gold.

47 The Monitor seeks approval of the assignment of the Designated Seller Contracts, save to the extent that consents from counterparties have not already been obtained.

48 The relevant statutory authority to approve such assignments is found in s. 11.3 of the *CCAA*:

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

. . .

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

(5) The applicant is to send a copy of the order to every party to the agreement.

49 The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

50 In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

51 In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

"Cure Cost" means, as applicable with respect to any Seller, (i) any amounts or assurances required by Section 365(b)(1) of the U.S. Bankruptcy Code under any applicable Designated Seller Contract or (ii) any amounts required to satisfy monetary defaults in relation to the applicable Designated Seller Contract pursuant to Section 11.3 of the CCAA.

52 Each of the Designated Seller Contracts and related anticipated cure costs are set out in a schedule to the Agreement. Pursuant to the Agreement, such cure costs are payable on closing. The order sought provides that upon payment, and upon assignment:

10. ... the Required Assigned Contracts [aka the Designated Seller Contracts] shall be deemed valid and binding and in full force and effect at the Closing, and the Purchaser shall enjoy all of the rights and benefits under each such Required Assigned Contract as of the applicable date of assumption.

53 Section 11.3 of the *CCAA* came into force in September 2009. Prior to that time, there was little case authority in terms of a *CCAA* court approving assignments of contracts over the objections of counterparties. One of those early cases is *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]); additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

54 In *Nexient Learning Inc., Re* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.) at 258, Wilton-Siegel J. cited both Spence J. in *Playdium Entertainment Corp., Re* and Tysoe J. (as he then was) in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (B.C. S.C.), in framing the test as being whether the assignment was "important to the reorganization process". Also of relevance was the effect of the assignment on the counterparty and the principle that third party rights should only

be affected as is absolutely required to assist in the reorganization and in a manner fair to that counterparty: see the additional reasons in *Playdium Entertainment Corp., Re* at 319; *Nexient Learning Inc., Re* at 259. See also discussion in *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 (B.C. S.C.) at paras. 107-108.

55 The approach of the courts in these earlier cases was essentially confirmed in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), where the Court stated the basis upon which relief might be "appropriate" and that any relief should result in "fair" treatment to all stakeholders:

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

56 Like many other amendments to the *CCAA* in September 2009, s. 11.3 was intended, in my view, to codify what had been the general approach to assignment issues, while also clarifying certain matters that had been to that time uncertain. One example of certainty achieved, although irrelevant on this application, arises by s. 11.3(2) which excludes certain contracts from the statutory authority of the court in s. 11.3(1).

57 Since its enactment, judicial consideration of s. 11.3 is scarce. In *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]), D.M. Brown J. (as he then was) approved the assignment of certain leases and designated contracts, finding that this would result in the continuation of the business in the greatest number of stores and the continued employment of the greater number of people. Cure costs were also to be paid: see paras. 19-25.

58 I do not see the result in *TBS Acquireco Inc., Re* as deviating from the previous approach of the courts in considering whether to approve an assignment based on the twin goals of assisting the reorganization process (i.e., the sale in this case) while also treating a counterparty fairly and equitably. These considerations can be discerned in particular from the factors set out in s. 11.3(3) set out above.

59 That brings me to the only issue that arises here in relation to the assignments. While no objection was raised to the assignments by persons who did not otherwise consent, the Monitor's counsel was candid in advising the court that only those persons on the service list were served with the Canadian application materials. It is not therefore apparent that the counterparties to the contracts did in fact receive a copy of the application materials.

60 This is not an approach that I would endorse. It may often be the case that a counterparty is not a creditor of the estate and therefore, that party would not get notice of the filing at the commencement of those proceedings. Further, even if that is the case, no assignment issue may be apparent at the time of initial service to the point that such person would take steps to be placed on the service list.

61 The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not. Section 11.3(1) specifically provides that the application is to be "on notice to every party to an agreement". Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3). Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court's decision on the issue.

62 Before proceeding with the application in *TBS Acquireco Inc., Re* , Brown J. was satisfied that the applicant had given notice of the request to seek a court-authorized assignment of the contracts: para. 25.

63 As I have mentioned, there was urgency in approving the Agreement so that Veris Gold's operations could continue in the ordinary course. Further delay was not feasible nor was it in the interests of all the stakeholders. The Monitor's counsel advised that all of the counterparties were in the U.S. and most of those counterparties, being capital lessors, were represented by Nevada counsel. Finally, I was advised that all of these counterparties were served with the U.S. application materials in anticipation of an application in Nevada to also approve the Agreement immediately after this application. Therefore, specific notice of the terms of the Agreement and the fact that approval of the assignment was sought would have been provided in any event, albeit in the context of the U.S. court materials.

64 In these exigent and extraordinary circumstances, I approved the assignments on the terms sought, but subject to the U.S. court being satisfied with the notification to and service on the counterparties to the Required Assigned Contracts who did not receive direct notice of this application. In that way, these counterparties will have been given the ability to attend the U.S. hearing and make submissions on the relief sought, all of which is a required condition to closing the Agreement.

Conclusion

65 Veris Gold has faced a number of operational challenges and adverse events over the course of this restructuring proceeding. Initially at least, they faced significant opposition by their major secured creditor, DB. Efforts to refinance or sell the assets have been met with little interest and certainly no offer was received by that process on which to base a transaction.

66 As matters stand, Veris Gold's operations are undercapitalized and susceptible to further disruptions unless stability is achieved quickly to avoid a liquidation process. That process would undoubtedly result in a loss of jobs, disruption of supply arrangements and heightened environmental risk.

67 The only realistic alternative is the one before the court on this application; namely, a credit bid by WBox, the interim lender, which would see a continuation of the operations in Nevada. The Monitor's view is that proceeding to close the Agreement on an expedited basis is necessary to protect the interests of the principal stakeholders in Veris Gold's operations, namely WBox, the employees, suppliers of goods and services and the environmental regulators.

68 The statutory requirements of the *CCAA* in ss. 36 and 11.3 have been satisfied by the Monitor toward approval of the Agreement, including approving the assignments of the Required Assigned Contracts. I am also satisfied that the orders sought are appropriate in the circumstances and consistent with the objectives of the *CCAA*.

69 The relief sought by the Monitor is granted. The Agreement is approved and Veris Gold and the Monitor are authorized to proceed to finalize the transactions with WBVG. The vesting of the assets on closing will be subject to an order of the U.S. court approving the Agreement and making such other ancillary orders as are appropriate in accordance with the *Bankruptcy Code*. The order provides that any issues that may be raised by the U.S. environmental regulators will be addressed by the U.S. court. Accordingly, this Court requests the aid, recognition and assistance of the U.S. court in terms of the carrying out of the terms of the order granted.

70 Finally, all orders sought with respect to the approval of the assignment by Veris Gold to WBVG of the Required Assigned Contracts are granted on the terms sought, including that such approval is subject to the payment of the cure costs.

Application granted.

End of Document

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRIMUS TELECOMMUNICATIONS CANADA, INC., PRIMUS TELECOMMUNICATIONS, INC., AND LINGO, INC.

Applicants
Court File No. CV-16-11257-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES OF THE MOVING PARTY, ZAYO CANADA INC.

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