Court File No. CV-18-611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

BOOK OF AUTHORITIES OF THE MONITOR
(Waiver of Privilege Motion)
(returnable March 20, 2019)

March 8, 2019

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Court-Appointed Monitor

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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 AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

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J.I. Laskin, E.A. Cronk, R.A. Blair JJ.A.

Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada, BNY Trust Company of Canada, as Indenture Trustees
Usman Sheikh for Coventree Capital Inc.
Allan Sternberg, Sam R. Sasso for Brookfield Asset Management and Partners Ltd., Hy Bloom Inc., Cardacian Mortgage Services Inc.
Neil C. Saxe for Dominion Bond Rating Service
James A. Woods, Sebastien Richemont, Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc., Jazz Air LP
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R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

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Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Miscellaneous cases

Leave to appeal — Parties were financial institutions, dealers and noteholders in market for Asset Backed Commercial Paper ("ABCP") — Canadian ABCP market experienced liquidity crisis — Plan of Compromise and Arrangement ("Plan") was put forward under Companies' Creditors Arrangement Act ("CCAA") — Plan included releases for claims against banks and dealers in negligence, misrepresentation and fraud, with "carve out" allowing fraudulent misrepresentations claims — Noteholders voted in favour of Plan — Minority noteholders ("opponents") opposed Plan based on releases — Applicants' application for approval of Plan was granted — Opponents brought application for leave to appeal and appeal from that decision — Application granted; appeal dismissed — Criteria for granting leave to appeal in CCAA proceedings was met — Proposed appeal raised issues of considerable importance to restructuring proceedings under CCAA Canada-wide — These were serious and arguable grounds of appeal and appeal would not unduly delay progress of proceedings.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;

b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;

c) The Canadian banks provide below-cost financing for the margin funding facility and,

d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25 th . The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?

2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought

> together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan*, *supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest*. [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

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

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues Paid under s.47 (f) of Timber Regulations in the Western Provinces*, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re*, *supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while

both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party*. [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

a) The parties to be released are necessary and essential to the restructuring of the debtor;

b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;

c) The Plan cannot succeed without the releases;

d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards

third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud*, *supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the

strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) ("*Stelco II*"). The Court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H*]*owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process*. [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*, *supra*. They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its*

> creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

Resignation or removal of directors

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

1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act*, *1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;

e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;

f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

TAB 2

2001 ABCA 255
Alberta Court of Appeal

Bre-X Minerals Ltd., Re

2001 CarswellAlta 1363, 2001 ABCA 255, [2001] A.J. No. 1264, [2002] 2 W.W.R. 71, [2002] A.W.L.D. 6, 109 A.C.W.S. (3d) 369, 12 C.P.C. (5th) 41, 206 D.L.R. (4th) 280, 257 W.A.C. 73, 293 A.R. 73, 29 C.B.R. (4th) 1, 97 Alta. L.R. (3d) 1

In the Matter of the Bankruptcy of Bre-X Minerals Ltd.

Deliotte & Touche Inc. Trustee in Bankruptcy of Bre-X Minerals Ltd., Appellants and Bennett Jones Verchere, Respondent

Conrad, Wittmann JJ.A., LoVecchio J. (ad hoc)

Heard: October 10, 2000
Judgment: October 5, 2001
Docket: Calgary Appeal 98-18077

Proceedings: affirming (1998), 168 D.L.R. (4th) 215 (Alta. Q.B.)

Counsel: *W.L. Severson*, for Appellants.
R.A. McLennan, *Q.C.*, *K. Fitz*, for Respondent.

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Headnote

Bankruptcy --- Administration of estate — Trustees — Miscellaneous issues

Solicitor-client privilege fell into category of interests which were not transferred to or conferred upon trustee by Bankruptcy and Insolvency Act — Privilege attached to documents which recorded privileged communication and precluded disclosure of communication — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — General

Solicitor-client privilege fell into category of interests which were not transferred to or conferred upon trustee by Bankruptcy and Insolvency Act — Privilege attached to documents which recorded privileged communication and precluded disclosure of communication — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

A company made an assignment in bankruptcy. Prior to the assignment, a law firm acted as counsel to the company and provided advice to the company, its officers and directors.

The trustee in bankruptcy's application for a declaration that it had the power and authority to waive the company's solicitor-client privilege was dismissed. The chambers judge found that the company's solicitor-client privilege did not pass or vest in the trustee. The chambers judge held that the law firm could be compelled to produce its lawyers and their files documents and records regarding the company for examination to the extent that privilege was not compromised.

The trustee appealed.

Held: The appeal was dismissed.

Per Conrad J.A. (Wittmann J.A. concurring): Solicitor-client privilege fell into a category of interests which were not transferred to or conferred upon a trustee by the *Bankruptcy and Insolvency Act*.

Section 16 of the Act and related provisions were not broad or explicit enough to empower the trustee to take possession of and use privileged communications which fell under the Act's definition of property. While there could be a physical document which recorded communication, the essence of the document was the privileged communication. Privilege attached to the document and precluded disclosure of the communication.

Solicitor-client privilege was not property under the Act. The right to waive privilege was not a power attaching to property divisible among creditors. An explicit delegation was required for trustees to have a categorical right to waive privilege for bankrupts.
The Act did not confer on a trustee the authority over privilege and did not provide that the trustee stepped into the shoes of the bankrupt for all purposes.
Potential benefits from the ability of trustees to waive privilege for a bankrupt were not overriding when compared to the interests protected and enhanced by solicitor-client privilege.
The trustee did not prove that disclosure of the company's privileged communications with the law firm would have furthered the interests and intentions of the company. No identity of interest could be assumed to exist between a trustee in bankruptcy and a bankrupt. The directors of the company did not waive the company's privilege prior to resigning. In the absence of contrary evidence, it could be assumed that the company intended to engage in confidential communications with its solicitor without an intention to disclose those communications.
As there were still company shareholders and a meeting could be called to deal with the issue of privilege, the company retained the capacity to waive privilege. No steps were taken to perfect the capacity. There was no evidence demonstrating that the trustee could not obtain the desired information without setting aside solicitor-client privilege. There was no evidence that the trustee's available options had been exhausted.
Per LeVecchio J. (ad hoc) (dissenting in part): The company continued to exist as a corporation and it continued to possess the power to waive its solicitor-client privilege. The company did not waive the privilege as it had no officer or directors and no corporate means to authorize a waiver.
The only basis upon which a trustee could claim the power to waive a bankrupt's solicitor-client privilege was statutory. That the trustee might come into possession of privileged documents was not sufficient to allow the trustee to waive privilege. As the compelled transfer of possession of privileged communication was involuntary, it could not constitute a waiver of the privilege.
That privilege was not mentioned in the Act led to the implication that its omission was deliberate. It was reasonable to conclude that the ability to waive solicitor-client privilege remaining with the bankrupt was intended.
Matters very personal to a bankrupt were not included as property under the Act. The right of privileged communication with a solicitor was personal and not included in the definition of property in the Act. Solicitor-client privilege remained with the bankrupt and the trustee had no power to waive the privilege.
As no evidence was present on the basis of which an exception to solicitor-client privilege could apply, there was no reason to make an exception.

APPEAL by trustee in bankruptcy from judgment reported at 1998 CarswellAlta 1061, 168 D.L.R. (4th) 215, 6 C.B.R. (4th) 32, 27 C.P.C. (4th) 51, *(sub nom. Bre-X Minerals Ltd. (Bankrupt), Re)* 233 A.R. 357 (Alta. Q.B.), dismissing application for declaration that trustee had authority to waive bankrupt company's solicitor-client privilege.

***Conrad J.A.* (*Wittmann J.A.* concurring):**

1 After a spectacular run in the market, the shares of Bre-X Minerals Ltd. ("Bre-X") took an equally dramatic fall, resulting in bankruptcy. The Trustee in Bankruptcy for Bre-X (the "Trustee") appealed an order refusing to declare that the Trustee has the authority and power to waive solicitor-client privilege on behalf of Bre-X.

Issues and Conclusions

2 Principally, the issues in this appeal are:

1. Does a trustee have the right to documents protected by solicitor-client privilege and does it have the power to waive solicitor-client privilege for a bankrupt?

2. If not, is this an occasion which justifies an exception to the privilege?

3 Solicitor-client privilege is the privilege of the bankrupt. It is a personal right and a protection which must be zealously protected. The privilege does not vest in a trustee upon bankruptcy, nor does the trustee have the authority to waive this privilege. Once privilege attaches to a document it need not be produced unless a governing statute says that it is subject to production whether or not privilege applies. While solicitor-client privilege is not an absolute right and exceptions apply, the Trustee in the within action has failed to demonstrate any basis for a court-sanctioned exception to the privilege. I would dismiss the appeal.

Background

4 Bre-X made an assignment in bankruptcy on November 7, 1997. Prior to the assignment, Bennett Jones Verchere ("BJV") acted as corporate and securities counsel to Bre-X providing advice and information to Bre-X, its officers and directors. Bre-X remains a subsisting corporate entity but, at present, has no directors or officers. BJV has not acted for Bre-X since May of 1997.

5 In August of 1998, the Trustee filed a notice of motion seeking a declaration that it had the power and authority to waive the solicitor-client privilege of Bre-X. The notice of motion references affidavit materials as well as ss. 34, 67(1), 71(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA" and the rules thereunder. Specifically, the Trustee sought a declaration that would confirm its power and authority to waive "any applicable solicitor-client privilege of Bre-X with respect to advice, information, opinions given to Bre-X by Bennett Jones Verchere . . . " BJV has conceded that its documents, records, files and solicitors are producible in respect of Bre-X's affairs and property, but it submits that professional advice, opinions and assistance provided to Bre-X are privileged and not compellable. For the purposes of the application, the parties agreed that the advice and information at issue constitute privileged communications between solicitor and client.

6 The Trustee argues, *inter alia*, that the information subject to solicitor-client privilege is critical to the proper administration of the bankrupt's estate. During argument, counsel conceded that a trustee may not automatically have the right to waive privilege. The Trustee, however, argues that in this case, a court sanctioned exception should be allowed because the information is critical to the administration of the bankrupt's estate and because Bre-X no longer has any officers or directors who could direct such a waiver and demand production.

7 The evidence in support of the application is minimal, and consists of the following allegations set out in the supporting affidavit of R. Ross Nelson, licensed Trustee:

> 7. In the course of its administration of the bankruptcy estate of Bre-X, and for use in the attempted realization by the Trustee of assets of Bre-X and to potentially realize upon claims against other parties, the Trustee is desirous of obtaining and using some information that may have been provided by Bennett Jones Verchere to Bre-X.
>
> 8. The Trustee views the receipt of such information as being a very important element to the administration of the Estate and to the realization of Bre-X property and to claims made against other parties.
>
> 9. Bennett Jones Verchere have taken the position that such information is the subject of Bre-X solicitor-client privilege with Bennett Jones Verchere, and that Bennett Jones Verchere cannot divulge that information without a waiver and consent by Bre-X or some authorized party on behalf of Bre-X.
>
> 10. Although Bre-X exists as a corporate entity, it has no officers or directors, and has no one to make corporate decisions for Bre-X, and has no one to exercise a will or directing mind on behalf of Bre-X.
>
> 11. In the current circumstances, it appears that if the Trustee is unable to waive such privilege on behalf of Bre-X, and if there is no other person who has the ability to waive such privilege on behalf of Bre-X, then in that case the Trustee's ability to administer the bankrupt estate, and the Trustee's ability to put forward its best

case to realize upon property of Bre-X and/or prosecute claims against third parties, will be severely prejudiced, if not entirely negated.

12. If the Trustee has the ability and authority to waive solicitor-client privilege on behalf of Bre-X, the Trustee would propose to assess the merits of waiving that privilege and make a decision accordingly.

8 The application is a very general one. The affidavit evidence does not specify any particular information which the Trustee expects to obtain from BJV, nor does it identify any specific action or potential actions which turn on the information sought. As well, the evidence does not demonstrate how any interest (neither the creditors' nor Bre-X's) may be affected by the disclosure or non-disclosure of privileged communications between Bre-X and BJV. Overall, the Trustee seeks a blanket exemption to solicitor-client privilege based on general evidence that such information would benefit the administration of the estate. The parties have agreed for the purposes of this application that solicitor-client privilege exists. The only issues are whether a Trustee has the right to waive this privilege for Bre-X and, if not, whether a court is justified in permitting an exception to the privilege.

Decision of the Chambers Judge

9 Relying upon *Clarkson Co. v. Chilcott* (1984), 48 O.R. (2d) 545 (Ont. C.A.), the learned Chambers Judge, in a well-reasoned judgment, refused to grant the declaration sought by the Trustee. In *Chilcott*, the trustee in bankruptcy sought to compel a solicitor to disclose privileged communications that might reveal the whereabouts of some of the bankrupt's property. The bankrupt did not waive his privilege and, at the time, was facing criminal charges for fraud allegedly associated with the bankruptcy.

10 The Ontario Court of Appeal varied the lower court's decision to compel evidence from the solicitor to avoid disclosure of any privileged communications. Specifically, the court confirmed that the privilege could not be waived by the trustee, as the privilege resides with the bankrupt. The Ontario Court of Appeal also limited the earlier decision of *Re Cirone* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) to its particular facts. In *Re Cirone*, the Ontario Supreme Court permitted a waiver of solicitor-client privilege by a trustee in circumstances where allegations of fraudulent preference had been made against the solicitor who refused to disclose certain communications. The Chambers Judge in the within action wholly adopted the reasoning of the Ontario Court of Appeal in *Chilcott*.

11 In addition, the Chambers Judge rejected the Trustee's analogies between this case and wills cases in which waiver of privilege by a third party may be permitted. Although he accepted the established nature of the exception in wills cases and acknowledged a superficial attraction in the analogy, he distinguished the estates cases. Namely, estates cases focus on the ascertainment of a deceased's intentions by disclosure of information protected by solicitor-client privilege. Waiver, in this situation, does not offend the rationale for this privilege.

12 The Chambers Judge denied the application and held that the Trustee does not have the legal right, power or authority to waive Bre-X's solicitor-client privilege. He confirmed that BJV could be compelled to produce its solicitors and their files, documents and records respecting the assets, affairs and transactions of Bre-X for examination, to the extent that solicitor-client privilege would not be compromised.

13 The Trustee's submissions in support of waiver of privilege may be distilled into two main categories. First, the Trustee submits that the case law, but for *Chilcott*, supports a waiver of privilege in this appeal. Second, the Trustee submits that exceptions to solicitor-client privilege exist and that the circumstances of the within appeal (e.g., the absence of directors to effect a waiver) justify an exception.

14 For the reasons that follow, I am of the view that the powers conferred on a trustee in bankruptcy do not include the general power to waive solicitor-client privilege and documents subject to that privilege need not be produced. There are no facts that justify an exception to the privilege here.

Analysis

1. Does a trustee have the power to waive solicitor-client privilege for a bankrupt?

a) Solicitor-Client Privilege

15 A basic understanding of the history and role of solicitor-client privilege is critical to the determination of both issues in this appeal. The case law specifically considering a trustee's power and authority to waive solicitor-client privilege is not extensive and is somewhat inconsistent. A broader appreciation, however, of the nature of solicitor-client privilege and its role in our legal system readily reveals the almost absolute protection afforded by this privilege.

16 Solicitor-client privilege, one of the oldest forms of common law privilege, protects the sanctity of the confidence between client and lawyer. The current rationale for solicitor-client privilege has remained unchanged for some time. The basis for this privilege was articulated aptly in *Greenough v. Gaskell* (1833), 1 My. & K. 98, at 103, 39 E.R. 618, at 620-21 (Eng. Ch. Div.):

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

17 The Supreme Court has consistently commented that solicitor-client privilege is an important cornerstone to the effective representation of clients by counsel. That court has gone as far as to characterize solicitor-client privilege as a "fundamental civil and legal right . . . ": *Solosky v. Canada* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 839.

18 It should be emphasized that solicitor-client privilege is not merely a rule of evidence but a substantive rule, which protects the client's *fundamental right* to confidentiality. The Supreme Court stated in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at 875:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

At 871, the court further noted:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that is "founded upon the unique relationship of solicitor and client" (*Solosky*, *supra*). It is a *personal* and extra-patrimonial right which follows a citizen throughout his dealings with others.
>
> (Emphasis added.)

Thus, this privilege casts a wide protective net over communications between solicitors and their clients and is protected zealously by the courts.

19 Due to its critical function in our legal system, solicitor-client privilege is distinct from other forms of evidentiary privilege. Solicitor-client privilege has attained the status of a class privilege, and is not assessed on a case-by-case basis like other forms of relational privilege. A consideration of other forms of relational privilege (e.g., priest/penitent, therapist/patient and so on) that are decided on a case-by-case basis is, however, useful. In particular, the Wigmore criteria, used to assess claims of privilege on a case-by-case basis, reveal the basic rationale for relational privilege and demonstrate why solicitor-client privilege constitutes an entrenched class of privilege.

20 The Wigmore criteria were quoted, perhaps most notably, by the Supreme Court in *Slavutych v. Baker* (1975), [1976] 1 S.C.R. 254 (S.C.C.). In *Slavutych*, the Supreme Court considered whether any privilege attached to a professor's comments about a colleague who was being considered for tenure. The professor was told by his superior that his comments and the evaluation form were part of a confidential review process. The professor's comments on the form were subsequently used in dismissal proceedings against him. When considering whether the professor's comments were privileged, the Supreme Court adopted the Wigmore criteria as the test for privilege at 260:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be *sedulously fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

When assessing claims of relational privilege on a case-by-case basis, these four fundamental conditions must be met before privilege will be held to arise. These stringent conditions limit the circumstances in which privilege may be claimed.

21 Solicitor-client privilege is presumed to meet all four criteria. As noted in *R. v. Fosty*, [1991] 3 S.C.R. 263 (S.C.C.), at 289: "[t]he *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system." Thus, it is essential that clients enjoy confidentiality in their pursuit of legal advice, otherwise clients might avoid seeking assistance from lawyers or might not disclose all necessary information to their lawyers when attempting to get advice. There is no question that this confidential relationship ought to be "sedulously fostered", as effective representation is a cornerstone of our legal system. The injury that would result from an erosion of solicitor-client privilege is great, including the collapse of effective legal representation.

22 Once solicitor-client privilege is established (i.e., the communication was in fact confidential, in the context of a professional relationship and in the course of seeking advice), the categorical circumstances in which disclosure of privileged information by a person other than the client will be permitted are very limited. Communications which are criminal or which seek to facilitate criminal activities are exempted: *Solosky*. Similarly, privilege may be set aside when the safety of the public is at risk from non-disclosure of the communications: *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.). In addition, the continued existence of solicitor-client privilege is not required where the client no longer has an interest to protect and where non-disclosure would compromise the ability of an accused to defend himself: *Smith*. Finally, while

the duty of confidentiality survives the death of the client, the privilege enures to the client's successor in title (e.g., heirs) and may be waived by a successor in interest to the client: *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), at 384. The within appeal does not fall within any of these categories nor is the Trustee's situation analogous to any of these exceptional circumstances.

23 The Trustee strongly urges an analogy between this action and estates cases in which disclosure is permitted. Disclosure in estates cases has been allowed to promote the deceased client's wishes and true testamentary intentions through disclosure of privileged communications. The interests that solicitor-client privilege seeks to protect are not compromised where the waiver will disclose the testator's intentions: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1990) at 753-54. The rationale for disclosure is not only that disclosure is consistent with what the testator would have wanted, but also that the client's communication is presumed to have been intended to remain a secret only during the testator's lifetime: Wigmore, *Evidence in Trials at Common Law*, vol. 8, 4th ed. (Boston: Little, Brown & Co., 1961) at para. 2314; *Geffen* at 385. Thus, the exception in *Geffen* allows the testator's intention to be carried out but should not be misinterpreted as authority for a widespread, case-by-case assessment of requests for waiver of privilege by third parties. The presumption described by Wigmore does not apply in the circumstances of this appeal.

b) The Powers of a Trustee in Bankruptcy

24 Solicitor-client privilege is the privilege of the client — in this case, Bre-X. Subject to an exception, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege and demand disclosure would be statutory. It is important to understand the powers of a trustee when resolving the question of privilege. A trustee has no inherent authority over the bankrupt's affairs. Rather, the trustee's rights are statutory and it is empowered to assume conduct of the bankrupt's affairs and take possession of his property pursuant to authority granted by the BIA which provides, in part:

> 16. (3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt and make an inventory, and for the purpose of making an inventory the trustee is entitled to enter, subject to subsection (3.1), on any premises on which the deeds, books, records, and documents or property of the bankrupt may be, notwithstanding that they may be in the possession of a sheriff, a secured creditor or other claimant thereto.
>
> . . .
>
> (5) No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.
>
> 18. The trustee may when necessary in the interests of the estate of the bankrupt
>
> > (a) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value; and
> >
> > (b) carry on the business of the bankrupt until the date fixed for the first meeting of creditors.
>
> 20. (1) The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property of the bankrupt . . .
>
> 21. The trustee may initiate such criminal proceedings as may be authorized by the creditors, the inspectors or the court against any person believed to have committed an offence under this Act.
>
> 67. (1) 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 the laws of the province within which the property is situated and within which the bankrupt resides,
>
> 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.
>
> 71. (2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee, the property shall pass from trustee to trustee without any conveyance, assignment or transfer.
>
> 163. (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.
>
> 164. (1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.
>
> 167. Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

There are many other provisions which confer broad powers upon the trustee, but notably absent is the delegation of any power to waive privilege, such as contained in the British legislation. While these sections allow for the examination of a solicitor and disclosure of information relating to the bankrupt's transactions, the sections omit any reference to privileged communications.

25 British insolvency legislation (the *Insolvency Act*, 1986, c. 45 (U.K.)) explicitly refers to privileged communications:

> 311(1). The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings).

26 This provision expressly permits the production of privileged documents, unlike the Canadian statute where neither production of privileged documents nor waiver of privilege is mentioned. A cursory review of *Halsbury's Laws of England*, vol. 3(1), 4th ed. (London: Butterworths, 1980) and vol. 3(2), 4th ed. (London: Butterworths, 1980), and British case authorities reveals that even where the privileged document is expressly producible notwithstanding the privilege,

the provision merely entitles the trustee to take possession. The protection afforded by solicitor-client privilege, however, is not displaced and the section does not confer any authority to waive the privilege upon the trustee.

27 The British legislation may be contrasted with comparable American provisions. The *Bankruptcy Code*, 11 U.S.C. §§ 542(e) provides:

> Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records and papers relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

The American legislation recognizes that the privilege protects communications from disclosure and cannot be waived by the trustee.

28 The Canadian legislation is silent regarding solicitor-client privilege, and thus it is necessary to determine whether the documents must be produced notwithstanding the privilege. Keeping in mind the importance and purpose of the privilege, it is my view that, absent specific language such as that contained in the British statute, once the privilege attaches disclosure of the communication cannot be compelled. That is the essence of the privilege. The purpose of the privilege is a recognition of the importance of confidentiality to the judicial system generally. If the document must be disclosed to a trustee in bankruptcy, then confidentiality and the judicial system it supports is undermined. And it is not corrected by saying that the trustee cannot use the information. Indeed, if the trustee cannot use the information then there is no purpose in the disclosure. If it can, then the foundation for the privilege is damaged.

29 There may be occasions where the trustee inadvertently comes into possession of privileged information. Even then, a trustee cannot waive the privilege and make use of the documents unless they fall within an exception.

30 Parliament did not include a clause making privileged communications producible. In addition to excluding any reference to solicitor-client privilege, Parliament does not confer all the bankrupt's property and personal rights in the trustee. Section 2(1) of the BIA defines "property" to include:

> money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

The "property" that vests in the trustee includes almost "every conceivable type of asset": *Chetty v. Burlingham Associates Inc.* (1995), 121 D.L.R. (4th) 297 (Sask. C.A.), at 300. Some types of property, however, are specifically excluded (e.g., property held in trust for another person, pursuant to s. 67(1)) or do not fall within the confines of the definition.

31 Notably, personal property and personal rights are very different and the cases interpreting the BIA distinguish the two. For example, "things in action", such as a cause of action for custody or divorce, are matters personal to the bankrupt and are not captured by s. 2(1) of the BIA: *Gano v. Alberta Motor Assn. Insurance Co.* (1997), 202 A.R. 118 (Alta. Master). Tax refunds for the support of disabled person are the "property of the bankrupt": *Re Neufeld* (1993), 144 A.R. 182 (Alta. Q.B.). Nor does a cause of action for damage to the reputation of a bankrupt vest in a trustee: *Eggen v. Grayson* (1956), 8 D.L.R. (2d) 125 (Alta. T.D.); *Rahall v. McLennan* (1996), 190 A.R. 183 (Alta. Q.B.). In my view, solicitor-client privilege is a personal right, at least as fundamental and individual as damages to reputation, which falls into a category of interests which are not transferred to or conferred upon a trustee by the BIA. As noted by Yoine Goldstein in "Bankruptcy as it Affects Third Parties: Some Aspects", [1985] Meredith Mem. Lect. 198 at 227: "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy . . . "

32 The distinction between property rights and personal rights, such as privilege, however, is far from absolute. For example, the BIA dictates that trustees take possession of all property of the bankrupt, including books, records and documents. The trustee argues that if a privileged communication has been reduced to writing (for example, in the form

of an opinion letter) the tangible letter is property that must be produced. But the very essence of the solicitor-client privilege (the personal right of the bankrupt) protects the privileged communication from being communicated. The BIA does not diminish the personal right of privilege enjoyed by the bankrupt in respect of that communication. Once privilege attaches to the communication, I am of the view that it need not be produced unless the statute specifically provides. Moreover, in cases where production of privileged material occurs inadvertently, the privilege remains extant and the bankrupt's right to privilege with respect to that document is maintained.

33 Section 16 of the BIA and other related provisions are neither sufficiently broad nor explicit enough to empower the trustee to take possession of and use privileged communications, advice or opinions which may fall under the BIA's definition of "property". Certainly a privileged communication is not property divisible amongst creditors such as that contemplated in s. 67. In short, while there may be a physical record or document which records the communication, the essence of the document is still the privileged communication, a personal right and not property contemplated or falling under the BIA. The personal right of privilege attaches to the document and, in my view, that personal right, retained by the bankrupt, precludes disclosure of the communication to the trustee whatever form the communication takes. If disclosure of the physical document was permitted, the personal privilege right would be totally defeated. Had a transfer of solicitor-client privilege, or production of privileged communications (whatever their form) been intended, Parliament would have so provided in the BIA. This was not done.

34 In the case of a company, the privilege is solely the right of the company. There may also be situations where questions of privilege will arise with respect to individuals such as directors, officers and managers of the corporation who seek advice from the corporate solicitor as to their own obligations, which may become intertwined with corporate opinions. This variant on the issues that may arise out a trustee's attempt to disclose privileged information is not before us and I need not address the issue.

35 In my view, there is no attempt in the legislation to displace the common law confidentiality rights enjoyed by a bankrupt with respect to its communications with solicitors. The privilege itself is not property under the BIA. Nor is the right to waive a power attaching to property divisible amongst creditors under s. 67. The essence of the privilege, whatever its form, is the confidential communication to which privilege attaches. An explicit delegation would be required in order for trustees to have a categorical right to waive privilege for bankrupts and even for trustees to have an enhanced ability to seek the authority to waive from the courts on a case-by-case basis. Thus, the personal right of privilege is not altered by the BIA.

c) Jurisprudence

36 The Trustee submits that diverging and inconsistent views regarding the ability of a trustee to waive a bankrupt's privilege exist among courts in Canada. It suggests that, notwithstanding *Chilcott*, the continuing rule in the jurisprudence is that a bankruptcy trustee can waive a bankrupt's solicitor-client privilege. It is true that there is a dearth of authority on this issue and that some of the earlier authorities are inconsistent with *Chilcott*. In my view, however, the approach of the court in *Chilcott* is compelling.

37 As noted earlier, in that case, a solicitor acted on behalf of the bankrupt prior to the bankruptcy and advised the bankrupt on financial and other corporate matters. The trustee sought to examine the solicitor regarding privileged communications with the bankrupt. Although the court accepted that the solicitor could be compelled to disclose information about the bankrupt's property, affairs and transactions, the court held that information on any topic necessarily involving disclosure of communications made between the solicitor and the bankrupt for the purpose of giving legal advice could not be disclosed. Ultimately, the court refused to speculate on circumstances in which a trustee might properly waive a bankrupt's privilege, but it concluded that the goal of protecting creditors' rights, standing alone, could not defeat solicitor-client privilege.

38 In my view, *Chilcott* correctly balances the importance of solicitor-client privilege against creditors' rights and is relevant and applicable to the case at bar. The fact that the bankrupt was an individual in *Chilcott*, as compared to

the corporate bankrupt involved in the within action, is not a relevant distinguishing factor. If anything, the bankrupt's refusal to waive privilege and the specific fraud allegations advanced against him in *Chilcott* resulted in a stronger case for disclosure than the Trustee has put before this Court.

39 In support of its submissions, the Trustee relies on the Alberta case of *Re Abacus Cities Ltd.* (1981), 40 C.B.R. (N.S.) 172 (Alta. Q.B.). In *Re Abacus Cities Ltd.*, a trustee sought the court's advice and direction regarding his authority over privilege applicable to communications between a bankrupt corporation and the bankrupt's solicitors where an officer of the bankrupt had been charged with fraud. The trustee's query arose when the Attorney General of Ontario, during a preliminary hearing into the fraud charges, asked the trustee to waive the bankrupt's solicitor-client privilege regarding certain communications relevant to the fraud charges. As the matter arose out of a bankruptcy action commenced in Ontario, the Alberta court declined to make a decision regarding the admissibility of evidence in Ontario proceedings and the existence of solicitor-client privilege. The judge did, however, comment upon the trustee's ability to waive privilege. Following *Re Cirone*, he accepted that the privilege belonged to the bankrupt, but held that the trustee could step into the shoes of the bankrupt to waive the privilege. In particular, the court specified that the trustee was authorized to waive the bankrupt's privilege after considering issues of public interest and if such a waiver would not be prejudicial to the interests that the trustee represented.

40 With respect, I do not accept that a trustee steps into the shoes of the bankrupt for all purposes, including the purpose of waiving solicitor-client privilege. A trustee's powers are prescribed by statute. The BIA does not confer any authority over privilege and does not provide that the trustee steps into the shoes of the bankrupt for all purposes. Moreover, a proper consideration of the public interest must include a careful examination of the rationale for solicitor-client privilege, including the overriding need to guard this privilege in order to ensure the integrity of our legal process and a client's right to effective representation by counsel. In addition, I note that *Re Abacus Cities Ltd.* relied heavily upon *Re Cirone*, but was decided before *Re Cirone* was limited to its facts by the Ontario Court of Appeal in *Chilcott*. Finally, in both *Re Abacus Cities Ltd.* and *Re Cirone*, fraudulent behaviour was involved (fraud being a potential exception to the privilege) and that these cases may, on that basis alone, be distinguished from the within appeal.

41 The Trustee also refers to *Re Amonson* (1985), 57 C.B.R. (N.S.) 314 (Alta. Q.B.). In my view, this case does not assist the Trustee. In that case the court followed the reasoning of the Ontario Supreme Court in *Chilcott*, without reference to the Ontario Court of Appeal's decision in that case. In *Re Amonson*, the court again considered whether a solicitor was a compellable witness in bankruptcy proceedings and whether the trustee could waive solicitor-client privilege. Although the court agreed with the decision at first instance in *Chilcott*, the court in *Re Amonson* did not eventually permit a blanket waiver. Ultimately, the court remained reticent about waiver of a bankrupt's privilege and concluded at 317 that "care should be taken with respect to the solicitor-client privilege concerning the giving of the legal advice unless this advice was in furtherance of a criminal purpose."

42 Similarly, *Wolch's Guaranteed Foods Ltd. (Trustee of) v. Wolch* (1994), 24 C.B.R. (3d) 268 (Alta. Q.B.) does not support the Trustee's position in the within action. In this case, the Registrar considered, *inter alia*, whether a trustee could waive the solicitor-client privilege of a bankrupt, but ultimately concluded that the case did not require him to generally determine whether a trustee was entitled to waive a bankrupt's privilege. On the specific facts before him, the Registrar held that waiver was not warranted, in part, because wide disclosure about the bankrupt's property had already been made. Thus, there was no true necessity for the waiver.

43 The Trustee appears to argue that *Wolch* contemplates the possibility of trustees being able to waive a bankrupt's privilege because the Registrar declined to make a final determination on the issue. In my view, the ultimate result of *Wolch* supports the respondent's position that privilege should not be waived and the case indicates a preference for the Ontario Court of Appeal's reasoning in *Chilcott*. Namely, at 273, the Registrar stated: " . . . there is no authority for holding a trustee can waive the bankrupt's privilege."

44 Finally, while not referred to by counsel in argument, this Court discussed release of information by a solicitor to a trustee in bankruptcy in the case of *Clark v. Law Society (Alberta)*, [2000] 11 W.W.R. 520 (Alta. C.A.). In that case,

a lawyer disclosed information about assets of the bankrupt to a trustee and the Law Society took disciplinary action. This Court granted relief to the lawyer. During the course of its reasons, this Court noted that the BIA conferred broad powers on a trustee to demand information about property, but held that the scope of these powers was not at issue because the lawyer had properly disclosed information (not privileged), as is clearly required by the BIA. The Court specifically declined to rule on the question of solicitor-client privilege, noting only that had privileged information been divulged, other problems might have arisen.

45 In my view, the state of the law regarding a trustee's ability to waive a bankrupt's privilege is not as ambiguous as the Trustee submits, nor is it evolving towards an exception favouring trustees generally. If anything, the common law is evolving in the contrary direction. While a small number of the cases put before us permitted disclosure, many of them predate *Chilcott*. Moreover, some deal with accepted exceptions, namely, criminal behaviour, which distinguishes them factually from the within appeal. Overwhelmingly, jurisprudence reiterates that solicitor-client privilege must be guarded zealously and there are no common law developments which support an erosion of that privilege in favour of trustees in bankruptcy.

2. Is this an occasion which justifies an exception to the privilege?

46 Finally, it is necessary to address the Trustee's submissions relating to the existing exceptions at common law which might permit disclosure of Bre-X's privileged information by this Court. The bases for solicitor-client privilege must be weighed against the potential benefits to be derived from an exception displacing the privilege of bankrupts.

47 In my view, the fact that disclosure is sought in a bankruptcy context, where creditors' financial recovery might be enhanced by disclosure, is insignificant compared to the benefits derived from protection of a bankrupt's solicitor-client privilege. Insolvent entities and persons in financial difficulty frequently need legal advice, perhaps even more so than those who enjoy financial stability. The ability of these individuals or corporations to obtain fully informed and reliable legal advice should not be compromised by threat of disclosure in the possible event of a bankruptcy. In my view, creditors may benefit more from the provision of good legal advice to persons on the brink of insolvency than they would from disclosure of solicitor-client communications between these debtors and their lawyers.

48 It is not helpful to simply say that in the public's interest trustees obtain all information that will help maximize asset recovery without also recognizing the public interest in solicitor-client privilege. Frequently, contrary public interests may compete with the public interest in solicitor-client privilege, but most often, the public interest in and the rationale for solicitor-client privilege prevail. As noted in *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536 (S.C.C.), at 562, a class privilege such as solicitor-client privilege is not easily displaced:

> A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an *overriding* interest commands disclosure.
>
> (Emphasis added.)

The potential benefits that may result from trustees generally being able to waive privilege for bankrupt persons simply cannot be viewed as "overriding" when compared to the interests protected and enhanced by solicitor-client privilege.

49 This begs the question — what interests will override solicitor-client privilege? In short, very, very few interests are more important than those protected by this privilege. The almost absolute nature of solicitor-client privilege was reiterated in the recent case of *R. v. McClure* (2001), 195 D.L.R. (4th) 513 (S.C.C.). In that case, an accused was charged with sexual offences. The Supreme Court considered whether to waive solicitor-client privilege over the litigation file of the lawyer representing the alleged victim in a related civil suit in order to allow the accused to explore and confirm potential defences in the criminal prosecution.

50 The Supreme Court noted that the occasions when this privilege will yield to other interests are rare and stated at 524 "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis." Ultimately, the court held that the file ought not to be produced, principally because the accused had not demonstrated that any useful information was in the litigation file and the necessity for disclosure was questionable.

51 In my view, the Supreme Court's recent decision in *McClure* narrows the exceptions to solicitor-client privilege significantly, particularly given that court's criticism of case-by-case assessment of requests to set aside privilege. The Trustee, however, argues that exceptions may arise on a case-by-case basis where a principled basis for waiver exists. Even if principled exceptions were permissible on a case-by-case basis, the Trustee has not demonstrated that the facts of this case merit any exception. The rationale for rejecting a categorical right by trustees to waive the solicitor-client privilege of bankrupts applies equally to the Trustee's request in this appeal for a principled exception.

52 In short, no overriding rationale for disclosure exists in the within action. There is simply no pressing objective that, in principle, surpasses in importance the interests protected by solicitor-client privilege, and thus no principled exception is justified. The factors that militate against disclosure and which reinforce the rationale for continued privilege include: the absence of any identity of interest between the bankrupt and the Trustee, the inability to displace any of the Wigmore justifications for continued privilege, the minimal importance of the creditors' likely financial recovery relative to the interests protected by solicitor-client privilege, and the absence of a demonstrated need for the waiver sought.

a) Identity of Interest

53 Because the evidence does not directly demonstrate what benefits the bankrupt or its estate will reap from disclosure, the materials before us invite a rather hypothetical debate about the potential identity and conflicts of interest between the Trustee and Bre-X (and trustees and bankrupts more generally). During oral submissions, the appellant and respondent took opposite positions on this point. The Trustee submits that the bankrupt could only benefit from proper administration of its estate. Conversely, the respondent suggested that a trustee in bankruptcy and the bankrupt likely never enjoy a unity of interest since a trustee's principal obligation is to the creditors.

54 The potential unity of interest that may hypothetically exist between a bankrupt and its trustee provides an interesting topic for debate and discussion, but this much is clear. The Trustee has not proven, with sufficient affidavit evidence, that disclosure of Bre-X's privileged communications with BJV will further the interests and intentions of the bankrupt. The trustee has simply asserted that a fishing expedition is something he is "desirous" of.

55 Furthermore, there is no obvious analogy between the Trustee's objectives in this case and the desire to determine a deceased person's intentions in estates cases. For example, in *Geffen*, the Supreme Court considered whether disclosure of privileged information (in order to obtain evidence from a solicitor regarding advice given to a client pertaining to the creation of a trust of which the client was a settlor) was justified. The action arose after the settlor/client's death, when her executor brought an action seeking to set aside the trust for undue influence. At trial, the solicitor, who advised the settlor prior to the creation of the trust, was permitted to give evidence regarding privileged communications with his client.

56 The Supreme Court considered the disclosure of privileged information permitted by the trial judge. The primary basis upon which the evidence was initially allowed was the accepted exception in wills cases. Namely, solicitors may be permitted to give evidence in wills cases to determine the validity of the will or intent of a testator. The Supreme Court accepted this exception and further elaborated upon the bases for the exception.

57 Traditionally, the exception for wills cases was rationalized on the grounds that the testator intended to disclose his intentions through the will and that communications with the solicitor were only intended to remain secret during his lifetime. The Supreme Court also appeared to justify the exception on the basis that the interests of the client and the claimants in wills cases were the same. In other words, both client and claimants wished to ensure the full expression of

the client's intentions. Ultimately, the court permitted the disclosure of the privileged communications in *Geffen* because, as stated at 387:

> [T]he considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focussing the inquiry on who those heirs or successors properly are.

58 The court's decision in *Geffen* is based largely upon the obvious analogy between the disclosure of the settlor's intention and confirmation of a testator's intention in estates cases. Namely, both in estates cases and in *Geffen*, solicitor-client privilege was not violated by disclosure because of the identity of interest between the claimant and client and, to a lesser degree, because of the deceased's presumed wish to have his intentions disclosed to his beneficiaries and other claimants.

59 No similar identity of interest can be assumed to exist between a trustee in bankruptcy and a bankrupt. While such a commonality may occasionally arise, any presumption that bankrupts and their trustees enjoy an identity of interest is obviously unwarranted. A trustee acts in the interests of the creditors, which are not identical to, and frequently conflict with, the interests of the bankrupt person. While a trustee is afforded broad powers to deal with a bankrupt's assets, the bankrupt still exists, whether as a person or a corporation. The interests of the two are not the same. Moreover, if they are identical, the bankrupt might well agree to waive the privilege.

60 Further, as noted earlier, in estates cases, the deceased person is presumed to have intended necessary disclosure of his intention after his death. No similar presumption may be advanced in this case. No one would suggest that a bankrupt anticipates or intends that privileged communications with his solicitor will be disclosed in the event of his insolvency and bankruptcy. Certainly, the directors of Bre-X did not waive the company's privilege prior to resigning. In the absence of any contrary evidence, we may assume that Bre-X intended to engage in fully confidential communications with its solicitor, without any intention to disclose such communications. Disclosure may compromise Bre-X's legitimate expectation of and entitlement to confidentiality. In addition, no identity of interest between the Trustee, who desires waiver, and Bre-X has been proven.

b) Creditors' Interests

61 Any decision about an exception invites a closer look at the interests of the estate and creditors which the trustee seeks to protect and enhance. Namely, how important are creditors' rights in the broader context of solicitor-client privilege? As noted earlier, it is obvious that a bankrupt's creditors might occasionally benefit from disclosure of privileged communications between the bankrupt and his solicitors. The mere fact that there might be a benefit is not a compelling reason to disclose information that is otherwise privileged.

62 By way of illustration, the disclosure of privileged discussions between the accused and his counsel in criminal cases might frequently promote convictions where evidence regarding the offence would be revealed by disclosure of privileged communications. There is a public interest in prosecuting criminals, yet the accused's solicitor-client privilege may prevent disclosure of material evidence and will be protected notwithstanding the possibility that a guilty party may not be convicted. The benefits of disclosure alone, whether in a civil or criminal context, are always outweighed compared to the societal benefit resulting from a legal system in which clients may freely seek advice from solicitors.

63 As noted earlier, there is simply no competition between creditors' rights and the collective benefits derived from effective legal representation within our legal system. Confidentiality is essential to the solicitor-client relationship and, using Wigmore's language, ought clearly to be sedulously fostered. Potentially insolvent corporations must not be discouraged from seeking legal advice due to the possibility of disclosure of their solicitor-client communications.

Particularly during periods of financial instability, corporations and their creditors benefit from appropriate and complete legal advice that may assist the corporation (and by extension, its creditors). One expects that persons in financial difficulty would be reluctant to avail themselves of legal advice where a real possibility of disclosure existed. Thus, disclosure would compromise the effective provision of legal advice to clients experiencing financial difficulty. A great injury to individuals and corporations in financial difficulty, as well as the shareholders and other creditors of such persons, would result from an erosion of solicitor-client privilege. This injury to the legal system and its ability to provide legal advice to persons in dire financial straits vastly outweighs the occasional benefits that might flow to the estate of the bankrupt.

c) No Necessity for Waiver by the Trustee

64 Finally, I must deal with the argument that disclosure of Bre-X's privileged communications with BJV is required because of Bre-X's alleged inability to waive its own privilege. The Supreme Court emphasized in *McClure* that solicitor-client privilege will not be set aside except in cases of dire need. When commenting on whether the accused's stated desire to review his alleged sexual assault victim's civil litigation file constituted a case of dire need, the court firmly stated at 527: "Before the test [for waiver of privilege] is even considered, the accused must establish that the information he is seeking in the solicitor-client file is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way." While this case was decided after this appeal was heard, it merely confirms my decision and in particular reiterates that waiver will only be permitted if there is no other way to obtain the information sought and if the information itself is demonstrably important and necessary.

65 The Trustee submits that an exception is necessary because all Bre-X's officers and directors resigned in 1997. That argument is difficult to entertain when one realizes that privilege continues even after death (with some exceptions): *Bullivant v. Attorney General*, [1901] A.C. 196 (U.K. H.L.), at 206; *Langworthy v. McVicar* (1913), 25 O.W.R. 297 (Ont. H.C.), at 298; *Stewart v. Walker* (1903), 6 O.L.R. 495 (Ont. C.A.), at 497. If privilege continues after death, surely the privilege of a corporation survives the mere resignation of its officers and directors. Moreover, the argument that there is no one to waive privilege is not persuasive because there are still Bre-X shareholders and a meeting could be called to deal with the issue of privilege, whether by the election of directors or otherwise. In the end, Bre-X retains the capacity in law to waive privilege, and no appropriate steps have been taken to perfect that capacity. This capacity for waiver seriously undermines the Trustee's request for an exception to Bre-X's privilege.

66 Furthermore, the BIA provides the Trustee with broad powers to take possession of property and obtain information regarding the bankrupt. For example, the Trustee has the discretion to examine witnesses, including BJV. Section 163(1) of the BIA provides:

> The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

While privilege may arise in respect of certain communications, the Trustee is still entitled to examine BJV and any former employee, officer or director of Bre-X. That option has not been exhausted in this case.

67 Thus, we know that the Trustee is equipped with a broad range of powers to obtain information from and about the bankrupt. Yet, there is no unequivocal evidence which demonstrates that the Trustee cannot obtain the information he seeks without setting aside solicitor-client privilege. There is no evidence that all available options have been exhausted. Thus, even if a case-by-case review is available, until the Trustee adduces evidence on these points, this Court cannot conclude that the disclosure sought is necessary.

68 Finally, I do not accept that the information sought will demonstrably assist the administration of the estate. Even if the lack of a directing mind to grant the waiver were a valid reason for an exception and the information could not be obtained without disclosure of privilege communications, this Court has not been advised, with any degree of precision, what information the Trustee seeks. There are no specific questions which BJV has thus far refused to answer. In the absence of specifics, this Court is not in a position to decide whether the information will truly be beneficial to the creditors and to the Trustee's administration of the estate. The information will not be disclosed so that the Trustee can go on a fishing expedition. A benefit must be anticipated and the likelihood of that benefit must be more than speculative.

Conclusion

69 In summary, the jurisprudence regarding solicitor-client privilege creates an extremely high threshold for disclosure of these communications. The Supreme Court has repeatedly reiterated the fundamental role which solicitor-client privilege plays in the trial process and the importance of the confidentiality right enjoyed by clients seeking advice from counsel. Accordingly, the privilege will only be displaced in exceptional circumstances, which overcome the important goals protected by solicitor-client privilege. In this case, the pecuniary interests of creditors of the bankrupt do not trump the interests protected by solicitor-client privilege.

70 Overall, no authority at common law, nor any provisions in insolvency legislation, nor any principle underlying solicitor-client privilege relax the application of solicitor-client privilege in the bankruptcy context. The BIA does not contain provisions forcing production of information notwithstanding solicitor-client privilege. There is no demonstrated identity of interest between the bankrupt and the Trustee. Furthermore, the evidence in this case, at best, expresses a hope that creditors might benefit from the disclosure of certain privileged communications, but the evidence does not specify what benefits are anticipated. Moreover, the mere resignation of the directors of the bankrupt does not, by itself, prove that the disclosure is necessary as other means to obtain the information may exist. Ultimately, the privilege cloaking communications between a bankrupt and his solicitor constitutes a personal and fundamental right over which a trustee in bankruptcy has no authority and may only be displaced in the most exceptional circumstances.

71 In the end, the relief sought by the Trustee would involve a significant relaxation of the rules of solicitor-client privilege. Given the somewhat common circumstances of this bankruptcy, in order to permit the Trustee to waive Bre-X's privilege, this Court would necessarily have to recognize a wide range of circumstances in which trustees in bankruptcy were entitled to waive bankrupts' solicitor-client privilege. I am not prepared to permit, nor has the Trustee advanced any reasonable basis for, such a massive erosion of solicitor-client privilege.

72 The appeal is dismissed.

LoVecchio J. **(ad hoc) (dissenting in part):**

73 I have had the benefit of reading the reasons of my colleague, Madam Justice Conrad. Although I agree with her conclusion, my road to that conclusion follows a slightly different path.

Background:

74 While the Bre-X story has been the subject matter of several books and lawsuits, the background facts for the application heard by the Chambers Judge are relatively simple. Prior to November 7, 1997, Bre-X retained Bennett Jones Verchere as corporate and securities counsel. Pursuant to this retainer, Bennett Jones Verchere provided advice and information to Bre-X. As a result of this solicitor-client relationship, some of these communications became privileged.

75 On November 7, 1997, Bre-X made an assignment in bankruptcy.

76 Bennett Jones Verchere argues that the professional advice and opinions are subject to solicitor-client privilege, and are not compellable. The trustee filed a Notice of Motion, seeking a declaration that it has the right to all files,

documents, and records of Bennett Jones Verchere concerning the assets and affairs of Bre-X and that it has the right to waive Bre-X's solicitor-client privilege.

77 On November 23, 1998, the Chambers Judge ordered that Bennett Jones Verchere are compellable witnesses together with their *non-privileged* files, documents, and records respecting the assets, business affairs, and transactions of Bre-X. Further, the Chambers Judge ordered that the Trustee did not have the right or power to waive the solicitor-client privilege of Bre-X.

78 The Notice of Motion for Leave to Appeal only mentioned the order of the Chambers Judge with respect to waiver of solicitor-client privilege. While no mention is made in the Notice of Motion for Leave to Appeal respecting the denial by the Chambers Judge of the Trustees request for the production of privileged documents, in my view, a consideration of that decision is a necessary part of the analysis of this appeal.

Issues:

79 The issues in this appeal are as follows:

> 1. Does a trustee have the right to obtain from the bankrupt's solicitor possession of all of the files, documents, and records respecting the assets, business affairs, and transactions of the bankrupt, including those that are subject to solicitor-client privilege?
>
> 2. Does a trustee have the inherent power or right to waive the solicitor-client privilege of the bankrupt?
>
> 3. If the trustee does not have the inherent power or right to waive the bankrupt's privilege, should the court exercise its overriding jurisdiction and grant this right or power to the trustee?

Decision Issue 1:

80 For the reasons outlined below, Bennett Jones Verchere may not object to the transfer of their entire files, documents, and records of Bre-X respecting the assets, business affairs, and transactions of Bre-X to the trustee, including those that are subject to solicitor-client privilege. However, in view of my decision respecting Issues 2 and 3, proper safeguards would have to be established respecting the transfer of possession to the trustee of materials on the Bre-X file that are privileged.

Analysis:

81 In the administration of the bankrupt's estate, the trustee is given very wide powers. The sections of the *Bankruptcy and Insolvency Act* [1] that are relevant to this appeal are as follows:

> 16(3) The trustee shall, as soon as possible, take possession of the deeds, books, records and documents and all property of the bankrupt . . .
>
> 163(1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.
>
> 164(1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book,

> document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.
>
> 167 Any person being examined is bound to answer all questions relating to the business or property or the bankrupt, to the causes of his bankruptcy and the disposition of his property.

82 These sections quite clearly allow for the examination of a solicitor. A solicitor may be compelled to disclose all information relating to the transactions of the bankrupt and the location of the bankrupt's property. Further, these sections allow for the trustee to obtain possession of all of the property of the bankrupt.

83 However, there is an omission in these sections: no reference is made to the delivery of privileged communications. This omission raises a question. Does the omission mean that privileged documents need not be delivered to the trustee? That is clearly the effect of the ruling of the Chambers Judge.

84 With respect to the examinations of solicitors, Holden & Morawetz in *Bankruptcy and Insolvency Law in Canada* [2] note:

> In the examination, the solicitor can be compelled to disclose all information regarding the bankrupt's affairs, transactions, whereabouts of his property, etc., which do not require the disclosure of communications made to the solicitor for the purpose of receiving legal advice or assistance [3]

Such an examination is limited to the goal of assisting the trustee in the administration of the estate by realizing property of the bankrupt and distributing the proceeds of this property to the bankrupt's creditors. [4] However, privileged communications are subject to solicitor-client privilege, and unless this privilege is waived by the bankrupt, this information may not be disclosed. This is a reference to communications. Such communications could be oral or written and in the case of written, the analysis is more complicated. It is axiomatic that a solicitor would have on their client's file a copy of any written opinions or advice given to a client.

85 Under s. 164 of the BIA, the solicitor may be compelled to provide the trustee with all "property" of the bankrupt and documents relating to the bankrupt's property. I believe it is settled law that a solicitor's file is really the property of the client and the definition of property in the BIA is so broad, it must be seen as encompassing the solicitor's file.

86 As a result, a potential problem exists if a solicitor could be compelled to deliver privileged communications (by this I mean the file copy of written communications which by any test are privileged) to the trustee and the trustee did not have the power to waive the privilege associated with the document just received. The problem is ensuring the confidentiality of the privileged communications when the documents are in the hands of the trustee, particularly when one concludes (as the Chambers Judge did and as will be noted below, I do) that the trustee does not have the power to waive the privilege. The Chambers Judge sidestepped the problem by only ordering the delivery to the trustee of the non-privileged materials.

87 British insolvency legislation explicitly refers to materials of the bankrupt that are privileged:

> 311(1) The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings). [5]

88 This legislation highlights that we are really dealing with two different issues: the trustee obtaining physical possession of the file and waiver. I do not accept that merely because the trustee may obtain possession of the solicitors file, this alone would give the trustee the power to waive the privilege. That is a different issue. I also note that the obtaining of possession relates only to materials of the bankrupt and would not extend to materials associated with advice given solely to the directors or officers of Bre-X as opposed to the company itself.

89 In addition, even though the trustee is entitled to possession of these privileged documents, their use would be limited to the affairs and property of the bankrupt.[6] The trustee must not use these documents to aid third parties in any action against Bre-X or any other party.

90 Put simply, the focus of the trustee in examining the solicitor's files, privileged and non-privileged, must be the property and affairs of the bankrupt. Further, the trustee, as an officer of the court, must strictly ensure the sanctity of the solicitor-client privilege of Bre-X. In other words, the trustee must not disclose the contents of these privileged communications to any third party. The trustee must take the greatest of care in its use of these important documents.

91 Given my decision below, rather than not order the production of the privileged, I would have ordered the delivery of all materials, both privileged and non-privileged, as they are property of the bankrupt. However, I would have ordered that Bennett Jones Verchere separate the privileged materials from the non-privileged materials and deliver these privileged materials separately and I would have ordered them sealed.

Decision Issue 2:

92 For the reasons that follow, a trustee does not have the inherent right or power to waive the solicitor-client privilege of a bankrupt.

Analysis:

93 This appeal deals solely with the question of whether the trustee has the power to waive the solicitor-client privilege of the bankrupt. Consequently, questions of whether a trustee *should* or *would* exercise such a power are not relevant to this appeal. That is a decision the trustee would make were the Court to find that the trustee was entitled to make such a decision.

94 The starting point for this analysis includes an examination of the bankrupt and its status and capacity. Notwithstanding its status as a bankrupt, it is clear that Bre-X continues to exist as a corporate entity. Stated another way, although all of the assets of Bre-X passed to the trustee through operation of the BIA, this does not destroy the corporate entity or totally restrict its ability to function as a corporation.[7]

95 As Bre-X continues to exist as a corporation, it continues to possess the power to waive its solicitor-client privilege.[8] Bre-X has not waived the privilege because of its particular situation. Bre-X, like most bankrupts, has no officers or directors at present. Because of this fact, Bre-X has no present corporate means to authorize such a waiver. This obstacle could be removed by holding a shareholders' meeting and electing directors. I recognize for practical purposes that it is unlikely this would be done.

96 As a result of this situation, the trustee wishes to waive the solicitor-client privilege of Bre-X.

97 Subject to the third issue, the only basis upon which a trustee could claim the right or power to waive the bankrupt's solicitor-client privilege would be statutory. This may explicitly appear in the BIA. Alternatively, the trustee may obtain this privilege, and therefore the right to waive it, under s. 71(2) of the BIA.

a. Explicit Provision

98 It may be argued by the trustee that the fact alone that it will receive possession of privileged documents from the solicitor through the operation of s. 164 is sufficient to waive privilege. However, for the reasons that follow, this argument must fail.

99 The trustee may come into possession of privileged documents through the operation of the BIA, as discussed in detail above. This mandated possession alone is not sufficient to allow the trustee to waive the privilege of the bankrupt. An analogous situation occurs in the context of medical reports:

> So where a statute requires disclosure, e.g., of a report, no voluntariness is said to be present and no implied waiver occurs. For example, where a medical report is disclosed pursuant to the Ontario *Evidence Act*, the attendant communications (e.g., surveillance films used to produce the report) remain privileged as there has been voluntariness in the disclosure of the report and no implied waiver of the attendant materials. [9]

Similarly, under the BIA, the transfer of possession of some privileged communications of the bankrupt and third persons, such as the solicitor, may be compelled. Such a transfer is likewise involuntary and therefore, cannot constitute waiver of the solicitor-client privilege.

100 The BIA is silent on the ability of the trustee to waive the solicitor-client privilege of the bankrupt. There is nothing in the BIA which gives the trustee the right or power to waive this privilege. The issue is simply not addressed in the BIA.

101 The rules of statutory interpretation shed light upon this omission in the BIA. The doctrine of "implied exclusion" or *expressio unius est exclusio alterius* provides:

> An implied exclusion argument lies whenever there is a reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there was no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature. [10]

This rule of statutory interpretation has been applied by the Supreme Court of Canada in *Nfld. Telephone Co. v. TAS Communications Systems Ltd.*. [11]

102 If Parliament had meant to exclude solicitor-client privilege, it would have referred to this expressly. The fact that privilege is not mentioned in the BIA leads to the implication that this omission was deliberate. Therefore, it is reasonable to conclude that Parliament intended that the ability to waive solicitor-client privilege remain with the bankrupt under the BIA.

b. Section 71(2)

103 In the absence of an express entitlement to waive Bre-X's privilege, the trustee suggested that s. 71(2) of the BIA indirectly provides this right:

> 71(2) On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer.

104 Section 71(2) provides that the "property" of Bre-X vested in the trustee upon bankruptcy. If solicitor-client privilege constitutes "property" under the BIA, then the trustee is vested with this privilege and consequently, has the power to waive it.

105 Section 2(1) of the BIA defines "property" very broadly:

> 2(1) "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

106 *Prima facie*, the "property" that vests in the trustee includes almost "every conceivable type of asset." [12] Some property is then excluded from sale and division among the creditors. [13] For example, s. 67(1) of the BIA excludes property held in trust for another person or property that is exempt according to provincial legislation.

107 In *Gano v. Alberta Motor Assn. Insurance Co.*, Master Funduk notes that there is a third category of property that is not available for distribution: matters very personal to the bankrupt. [14] These "personal rights" are not "property" under the BIA, based upon the purpose of the BIA:

> *Husky Oil Operations Ltd. v. Minister of National Revenue et al.*, [1995] 3 S.C.R. 453, 188 N.R. 1, 137 Sask. R. 81, 107 W.A.C. 81, says that there are two fundamental purposes underlying the B.I.A. One is to ensure the equitable distribution of a bankrupt's assets among his creditors and the second is the financial rehabilitation of the bankrupt. Given those purposes it becomes quickly apparent that certain "things in action" simply do not fit into the objectives of the B.I.A. even though in law they are "things in action". For example, a bankrupt has a cause of action for divorce. It would be stupid to suggest that that cause of action is "property" of the bankrupt available for distribution among his creditors. A bankrupt has a cause of action for voiding his marriage because his wife was still married to someone else at the time of the marriage to the bankrupt. A bankrupt has a cause of action for custody of his children. None of these would be "things in action" within the scope of the B.I.A. *They are all matters very personal to the bankrupt*. [15]

108 Various other authorities reveal that such "personal rights" are not "property" under the BIA. In *Re Neufeld*, the Court concluded that tax refunds received by the bankrupt for the support of a disabled person are not the "property" of the bankrupt and therefore, do not vest in the trustee. [16] A right of action for injury to character and reputation remains vested in the bankrupt. [17] Punitive damages are not "property" of the bankrupt. [18] All of these relate to matters very personal to the bankrupt and as such, are not included as "property" under the BIA.

109 The right of privileged communications with a solicitor must be equally personal. In fact, one author noted that "I can think of nothing more attached to the person and nothing less pecuniary, than a communication to a person bound by professional secrecy". [19]

110 There is ample case authority to support this proposition that the solicitor-client privilege constitutes a "personal right". [20] The Supreme Court of Canada noted that:

> There is no denying that a person has a right to communicate with a legal adviser in all confidence, a right that it "founded upon the unique relationship of solicitor and client" (*Solosky*,*supra*). *It is a personal and extra-patrimonial right which follows a citizen throughout his dealings with others.* [21]

111 In my view, matters that are very personal in nature are not included within the definition of "property" in the BIA. This conclusion is based upon the fundamental purpose of the BIA, as set out by the Supreme Court of Canada in *Husky Oil Operations Ltd. v. Minister of National Revenue* [(1995), 128 D.L.R. (4th) 1 (S.C.C.)]. Further, the right of solicitor-client privilege has been affirmed by the Supreme Court and other authorities as a "personal" right. As a result, one must conclude that the solicitor-client privilege is a personal right and as such, is not "property" that vests in the trustee. The solicitor-client privilege remains with the bankrupt. Therefore, the trustee has no power to waive the solicitor-client privilege.

112 Many authorities support this result. [22] Further, *Re Laprairie Shopping Centre Ltd.* [23] and *Re 164461 Canada Inc.* [24] support the above analysis. However, because of their roots in the civil law, these two cases should be viewed with caution in this common law jurisdiction.

Decision Issue 3:

113 The Court should not exercise its overriding jurisdiction and grant the right or power in the circumstances of this case.

Analysis:

114 Although the trustee has no right to waive the bankrupt's privilege, the court may, in appropriate circumstances, apply its inherent jurisdiction to grant this right to the trustee.

115 In a recent judgment of the Supreme Court of Canada, the Court reinforced the importance of solicitor-client privilege:

> Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends upon the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interest to be fully represented. [25]

116 As noted by Madam Justice Conrad in her reasons for judgment, solicitor-client privilege "protects the sanctity of the confidence between client and lawyer." Without such privilege, there could not be effective representation of clients by counsel. The Supreme Court of Canada in *Solosky v. Canada* has gone so far as to classify solicitor-client privilege as a "fundamental civil and legal right". [26]

117 Given the sanctity of solicitor-client privilege, it will not be disregarded lightly. Very few interests will prove important enough to override solicitor-client privilege. The Supreme Court in *R. v. McClure* has recently further narrowed the exceptions to solicitor-client privilege. The Court noted that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances and does not involve a balancing of interest on a case-by-case basis." [27] Unless there are extremely pressing considerations, solicitor-client privilege will not be ignored.

118 No reason exists for making an exception in this action as no evidence was presented on the basis of which any of the exceptions set out in *R. v. McClure* could be applied.

Conclusion

119 As the trustee has not appealed the part of the Order which in effect declined to order the delivery of the privileged documents to the trustee, even on my analysis, the appeal should be dismissed and the order of the Chambers Judge confirmed.

Appeal dismissed.

Footnotes

1 R.S.C. 1985, c. B-3.

2 Houlden & Morawetz, *Bankruptcy and Insolvency Law in Canada*, Vol. 2, 3rd ed. (Toronto: Carswell, 1998).

3 *Ibid.* at 6-16.

4 *Ibid.* at 6-15.

5 *Insolvency Act*, 1986, c. 45 (U.K.).

6 *Re Taylor Ventures Ltd.* (1999), 60 B.C.L.R. (3d) 348 (B.C. S.C.), at 363-64. See also Houlden & Morawetz, *supra* at 6-18.15 - 6-18.16.

7 *Ciriello v. R.* (2000), 21 C.B.R. (4th) 9 (T.C.C. [Informal Procedure]) at 17, citing with approval *National Trust Co. v. Ebro Irrigation & Power Co.*, [1954] 3 D.L.R. 326 (Ont. H.C.).

8 *Shepherd (Trustee of) v. Shepherd* (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div. [Commercial List]).

9 R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law*, (Markham, Butterworths, 1993) at 191 [footnotes omitted]. See also *Cameron v. Campbell* (1987), 29 C.P.C. (2d) 41 (Ont. H.C.).

10 R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Markham: Butterworths, 1994) at 168. See also P. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville: Les Éditions Yvon Blais Inc., 1992) at 282.

11 [1987] 2 S.C.R. 466 (S.C.C.), at 483-84.

12 *Chetty v. Burlingham Associates Inc.* (1995), 121 D.L.R. (4th) 297 (Sask. C.A.), at 300.

13 *Chetty v. Burlingham Associates Inc.*, *supra* at 300.

14 (1997), 202 A.R. 118 (Alta. Master) at para. 33.

15 *Gano v. Alberta Motor Association Insurance Co.*, *supra* at 125.

16 (1993), 144 A.R. 182 (Alta. Q.B.), at 184.

17 *Eggen v. Grayson* (1956), 8 D.L.R. (2d) 125 (Alta. T.D.); *Rahall v. McLennan* (1996), 190 A.R. 183 (Alta. Q.B.).

18 *Gano v. Alberta Motor Assn. Insurance Co.*, *supra* at 133.

19 Y. Goldstein, "Bankruptcy as it Affects Third Parties: Some Aspects" (1985) Meredith Mem. Lect. 198 at 227.

20 *Taberner Investments Ltd. v. Price Waterhouse*, [2000] O.J. No. 2595 (Ont. S.C.J.) at para. 18; *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at 871; *Festing v. Canada (Attorney General)*, [2000] 5 W.W.R. 413 (B.C. S.C.), at 433-34.

21 *Descôteaux v. Mierzwinski*, *supra* at 871, cited with approval in *Festing v. Canada (Attorney General)*, *supra* at 433-34.

22 *Taberner Investments Ltd. v. Price Waterhouse*, *supra*; *Clarkson Co. v. Chilcott* [(1984), 48 O.R. (2d) 545 (Ont. C.A.)], *supra*; *Canbook Distribution Corp. v. Borins* (1999), 7 C.B.R. (4th) 121 (Ont. Gen. Div. [Commercial List]). See also R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 68-69.

23 [1998] R.J.Q. 448 (C.A. Que.).

24 [1996] A.Q. No. 4203 (C.S. Que.).

25 *R. v. McClure* (2001), 195 D.L.R. (4th) 513 (S.C.C.), at 517.

26 (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 839.

27 *R. v. McClure*, *supra* at 524.

End of Document

TAB 3

1998 CarswellOnt 879
Ontario Court of Justice, General Division (In Bankruptcy)

Canadian Triton International Ltd., Re

1998 CarswellOnt 879, [1998] O.J. No. 976, 3 C.B.R. (4th) 231, 60 O.T.C. 262, 78 A.C.W.S. (3d) 12

In The Matter of the Bankruptcy of Canadian Triton International Ltd.

Farley J.

Heard: February 18, 1998
Judgment: February 22, 1998
Docket: 98-BK-2006, 31-205425T

Counsel: *Steven G. Golick*, for Price Waterhouse Ltd., Trustee of the Estate of Canadian Triton International Ltd.
P. McCallen and *S. Graff*, for Durferco International Trading Ltd. and Robert Stein.
Chris Reed, for Nantong S.A.
Stephen Turk, for Crown Resources and Dr. Alfati.
Justin Fogarty, for Mastin's Manitoulin Limited.

Subject: Insolvency; Civil Practice and Procedure

Headnote

Practice --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege

Trustee brought motion to compel disclosure of documents from former solicitor of bankrupt — Motion was granted — Former solicitor refused disclosure, claiming disclosure would breach confidentiality — Trustee had wide powers of examination — Trustee was attempting to determine estate's interest in arbitration proceeding — Prior to bankruptcy, former solicitor represented bankrupt in same claim — Former solicitor was ordered to produce documentation forthwith.

Barristers and solicitors --- Relationship with client — Conflict of interest — Duty to former client — General

Creditor brought motion to disqualify O as counsel for trustee in bankruptcy for arbitration proceedings — Motion was granted — Prior to bankruptcy, trustee retained legal services of O — Prior to bankruptcy, but after trustee retained O, bankrupt and creditor initiated action against insurer — Action was stayed because of arbitration clause — On motion to stay proceedings, insurer was represented by O — O failed to demonstrate that reasonable person would be satisfied no breach of confidence would occur — O was disqualified as legal counsel for trustee.

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Trustee brought motion for directions on whether proceeds were free and clear of creditor's secured interest — Funds were free and clear — Trustee entered option to purchase agreement with P — Under agreement, P paid funds to trustee for option to purchase assets of bankrupt — Creditor claimed to have secured interest in assets of bankrupt — Trustee was entitled to retain funds whether or not option was exercised — Option did not itself affect assets — Creditor was not entitled to funds.

Prior to bankruptcy, the bankrupt and one of its creditors initiated an action against an insurer. The action was stayed because of a mandatory arbitration clause. Upon proceeding to arbitration, the trustee in bankruptcy requested disclosure of documents from S, the former solicitor of the bankrupt. S refused disclosure, claiming that such disclosure would breach confidentiality. S may have used documents from other clients in connection with the bankrupt's file and demanded payment to review and sort through his files. The trustee brought a motion to compel disclosure of documents from S and to compel his attendance for examination, pursuant to s. 163 of the *Bankruptcy and Insolvency Act*.

Prior to bankruptcy, while still the interim receiver, the trustee in bankruptcy retained the legal services of O. On the motion to stay the proceedings, the insurer also retained O. Both the bankrupt and the creditor were represented by S. The

trustee in bankruptcy continued to retain O for the arbitration proceeding. The creditor brought a motion to disqualify O from acting on behalf of the trustee in connection with the arbitration, on the grounds that O had a conflict of interest. The trustee in bankruptcy entered an agreement with P, pursuant to which P paid the trustee $500,000 US for an option to purchase the assets of the bankrupt. The creditor of the bankrupt claimed to have a secured interest in the bankrupt's assets. The trustee brought a motion for advice and directions as to whether the funds held by the trustee were free and clear of the creditor's alleged security interest. For the purposes of this motion, the security interest was assumed to be valid.

Held: The motion to compel disclosure from S was granted; the motion to disqualify O as legal counsel was granted; the motion for direction was granted; the funds held by the trustee were free and clear of security interest.

Pursuant to s. 16 of the *Bankruptcy and Insolvency Act*, solicitor S was compelled to produce the accounts and any documents relating to the dealings of the bankrupt. S's problem of exposing documents from other clients, used in connection with the bankrupt's file, was a problem of his own creation. A client is not responsible to pay a solicitor to review files to see whether material from one file was inadvertently placed in another. The trustee was granted very wide powers under ss. 163 and 164 to examine the extent of the bankrupt's property. The trustee should have extremely wide scope where it is trying to establish the estate's interest in pursuing an insurance arbitration and to find out what information former counsel has in that regard, having prosecuted the claim prior to bankruptcy. Subject to valid privilege claims, S should forthwith produce all relevant documents in his possession relating to the affairs of the bankrupt.

The test for disqualification of a solicitor is whether a reasonably informed person would be satisfied that no use of confidential information would occur. Even the appearance of impropriety must be avoided. While the purported conflict was more embarrassing than real, O did not provide any basis on which to conclude that a conflict did not exist. O should be disqualified from advising the trustee on the arbitration.

The contract between the trustee and P did not require P to purchase the bankrupt's assets, even if $500,000 were paid to secure the option. The trustee was entitled to retain the funds in all events. The grant of the option did not itself affect the assets over which the creditor claimed security. The creditor was not entitled to the $500,000 payment received by the trustee from P.

MOTIONS by trustee in bankruptcy to compel disclosure of documents from former solicitor of bankrupt and for directions on whether funds held by trustee were free and clear of security interest; MOTION by creditor for disqualification of solicitor of record for trustee in bankruptcy.

***Farley J.*:**

1 Various motions (the first three brought by Price Waterhouse Limited, as trustee in bankruptcy ("Trustee" or "Trustee in Bankruptcy") and the last by the Duferco interests) were heard on February 18, 1998, namely:

> 1. to compel Robert Stein ("Stein"), a partner in the New York law firm of Camhy Karlinsky & Stein and counsel to the Duferco companies and former counsel for Canadian Triton International Ltd. ("CTI") in relation to the arbitration in London, England as to a dispute with Lloyds' Underwriters Ltd. ("Lloyds") to produce account books or any papers or documents relating to the accounts or to any trade dealings of CTI pursuant to s.16 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("BIA");
>
> 2. to compel Stein to attend at a s.163 examination and produce at such examination any books, documents, correspondence or papers in his possession or power relating all or in part to CTI, its dealings or property pursuant to ss. 163 and 164 of BIA;
>
> 3. for advice and directions as to whether the funds held by the Trustee, being $500,000.00 U.S. paid by Penguin Drilling and Production Corporation ("Penguin") pursuant to an Option Agreement and Offer to Purchase dated December 19, 1997 ("Agreement") are held by the Trustee free and clear of an alleged security interest claimed by a Duferco corporation over certain of the oil rigs and other equipment of CTI.

4. to disqualify the legal firm of Osler, Hoskin & Harcourt ("Oslers") from acting on behalf of the Trustee in connection with the London arbitration with Lloyds in which CTI and Duferco are participants.

2 No lien was claimed by Stein as to any of the material requested; however, as to his provision of same to the Trustee, he was demanding that he be paid a fee at his regular rates to review his files (and segregate same) and to photocopy such material before sending it on. A solicitor may not require a trustee in bankruptcy to attend at the solicitor's office to inspect documents; rather these documents are to be delivered to the trustee: see in *Motherwell, Re* (1921), 1 C.B.R. 497 (Ont. Reg. in Bktcy.) at p. 504, affirmed (1921), 2 C.B.R. 128 (Ont. S.C.) at p. 129; *422686 Ontario Ltd., Re* (1980), 36 C.B.R. (N.S.) 41 (Ont. H.C.) at p. 43. Thus Stein's previous suggestion that the Trustee or its representatives attend at his office to review files is inappropriate.

3 It should be appreciated that Stein is required by section 16 to produce not only books of account of CTI (which he advises he does not have) but also" any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt" (s. 16(5)). While all such material may not have been requested originally, that is no defence as to not producing same when a later omnibus request has been made.

4 Stein has asserted that, aside from six small file folders delivered by CTI to Stein in connection with the arbitration, all of the documents in his possession relating to the affairs of CTI constitute documents delivered by clients other than CTI. He submits that there is no right to view documents belonging to his other clients and that if he were to provide such access he would be in breach of his professional duty of confidentiality: see *Bank of Nova Scotia v. Imperial Developments (Canada) Ltd.* (1987), 66 C.B.R. (N.S.) 13 (Man. Q.B.), at pp. 16-17, affirmed (1987), 46 D.L.R. (4th) 190 (Man. C.A.). Curiously enough Stein advised that he would return the six folders above to Mr. Katic, the President of CTI, as opposed to the proper entity, namely the Trustee. While Stein now wishes not to be involved in any exposure to his other clients by not providing copies of what they may have given him and he has used in connection with CTI files, the problem if there is one of this nature was created by Stein at the time that he used such obtained material in conjunction with a CTI file. Of course he would have no problem if he had previously obtained the consent of his other clients to use such material not only in conjunction with that client's file but also a CTI file. I would also note that aside from being inappropriate to commingle client files (if that has been done since Stein's letters are somewhat obscure), that was a choice of Stein and not of CTI. The *Imperial* case is quite clear that a client is not responsible for paying a lawyer to review his files to see if he has (advertently or inadvertently) put material belonging to one client on the file of the other. As Glowacki, J. at p. 16 of *Imperial* pointed out:

> The files belong to the client although as is pointed out in Cordery's Law Relating to Solicitors, 7th ed (1981), at pp. 99-101, there may be certain documents on file which belong to the solicitors ... Cordery on Solicitors, at pp. 118-120 sets out principles for determining which documents can be considered as belonging to the solicitor.

5 He then sets out a procedure as to the review of the files at pp. 16-7 so as to preserve the confidentiality of the other clients' files. However, it would not seem that this precaution would be necessary where the other client had explicitly or implicitly given Stein permission to use that client's material in conjunction with CTI as a client of Stein. The Manitoba Court of Appeal agreed with Glowacki, J's observations about ownership of files. O'Sullivan, J.A. said at p. 191:

> This may be true of open files. The principles set out in Cordery's Law Relating to Solicitors, 7th ed (1981), at pp. 99-101, may afford useful guides for determining which documents in an open file belong to the client and which to the lawyer. But once a file is closed, there is a duty on the part of the solicitor to report the matter to his client and, if he retains documents of his client, he must list them so that his client can obtain them from him if he wishes to have them.

6 There has been no suggestion made that the CTI files are "closed" files; if there are any such closed files, then it would not seem that Stein has reported on them and listed any retained documents.

7 If there has been a breach of privilege by Stein in disclosing another client's materials then it would seem to me that the privilege has not been forever lost if there were inadvertence. In this respect, it may be helpful if counsel were to review those cases dealing with accidental or unintentional waiver.

8 Stein asserted that the *Imperial* case stood for the proposition that a lawyer must be paid for his review of his files and photocopying. To the contrary it seems to me that this case states the opposite general proposition and then allows some restricted payment in light of the unusual circumstances of the case. It further appears that the permitted charges appear to be essentially as to the preparation of lists of the files (as this is not a normal lawyer item) and the retrieval from storage costs (the latter because of the large number of boxes in that case - 1,100).

9 With respect to the question of *Clarkson Co. v. Chilcott* (1984), 53 C.B.R. (N.S.) 251 (Ont. C.A.) suggesting that the *Cirone, Re* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) be limited to its own facts (see at p. 254), it would not seem to me that *Clarkson Co.* is applicable to the facts circumstances of the subject case. It should be noted that the *Clarkson Co.* case was one in which an individual has been personally adjudged bankrupt and (at p. 253): "it is significant that the bankrupt *Dilawri* is presently facing criminal charges on certain counts of fraud relating essentially, it is alleged, to the same transactions which were the subject of the bankruptcy trial and the appellant is to be Dilawri's counsel in the criminal proceedings". While the lawyer there was not required to disclose communications made by Dilawri to him for the purpose of obtaining legal advice since these would be privileged and it was determined that Dilawri's trustee in bankruptcy did not have the capacity to waive that privilege (that privilege being important for the criminal proceedings ensuing), that condition does not prevail here. CTI does not face any criminal proceedings and it is a corporation whose activities are being conducted and controlled by the Trustee in Bankruptcy (not an individual who notwithstanding his business persona had been assumed by his trustee still operated in control of his personal persona which would be subject to criminal punishment). As MacDonald, J. in *Abacus Cities Ltd., Re* (1981) 40 C.B.R. (N.S.) 172 (Alta. Q.B.) stated at p. 176: "...but an order will go authorizing the trustee to waive privilege and suggesting that he do so if he has no reason to believe that such waiver would be prejudicial to the rights that he represents" (in respect of the corporation). In all practical respects, it seems to me that Stein's raising the aspect of privilege vis-a-vis CTI and Stein as not being waivable even if it exists in a legal (but not practical) sense is truly a red herring. It should also be noted that at p. 255 of *Clarkson Co.*, the Court indicated that the lawyer in any event had to disclose "all [non-privileged] information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc."

10 In *303687 Ontario Ltd., Re* (1986), 58 C.B.R. (N.S.) 198 (Ont. S.C.) at p. 200 Saunders, J. observed:

> The purpose of a s.133 [now s.163] examination is to provide information to a trustee to assist him in carrying out his duty to administer the estate by collecting the property of the bankrupt and disclosing it to his creditors. In particular, a trustee needs to find out the extent of the property of the bankrupt and whether there have been dispositions or dealings with that property that should be attacked on behalf of the creditors.

See also *Long, Re* (1978), 29 C.B.R. (N.S.) 225 (Ont. H.C.) at p. 227.

11 A trustee need not wait until the legal proceedings are initiated to obtain the equivalent of discovery via a s.163 examination: see In *D.W. McIntosh Ltd., Re* (1939) 21 C.B.R. 206 (Ont. Bktcy.) at p. 208. It was recognized in *Nadon Paving Ltd., Re* (1967), 10 C.B.R. (N.S.) 57 (Alta. C.A.) that ss. 163 and 164 grant the trustee a very wide power of examination: see p. 60:

> While the section gives wider power to a trustee than the bankrupt would have had, and while James L.J. in *Ex parte Tatton; Re Thorpe* (1881), 17 Ch. D.512 at p. 514, has said that the section is "a very inquisitorial one, and the power which it gives should be exercised with considerable discretion", its language is quite plain and there is no reason why effect should not be given to it when, as in the present case, the appellant clearly comes within it.

12 While *Clarkson Co., supra* questioned the ability of the trustee in bankruptcy to waive privilege of the bankrupt as had been accepted in the *Cirone* case, *supra*, it was not questioned as to the following proposition at p. 243 of *Cirone*:

> The trustee in bankruptcy under the *Bankruptcy Act* should be permitted much wider scope to the course of his examination in cases where he is obliged to take an action in court on behalf of the creditors to try to recover funds, and where it is his duty to make all possible investigation in his work as a trustee to carry out fully the administration of the estate for the benefit of the creditors.

13 I cannot conceive of a situation where the Trustee should have a wider scope than where it is trying to establish whether it is in the interest of the estate to pursue the arbitration proceedings to enforce an insurance claim against Lloyds and it wants to find out what information and materials its former counsel Stein has in that regard with respect to his prosecution of claim on behalf of CTI prior to its bankruptcy. I do, however, appreciate that Stein has advised that he will provide certain arbitration materials to the Trustee (or other counsel the Trustee may nominate) but not if that material will find its way to Oslers since Stein asserts that Oslers has a conflict with respect to the arbitration. That objection should not have impeded Stein in giving to the Trustee (and Oslers) any non-arbitration CTI material nor in being examined (and having available material).

14 Where should the examination take place? It would appear to me that the most convenient location and circumstances under the Bankruptcy Rules and the *Rules of Civil Procedure* would be New York City where Stein is located. This does not of course excuse Stein from his obligation to deliver s. 16 material to the Trustee. See Rules 4 and 103 of the Bankruptcy Rules, Rule 34.07 (2) of the *Rules of Civil Procedure* and *Elfe Juvenile Products Inc. v. Bern* (1993), 19 C.P.C. (3d) 355 (Ont. Gen.Div.); *Quinn, Re* (1986), 12 C.P.C. (2d) 315 at 317 (Ont. Master) affirmed (1986), 12 C.P.C. (2d) 315 (Ont. S.C.); *Sharp v. Price*, [1945] O.W.N. 710 (Ont. H.C.).

15 As was discussed by Cory, J. at p. 227, of *Long, Re*, *supra* the right to examine in the context of determining whether or not to proceed with an action should not be unduly fettered or restricted:

> There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great importance and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it could become so abusive that the court would take steps to restrict the practice.

16 Registrar Cantlie observed in *S.P. Paint Factory Ltd., Re* (1980), 39 C.B.R. (N.S.) 12 (Man. Q.B.) at p. 16:

> In attacking the chattel mortgage as a preference, the trustee will be pursuing a remedy conferred by the *Bankruptcy Act* which indeed would not exist but for the bankruptcy. Undoubtedly, the trustee is hoping to make the bank produce documents which will provide evidence against itself, but equally that is precisely what s. 133 [now 163] is intended to enable a trustee to do. Consequently, I can see no possible answer to this part of the trustee's request.

17 Registrar Ferron in *Trend International Tool Ltd. (Trustee of) v. Wayne Forge Ltd.* (1986), 59 C.B.R. (N.S.) 164 (Ont. S.C.) noted at pp. 165-6:

> Counsel for the respondent seems to take the position that the documents demanded are those produced by a third party, that is the suppliers, they do not relate to the bankrupt, his dealings or property. Such documents, however, in the hands of the respondent and dealing as they do with a claim to property (the deposit) of the debtor are available to the trustee under the section and can be produced.

18 Thus documents originating from Duferco or other Stein clients are producible. I note Mr. Golick's letter to Stein dated February 6, 1998: "you have indicated to me on several times that you had a substantial number of documents in your possession, many of which come from Duferco, that were not prepared in contemplation of litigation". If that is true then it would not seem that litigation privilege would be claimed validly. I am therefore of the view that subject

to a valid privilege claim for the protection of other clients, Stein is required to make full disclosure and produce all relevant documents in his possession relating to CTI. That should be done forthwith and without any charge to the Trustee who is entitled to receive same in Toronto. I would also note that it is not up to the Trustee to identify the documents it wishes; Stein has the responsibility of producing everything relating to the affairs of CTI in his possession. However, the arbitration material is easily identifiable since it is what Stein has and will make available to Lloyds, the opponent in the arbitration. It is perhaps ironic that Lloyds, the opponent, can receive this material yet CTI, the client (now the Trustee) cannot get this arbitration material from Stein, its (then) counsel. Stein professes that he would be willing to give the Trustee this material if it promised that it would not disclose it to Oslers. In the practical aspects of this case, I find that position to be pure sophistry although I will otherwise deal with the question of conflict of interest generally. Stein's objection to Oslers is that Oslers represented Lloyds in obtaining a stay of proceedings against Duferco pressing its insurance claim (the same one which Stein was jointly pressing for Duferco and CTI) in the Ontario Courts, before Stein commenced to represent CTI because there was a mandatory exclusionary arbitration clause in the insurance contract. The result of this was that the insurance claims are now being pressed in the London arbitration - and the London arbitrators are justifiably concerned about whether this arbitration will proceed as scheduled this year or need to be postponed in light of CTI's bankruptcy and the "mutual understanding" of CTI under the Trustee and Stein to part company. The arbitrators are entitled to a timely answer which the Trustee cannot give them because it does not have the material which Stein has and which Stein is giving Lloyds the opponent. It would not seem to me that anyone could see any harm in Oslers seeing what the opponent (its client for the stay motion) is seeing when the Trustee has no objection.

19 Should Oslers be otherwise prohibited from acting for the Trustee in relation to the London arbitration (recognizing that while Oslers may not be counsel at the arbitration, they may quarter back or otherwise advise the Trustee as to the arbitration, either whether to press on with it and if so, with what strategy)?

20 Duferco brought an Ontario action against Lloyds in September 1995. This was after Oslers had been retained by Price Waterhouse Limited, now the Trustee in Bankruptcy, but then the interim receiver ("IR") of CTI. It would seem that the Oslers' conflict search may not have disclosed the inter-relationship of the various parties when it was approached to represent Lloyds on the stay motion. The stay motion preparation would not involve disclosure of anything to do with the merits of the claim but rather the motion was merely a technical one dealing with where the claim should be adjudicated in light of the mandatory exclusionary arbitration clause. It is, of course, curious to note that Stein and Duferco knew of Oslers' involvement with Lloyds in this regard but have not previously pressed any concern about Oslers being counsel to Price Waterhouse Limited as IR or as Trustee.

21 Duferco brought the cross motion for disqualification of Oslers in relation to the London arbitration. Rule 5 of the *Rules of Professional Conduct* was cited along with the Commentaries 1 and 13 to that rule:

> **Rule 5**
>
> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.
>
> [emphasis added]
>
> ***Commentary 1***
>
> A conflicting interest is one which would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to the client or prospective client.
>
> [emphasis added]
>
> ***Commentary 13***

> A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or when the lawyer has obtained confidential information from the other party in the course of performing professional services. It is not however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person, and where such confidential information is irrelevant to that matter."
>
> [emphasis added]

22 Sopinka, J. in *MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 (S.C.C.) said at pp. 256-7:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings: see, for example, *Re Law Society of Manitoba and Giesbrecht* (1983), 2 D.L.R. (4th) 354, 39 C.P.C. 26, 24 Man. R. (2d) 228 (C.A). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. None the less, an expression of a professional standard in a code of ethics relating to a mater before the court should be considered an important statement of public policy. The statement in c. V should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an appearance of impropriety should be avoided.
>
> [emphasis added]

23 He went on to note at p. 257, in discussing the two different tests of (1) the probability of real mischief and (2) the possibility of real mischief, that:

> The "probability of real mischief" test is the traditional English approach based on *Rakusen v. Ellis, Munday & Clarke* [[1912] 1 Ch. D 831 (C.A.)]

However he went on at p. 262 to observe that as opposed to England, Canada had usually applied a stricter test, at least recently:

> In Canada, some courts have applied *Rakusen* but the trend is to apply a stricter test which reflects the concern for the appearance of justice. P.W. Kryworuk, *supra*, points out [at p. 17] that Canadian courts are largely applying the stricter American test or are applying a stricter version of *Rakusen* "in light of current attitude towards conflict of interest, justice and the appearance of justice and even the concept of "fairness".

24 Sopinka, J. at p. 267 determined that it was necessary to adopt a stricter test in Canada than the one prevailing in England.

> What then should be the correct approach? Is the "probability of mischief" standard sufficiently high to satisfy the public requirement hat there be an appearance of justice? In my opinion, it is not. This is borne out by the judicial statements to which I have referred and to the desire of the legal profession for strict rules of professional conduct as its adoption of the Canadian Code of Professional Conduct demonstrates. The probability of mischief test is very much the same as the standard of proof in a civil case. We act on probabilities. This is the basis of *Rakusen*. I am, however, driven to the conclusion that the public, and indeed lawyers and judges, have found that standard wanting. In dealing with the question of the use of confidential information we are dealing with a matter that is usually not susceptible of proof. As pointed out by Fletcher Moulton L.J. in *Rakusen*, "that is a thing which you cannot prove" (at p. 841). I would add "or disprove". If it were otherwise, then no doubt the public would be satisfied

> upon proof that no prejudice would be occasioned. Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.
>
> Typically, these cases require two questions to be answered (1) Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

25 The Trustee has no concerns about Oslers being involved in any aspect of the arbitration proceedings. Lloyds has not complained although it is not altogether certain that Oslers' potential involvement (subsequent to it representing Lloyds in the stay motion) has been brought squarely to Lloyds' attention. Does Duferco have standing? It would seem so pursuant to the observations of Hoilette, J. in *781332 Ontario Inc. v. Mortgage Insurance Co. of Canada* (1991), 3 C.P.C. (3d) 33 (Ont. Gen. Div.) at page 38:

> The threshold issue of the moving party's standing to bring this motion may, in my view, be summarily disposed of; well-established as it is that counsel, as an officer of the court has the right, if not the duty, to raise the issue where in his/her view there are circumstances which cast a shadow upon the integrity of the administration of justice. That proposition finds support in the recent decision of Sutherland J. in *Shaunessy Brothers Investments Ltd. v. Lakehead Trailer Park (1985) Ltd.* (1987), 23 C.P.C. (2d) 194, 63 O.R. (2d) 225 at p. 203 [C.P.C.] - Ontario Supreme Court [High Court of Justice], as it then was. That view of the law is not unique to Ontario.

26 Sopinka, J. went on to say in *McDonald Estate v. Martin* at p.268

> There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there exists a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. None the less, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.
>
> [emphasis added]

27 Duferco maintains that there is no affidavit evidence to the effect that (i) the Lloyds retainer has terminated and (ii) there has been no confidential information pertaining to the matters which has passed or may pass. Duferco also notes that there would be concerns amongst the reasonably informed community that there could be a clash of loyalties particularly when as here it could not be said (as per commentary 13) that the London arbitration when compared with the stay motion would be "*a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where such confidential information is irrelevant to that matter*" [emphasis added]. Thus the commentary appears to give an expansive definition to" dispute" in Rule 5.

28 Thus while it would seem to me that the purported conflict is more embarrassing than real for Oslers and would not likely cause a problem if the probability of mischief test were the test in Canada, I cannot overlook that aside from the test in Canada being the stricter *McDonald Estate v. Martin* one, Oslers has not provided any basis on which to conclude that a reasonably informed person knowing the material facts would not conclude that there was a conflict. I cannot

assume for the purposes of this motion that this was an unintentional oversight; rather I have to assume the contrary (as to the lack of affidavit evidence as to the two points above).

29 I have applied the Canadian test. If Oslers were not a Canadian firm giving legal advice as it is here to the Trustee in Ontario then it would be appropriate to have Oslers subject to the more relaxed English rules of conflict. However, that is not the case. In my view Oslers is disqualified from advising the Trustee in respect of the London arbitration.

30 That leaves remaining the question of whether the Trustee is entitled to retain the $500,000 U.S. payment it received from Penguin pursuant to the Agreement notwithstanding that for the purposes of this motion the court is to assume that Duferco has a valid security interest in CTI's oil rigs and related equipment ("Assets").

31 The Agreement was the second effort by Penguin. On August 29, 1997, Penguin entered into a letter agreement ("APS") with Price Waterhouse Limited (then IR) to purchase the Assets when it could not close that deal in accordance with its terms. Penguin forfeited a previous $500,000 U.S. it had given the IR as a deposit. The Agreement is not however in the same form as the APS. The APS did not provide that the IR could not sue for specific performance or for damages although the IR has done neither. The Agreement provides that Penguin pay the Trustee $500,000 U.S. in two instalments "for an option to purchase all of the Trustee's right, title and interest in [the Assets]". If Penguin made the instalments then it could deliver a notice that it was not going to purchase the Assets but if it did not give such notice then it was deemed to have agreed to purchase the Assets. The purchase price was to be paid by way of giving a letter of credit. When adjustments were factored in, the purchase price under the Agreement was $500,000 U.S. less than under the APS. Duferco asserts that this is more than a mere casual coincidence that under the Agreement if one were to add on the first $500,000 U.S. paid to the IR as a forfeited deposit regarding the APS and the $500,000 U.S. option payment then the cost to Penguin would be the same under the Agreement arrangement as it had been pursuant to the APS. However, apparently Duferco did not request any clarification or elaboration on the Trustee's first report dated January 27, 1998 nor did Duferco request to examine the Trustee on this report (since it is a contentious issue in dispute between Duferco individually and the Trustee representing the creditors generally as would be permissible to so request even subject to the caution contained in *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List])).

32 Duferco relies on its (assumed valid for the purpose of this motion) Assignment/Grant of Security Interest dated July 19, 1993 to claim the option payment of $500,000 U.S. as "proceeds" pursuant to the security:

> As security for the obligations of CTI to Duferco and BHF under and pursuant to the Agreements, CTI hereby assigns to Duferco and BHF all of its right, title and interest in and to, and hereby grants Duferco and BHF a continuing first lien and security interest in (a) those certain oil drilling rigs and related material and equipment identified on Exhibit "A" annexed hereto, and (b) all proceeds of any of the foregoing.
>
> [emphasis added]

33 While not conceding that the Ontario legislation of the *Personal Property Security Act*, R.S.O. 1990, c.P. 10 as amended ("PPSA") is applicable to this situation, Duferco notes that the term "proceeds" is given a definition as follows:

> Section 1(1) "[p]roceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with collateral or the proceeds therefrom, and includes any payment representing ind[emnit]y or compensation for loss of or damage to the collateral or proceeds therefrom.
>
> [emphasis added]

34 Duferco also notes Section 25(1) of the PPSA:

> Section 25(1) where collateral gives rise to proceeds, the security interest therein.

> (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral; and
>
> (b) extends to the proceeds.

[emphasis added]

35 Lastly Duferco submits that the dealings between Penguin and the Trustee with respect to the option payment should be accorded the same treatment as the deposit in *Alma College v. United Church of Canada* (October 7, 1997), Doc. London 14793F, 1032/94 (Ont. Gen. Div.), especially at paragraphs 18-19 and 26-27. However this case should be restricted to its fact situation which is quite unlike the present case. The contractual arrangements in *Alma* left no doubt about the nature of the deposit (although I do not see any doubt when one contemplates deposits generally). See paragraphs 23-24 where the terms of the Alma Agreement included:

> In the event the transaction of purchase and sale is not completed by the purchaser on the date scheduled for completion, all monies paid by way of deposit shall be forfeited by the purchaser and shall be retained by the vendor as liquidated damages.
>
> . . . . .
>
> (a) Vendor acknowledges that purchaser has deposited the sum of Two Hundred and Ten Thousand, One Hundred and Eighty-One Dollars and forty-three cents ($210,181.43) (the "deposit"). These monies should be credited to the purchase price on completion. If this transaction is not completed, nothing associated with this offer shall constitute an admission by either party as to whether or not the monies on deposit have been forfeited.

36 However it seems to me that one has to have regard for what business deal the Trustee and Penguin entered into. As discussed above, the Agreement provided for the payment by Penguin of $500,000 U.S. to the Trustee and in return Penguin got from the Trustee "an option to purchase (the "Option") all of the Trustee's right, title and interest in and to the rigs and equipment of CTI located at the CTI Camp in Ahwaz brought into Iran for export (the "Assets")." The Agreement did not require Penguin to purchase the Assets even if it paid the $500,000 U.S. to secure the option. Interestingly enough if Penguin did pay that amount it would become bound to purchase the Assets if it had not delivered by January 12, 1998 a notice of non-purchase. In any event the $500,000 U.S. was not specified as being credited to the purchase price of the Assets which purchase price was separately specified. Rather it was noted that the Trustee was entitled to retain the $500,000 U.S. under all events: namely, (a) if Penguin delivered its notice of nonpurchase or (b) if Penguin became bound to purchase the Assets not having delivered its notice of non-purchase and either (i) completed the purchase or (ii) failed to complete the purchase.

37 The Shorter Oxford English Dictionary on Historical Principles (third ed., 1988; Oxford University Press, Oxford) gives the following pertinent definitions of "option":

> **Option**
>
> 1. The action of choosing; choice.
>
> 2. Power or liberty of choosing; a freedom of choice.
>
> . . . . .
>
> 4. The privilege (acquired on some consideration) of executing or relinquishing, as one may choose, within a specified period a commercial transaction on terms now fixed; esp. that of calling for the delivery (a call) or making delivery (a put), or both (a double option), within a specified time, of some particular stock or produce at a specified price and to a specified amount.

38 I see no reason not to give the word "option" as used in the agreement its plain English meaning, particularly when the surrounding terms of the agreement relating to it are in accord with the above dictionary definition. Penguin had a choice; it did not have to make its choice for three weeks after entering the agreement and provided it paid $500,000 U.S. as required it tied up the right (but not the obligation) to acquire the Assets on specified terms. It seems to me that the Trustee and Penguin structured their deal with a fundamental element that Penguin had time to decide what to do and possibly to make arrangements as how to finance the acquisition (the first deal with the IR having faltered because of funding arrangements). In fact Penguin did not acquire the Assets under the second deal (the Agreement) but it is not exposed further.

39 The Shorter Oxford English Dictionary also defines "proceeds" as follows:

"Proceed"

2. That which proceeds from something; produce, outcome, profit. Now usu. in pl. proceeds.

40 In my view this definition would not support Duferco's contention. Duferco needs something "extra" to assist it. It advanced the PPSA definition. Even if one were to take the PPSA definition of "proceeds" (and apparently the applicability of the PPSA as an Ontario statute to the Duferco security interest is disputed by Duferco) the question would be whether the $500,000 U.S. is "derived indirectly from any dealing with" the Assets. While the option is *related* to the Assets in the sense that Penguin has the right to decide for a three week period whether it wishes to acquire the Assets by paying the purchase price for them, I do not see this as funds which are *derived indirectly* from any dealing with the Assets in the sense set out in the PPSA definition. The monies are obtained for the grant of time in essence, not with respect to any funds arising from doing a deal with the Assets while there is the potential to have something happen to the Assets, this is a future consideration and here the $500,000 U.S. has been paid over as a non-future event and that payment does not affect the actual (if it happens) acquisition of the Assets. The option (and the payment) are not affected in any way if Penguin does not exercise its right to acquire the Assets.

41 The grant of the option does not in itself affect the Assets over which Duferco claims security. The Trustee submitted that there was no applicable precedents for this situation; Duferco did not present any aside from the non-applicable *Alma case*. The Trustee thus analogized the situation to a secured creditor which is not in possession of the secured assets. Such secured creditor would not be entitled to rent arising with respect to the collateral charged by the security in priority to the debtor owner (see *Metropolitan Amalgamated Estates Ltd., Re*, [1912] 2 Ch. 497 (Eng. Ch. Div.) at p. 501; *Sellick v. Hayward*, [1917] 2 W.W.R. 803 (B.C. S.C.) at p. 804). A second mortgagee in possession would be entitled to receive rents without accounting to the first mortgagee (see *Metropolitan, supra* at p. 501; *Breiger Holdings Ltd. v. Thorne Riddell Inc.* (1980) 34 C.B.R. (N.S.) 244 (Man. Q.B.) at p. 249). Duferco has not taken any steps to go into possession of the Assets. It appears to me as well that this is an apt analogy.

42 It therefore seems to me that Duferco as a secured creditor (with assumed valid security) over the Assets and proceeds thereof is not entitled to the $500,000 U.S. payment received by the Trustee from Penguin pursuant to the Agreement. As this was an option payment which did not effect a payment for the Assets the necessity of these funds as alluded to in paragraph 25 of the Trustee's Report is not a relevant factor in determining entitlement; this type of atmosphere should be avoided.

43 As the disqualification motion ought in my view to have been raised earlier (but at that time it appears that Duferco was content to let this matter lie while Stein acted for both Duferco and Price Waterhouse Limited as IR guided by Oslers), it would seem to me that each should bear its own costs. Stein is to pay the Trustee $2,500 forthwith; Duferco is to pay the Trustee $2,500 forthwith.

Motions granted.

End of Document

TAB 4

2012 ONCA 153
Ontario Court of Appeal

Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.

2012 CarswellOnt 2577, 2012 ONCA 153, [2012] I.L.R. I-5263, 20 C.P.C. (7th) 1

Pye Bros. Fuels Ltd., Respondent and Imperial Oil Limited, Appellant

Winkler C.J.O., Robert P. Armstrong, H.S. LaForme JJ.A.

Heard: March 5, 2012
Judgment: March 12, 2012
Docket: CA C54487

Proceedings: reversing *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.* (2011), 2011 ONSC 3499, 2011 CarswellOnt 15646 (Ont. Div. Ct.)

Counsel: Amy B. Pressman, Jonathan Davis-Sydor, for Appellant
Stephen J. Wojciechowski, for Respondent

Subject: Insurance; Civil Practice and Procedure; Environmental; Evidence; Torts

Headnote

Insurance --- Actions on policies — Practice and procedure — Discovery — Discovery of documents — Application for production

Disclosure of policy — Home oil heater began leaking — Plaintiffs brought action against PB Ltd., I Ltd. and others — PB Ltd.'s motion for disclosure of insurance policy by I Ltd. was dismissed — PB Ltd.'s appeal was allowed and policy ordered disclosed — I Ltd. appealed — Appeal allowed — Trial judge did not err by relying on evidence of I Ltd. regarding terms of policy — Evidence regarding policy was not contradicted — Motion judge was not interpreting policy but merely deductible limit and whether claim had been made — PB claimed that policy was relevant regarding duty to defend, but this was not in issue as pleaded by PB Ltd. — Documents were not relevant and had been ordered produced in error — PB Ltd. was not entitled to gain documents for collateral purpose.

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Miscellaneous

Disclosure of policy — Home oil heater began leaking — Plaintiffs brought action against PB Ltd., I Ltd. and others — PB Ltd.'s motion for disclosure of insurance policy by I Ltd. was dismissed — PB Ltd.'s appeal was allowed and policy ordered disclosed — I Ltd. appealed — Appeal allowed — Trial judge did not err by relying on evidence of I Ltd. regarding terms of policy — Evidence regarding policy was not contradicted — Motion judge was not interpreting policy but merely deductible limit and whether claim had been made — PB claimed that policy was relevant regarding duty to defend, but this was not in issue as pleaded by PB Ltd. — Documents were not relevant and had been ordered produced in error — PB Ltd. was not entitled to gain documents for collateral purpose.

APPEAL by defendant from judgment reported at *Pye Bros. Fuels Ltd. v. Imperial Oil Ltd.* (2011), 2011 ONSC 3499, 2011 CarswellOnt 15646 (Ont. Div. Ct.), reversing judgment refusing to order disclosure of insurance policy.

***Per curiam*:**

Background

1 Pye Bros. and Imperial Oil are co-defendants in an action for damages related to the alleged release of oil from a home heating fuel oil tank at a residence. Various allegations of negligence are made against Imperial Oil and Pye Bros.

and damages are sought in the amount of $350,000 plus costs and interest. Pye Bros. has cross-claimed against its co-defendants, including Imperial Oil, but only for contribution and indemnity.

2 This action is being case managed with several other actions in which home heating oil tanks made by a common manufacturer are all alleged to have failed.

3 Pye Bros. brought a motion before the case management judge under Rule 30.02(3) for production of an insurance policy in the possession of Imperial Oil. The motion judge concluded that the policy did not meet the criteria for production under the Rule and that Pye Bros. was seeking the policy for a collateral purpose.

4 The Divisional Court allowed Pye Bros.' appeal and ordered production of the insurance policy. That court essentially accepted Pye Bros.' submissions; that the motion judge had made two palpable and overriding errors. The first is that she erroneously made findings regarding the terms of the insurance policy without any reference to the policy itself. That is, she relied solely on the affidavit evidence filed, which was evidence tendered by a party with an interest adverse to that of Pye Bros. The second is that the motion judge erred in her application of Rule 30.02(3).

5 We disagree with the Divisional Court's conclusion that the motion judge committed these errors. Moreover, we disagree with the Divisional Court's reasons for reaching its conclusions and the appeal must be allowed.

Discussion

6 First, it was not a palpable and overriding error for the motion judge to rely on Imperial Oil's evidence without reading the policy itself. The Divisional Court's conclusion otherwise, which included the fact that the evidence was provided by a party who was adverse in interest to Pye Bros, is wrong. If one party's evidence on a material fact is entirely unchallenged — here Pye Bros. did not conduct any cross-examination of Imperial Oil's affidavit evidence — or is uncontradicted, it is not an error in any sense for a trier of fact to rely on that evidence.

7 Moreover, if it was an error for the motion judge to decide this issue without reading the insurance policy, we would note that the Divisional Court committed the very same error. In any case, it was not an error in the circumstances of this case.

8 Second, Pye Bros. is not asserting that the insurance policy is a relevant document to the main litigation. Rather, the real issue that is being advanced is the duty to defend, although this was not the position on the motion. But, Pye Bros., as the motion judge correctly observed, has not made any claims against Imperial Oil relating to its insurance coverage, or its contractual relationship, or any alleged duty to defend.

9 Rule 30.02(3) is not intended to provide a means to obtain discovery of documents in advance of commencing a separate action relating to coverage or contractual obligations. The purpose of the Rule is to provide a specific and limited exception to the general rule that only relevant documents need be produced. It is to assist the making of informed and sensible decisions by parties involved in litigation in circumstances where recourse may be had to any available insurance money: *Sabatino v. Gunning* (1985), 50 O.R. (2d) 171 (Ont. C.A.).

10 In this case, the motion judge was not interpreting the policy. Rather, she was simply considering two uncontradicted facts about the policy: (i) that the deductible limit of the policy exceeded the amount of the claim made by the plaintiffs; and (ii) that the policy was a "claims made" type of policy and no claims had been made to trigger the coverage. She could clearly decide this issue on the record before her without the need to refer to the policy itself.

11 We agree with counsel for Imperial Oil; the Divisional Court appears to have analyzed the matter as if this were a case between Pye Bros. and Imperial Oil, without regard to the actual pleadings in the underlying action. Because of this, the court effectively ordered production of a document that is not relevant, on the basis of an implied contractual right that was not asserted in the pleadings by Pye Bros.

12 In our view, the motion judge was entitled to consider the purpose for which production of the policy was sought and to refuse production of it. She did not err in either her interpretation of the law or her approach to deciding the motion. The Divisional Court, on the other hand, was in error in deciding that she was.

Disposition

13 The appeal is allowed. Imperial Oil is awarded its costs of leave to appeal to this court and the appeal fixed in the aggregate amount of $22,000 inclusive of disbursements and HST. Imperial Oil is also entitled to its costs of the appeal to the Divisional Court in the same amount that court awarded Pye Bros. Finally, Imperial Oil's costs award made by the motion judge is reinstated.

Appeal allowed.

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TAB 5

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

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])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant
Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

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

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust

account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown.

Taxation --- Taxe sur les produits et services — Perception et versement — Montant de TPS détenu en fiducie

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Taxation --- Principes généraux — Priorité des créances fiscales dans le cadre de procédures en faillite

Débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA) — Débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC) — En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs a servi à payer le créancier garanti principal — Demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement des montants de TPS non remis a été rejetée — Appel interjeté par la Couronne a été accueilli — Créancier a formé un pourvoi — Pourvoi accueilli — Analyse de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000 — Législateur avait mis un terme à la priorité accordée aux créances de la Couronne sous

les régimes de la LACC et de la Loi sur la faillite et l'insolvabilité (LFI), et ni l'une ni l'autre de ces lois ne prévoyaient que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel — Fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet de restreindre le recours à la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC — Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle — On ne pourrait pas considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC, compte tenu des modifications récemment apportées à la LACC — Sous le régime de la LACC, le tribunal avait discrétion pour établir une passerelle vers une liquidation opérée sous le régime de la LFI et de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation — Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse — Montant perçu au titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

The debtor company owed the Crown under the Excise Tax Act (ETA) for GST that was not remitted. The debtor commenced proceedings under the Companies' Creditors Arrangement Act (CCAA). Under an order by the B.C. Supreme Court, the amount of the tax debt was placed in a trust account, and the remaining proceeds from the sale of the debtor's assets were paid to the major secured creditor. The debtor's application for a partial lifting of the stay of proceedings in order to assign itself into bankruptcy was granted, while the Crown's application for the immediate payment of the unremitted GST was dismissed.

The Crown's appeal to the B.C. Court of Appeal was allowed. The Court of Appeal found that the lower court was bound by the ETA to give the Crown priority once bankruptcy was inevitable. The Court of Appeal ruled that there was a deemed trust under s. 222 of the ETA or that an express trust was created in the Crown's favour by the court order segregating the GST funds in the trust account.

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded 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. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

Giving the Crown priority over GST claims during CCAA proceedings but not in bankruptcy would, in practice, deprive companies of the option to restructure under the more flexible and responsive CCAA regime. It seemed likely that Parliament had inadvertently succumbed to a drafting anomaly, which could be resolved by giving precedence to s. 18.3 of the CCAA. Section 222(3) of the ETA could no longer be seen as having impliedly repealed s. 18.3 of the CCAA by being passed subsequently to the CCAA, given the recent amendments to the CCAA. The legislative context supported the conclusion that s. 222(3) of the ETA was not intended to narrow the scope of s. 18.3 of the CCAA.

The breadth of the court's discretion under the CCAA was sufficient to construct a bridge to liquidation under the BIA, so there was authority under the CCAA to partially lift the stay of proceedings to allow the debtor's entry into liquidation. There should be no gap between the CCAA and BIA proceedings that would invite a race to the courthouse to assert priorities.

The court order did not have the certainty that the Crown would actually be the beneficiary of the funds sufficient to support an express trust, as the funds were segregated until the dispute between the creditor and the Crown could be resolved. The amount collected in respect of GST but not yet remitted to the Receiver General of Canada was not subject to a deemed trust, priority or express trust in favour of the Crown.

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming

its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.
Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.
La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.
L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.
Le créancier a formé un pourvoi.
Arrêt: Le pourvoi a été accueilli.
Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.
Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte

législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.
L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.
Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.
Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la présance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

APPEAL by creditor from judgment reported at 2009 CarswellBC 1195, 2009 BCCA 205, [2009] G.S.T.C. 79, 98 B.C.L.R. (4th) 242, [2009] 12 W.W.R. 684, 270 B.C.A.C. 167, 454 W.A.C. 167, 2009 G.T.C. 2020 (Eng.) (B.C. C.A.), allowing Crown's appeal from dismissal of application for immediate payment of tax debt.

***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
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> (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,
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> ...
>
> (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 6

2004 CarswellOnt 2784
Ontario Superior Court of Justice [Commercial List]

Teleglobe Inc., Re

2004 CarswellOnt 2784, [2004] O.J. No. 2905, [2004] O.T.C. 614, 132 A.C.W.S. (3d) 241, 4 C.B.R. (5th) 119

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1885, c. C-36

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TELEGLOBE INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Farley J.

Heard: June 1, 2004
Judgment: June 15, 2004
Docket: 02-CL-4528

Counsel: Harvey Chaiton for Interim Receiver
Jim Bunting for former solicitors for Teleglobe
Fred Myers for Secured Banking Syndicate
Julia Barss for Defendant Directors in the related action against the Teleglobe Directors
Robert Staley for Bondholders of Teleglobe
Glenn Zacher for BCE Inc.
Peter J. Osborne for Monitor and Interim Administrator

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — General principles

T Inc. was subject to protection of Companies' Creditors Arrangement Act — Law firm that had acted for T Inc. was requested to deliver documents to interim receiver — Law firm asserted solicitor-client privilege over 194 documents in its possession — T Inc. no longer had board of directors to deal with question of waiver — Court ordered monitor and interim administrator of T Inc. to consider waiver of privilege.

RULING on waiver of solicitor-client privilege over documents relating to insolvent company.

***Farley J.*:**

1 With respect to the motion of the Interim Receiver ("IR") for the back up tapes containing email communications and data files of various officers and directors of Teleglobe that resided on a BCE or BCE related company (collectively "BCE") servers for the period November 1, 2000 to May 15, 2002, BCE is to allow access to such servers by an independent company with the requisite expertise to extract same, subject to the proviso that such company give BCE an executed confidentiality agreement which reasonably protects any BCE interest in non-Teleglobe matters. That company may then provide copies of the extracted materials to the IR. It apparently was the choice of BCE to intermingle this requested Teleglobe material with other BCE material. The process above will adequately protect BCE from its failure to appropriately segregate such material in the first place. The reasonable cost of such extraction by the independent company is to be borne by BCE. Clearly, the IR of Teleglobe is entitled to Teleglobe "documentation" including material of this nature by virtue of its appointment to the office of Interim Receiver and its power and authority to conduct an investigation.

2 With respect to Pierre Van Gheluwe, it is asserted by BCE that he was not an officer or employee of Teleglobe (or Teleglobe affiliate or subsidiary) during the relevant period, notwithstanding that identification of relationship for a period of time in respect of office communications. That identification was said to be an inadvertent "carry-over" error. I would assume that that issue can be sorted out without any difficulty - but that if there is any difficulty then I would assume that this would be sorted out by checking corporate minutes and other records plus of course the material required to be filed with the Corporations Branch.

3 Of course if there were *in fact* no storage of materials for one or more of such officers or directors then that is the end of that for that individual. However, that *fact* will be verified by the independent company.

4 I do not understand the logic, rationale, practicality, or legality of "BCE's position that the emails and data files on its servers are BCE property, not Teleglobe property, and that the Interim Receiver is not entitled to this information". That in my view confuses "physical" material with "intellectual" material which is owned by one party but located in storage on the server of a third party. See also my views above as to this being the choice of BCE.

5 Thus there is to be an order to give effect to the foregoing.

6 That leaves the question of the request for Davies Ward Phillips & Vineberg LLP ("Davies") to deliver to the IR the Davies Teleglobe Documents. These were said to be approximately 270 documents in Davies files as to which Davies asserts that there is solicitor-client privilege. There may be some confusion which I am certain counsel will be able to sort out as to the number - as apparently Davies indicates that there are duplicates, but as well some BCE documents, mistakenly included in the 270. Davies indicates now that there are only 194 documents. Assuming for the moment that there are duplicates and that there is an order for delivery to the IR, it seems to me that the duplicates should be delivered as well so that the IR could satisfy itself as to there being true duplication (as opposed to similar documents as would be the case where the same typed document was in various forms being commented on by handwritten notes by various individuals). With respect to the BCE mistakenly included files, it would probably be desirable for there to be some independent verification that such were not Davies Teleglobe Documents in fact.

7 The solicitor-client privilege is something which is for the benefit of the client - not the lawyer. However, the lawyer (as Davies is appropriately doing here) must assert that privilege for the benefit of the client. The client here is Teleglobe. It no longer has a board of directors to deal with a question of waiver. Davies asserts that Kroll as IR does not have the power and authority to waive the privilege. However, there seems to be acknowledgment that in the circumstances, E&Y as Monitor and Interim Administrator would have.

8 Davies relies on *Pritchard v. Ontario (Human Rights Commission)*, [2004] S.C.J. No. 16 (S.C.C.) at paragraph 33 that "solicitor-client privilege cannot be abrogated by inference." One may reasonably wonder about the breadth of such a sweeping statement by the Supreme Court of Canada, particularly where there did not appear to be any contextual analysis of the facts of that case. However, it seems to me that the appropriate way of proceeding and in the interests of having Kroll as IR complete an appropriate investigation is for E&Y to appropriately consider waiving the privilege.

9 There is therefore to be an Order that E&Y consider waiving the privilege.

Schedule "A"

Teleglobe Financial Holdings Ltd. (C)

Teleglobe Canada Limited Partnership (C)

Teleglobe Management Services Inc. (C)

Teleglobe Marine, Inc. (C)

Teleglobe Marine, L.P. (C)

Teleglobe Holdings (U.S.) Corporation (US)

Teleglobe Telecom Corporation (US)

Teleglobe Luxembourg LLC (US)

Teleglobe Holding Corp. (US)

Teleglobe Investment Corp. (US)

Teleglobe Communications Corporation (US)

Teleglobe USA Inc. (US)

Optel Telecommunications Inc. (US)

Teleglobe Marine (US) Inc. (US)

Teleglobe Puerto Rico Inc. (US)

Teleglobe Canada Management Services Inc.

3692795 Canada Inc.

Teleglobe Vision Call Center Services, General Partnership

Teleglobe Submarine Inc. (US)

Order accordingly.

TAB 7

2014 ONSC 1606
Ontario Superior Court of Justice

Williams v. Pintar

2014 CarswellOnt 3384, 2014 ONSC 1606, [2014] I.L.R. I-5584, [2014] O.J. No. 1267, 119 O.R. (3d) 447, 238 A.C.W.S. (3d) 722, 32 C.C.L.I. (5th) 143

Christine Williams, Plaintiff (Moving Party) and Zdenko Pintar, Defendant and Jevco Insurance Company, Third Party (Responding Party)

Master Pierre E. Roger

Heard: January 30, 2014
Judgment: March 14, 2014
Docket: 09-46686

Counsel: Christopher A. Obagi, for Plaintiff / Moving Party
Ashlee L. Barber, for Third Party / Responding Party

Subject: Civil Practice and Procedure; Insurance

Headnote

Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant

Plaintiff W was pedestrian who was struck by vehicle of defendant P — P had insured previous vehicle with insurer J — J claimed that P was not insured for vehicle involved in accident, and denied coverage accordingly — P did not defend action brought by W, and was noted in default — J added itself as statutory third party — W claimed that J should be defendant — W moved for leave to amend statement of claim, so that she could pursue declaratory relief — Motion granted — Merits of amendment were not at issue, as long as amendment was legally tenable — Amendment could not result in prejudice that was not remediable by costs — Although there was no cause of action without judgment in favour of W, declaratory relief was still possibility — Applicable law did not preclude W from seeking this relief — Allowance of amendments was important to allow for access to justice and timely resolution of dispute — Amendment was allowed except for one portion which was untenable at law.

Civil practice and procedure --- Judgments and orders — Declaratory judgments or orders — Availability — General principles

Plaintiff W was pedestrian who was struck by vehicle of defendant P — P had insured previous vehicle with insurer J — J claimed that P was not insured for vehicle involved in accident, and denied coverage accordingly — P did not defend action brought by W, and was noted in default — J added itself as statutory third party — W claimed that J should be defendant — W moved for leave to amend statement of claim, so that she could pursue declaratory relief — Motion granted — Merits of amendment were not at issue, as long as amendment was legally tenable — Amendment could not result in prejudice that was not remediable by costs — Although there was no cause of action without judgment in favour of W, declaratory relief was still possibility — Applicable law did not preclude W from seeking this relief — Allowance of amendments was important to allow for access to justice and timely resolution of dispute — Amendment was allowed except for one portion which was untenable at law.

MOTION by plaintiff W for leave to amend statement of claim to add insurer J, to pursue declaratory relief.

***Master Pierre E. Roger*:**

1 The plaintiff brings this motion seeking an order granting her leave to amend the statement of claim to add Jevco Insurance Company as a defendant to the main action and to seek against Jevco declaratory relief related to insurance coverage.

Background Information

2 This action arises from personal injuries sustained in a car-pedestrian accident that occurred on November 1, 2007. The defendant, Zdenko Pintar ("Pintar") was the driver and owner of an automobile that collided with the plaintiff as she was crossing the street.

3 Jevco denied coverage to Pintar. Pintar did not defend the action and has been noted in default. Jevco added itself as a statutory third party under section 258(14) of the *Insurance Act*, R.S.O. 1990, c. I.8, on the basis that Pintar was not covered for the vehicle he was driving at the time of the accident. The plaintiff had no available automobile insurance coverage and could therefore not add her insurer for any uninsured or underinsured coverage as would otherwise be the normal course in such circumstances.

4 Pursuant to a court order, the defendant attended an examination for discovery on October 24, 2011 and produced his relevant documents, including those relevant to insurance coverage. Also pursuant to a court order, the defendant's insurance broker, Paul Landry Insurance Brokers Ltd., also produced its relevant documents regarding Pintar's insurance coverage.

5 The facts relevant to coverage between Pintar and Jevco, although not material to this motion, appear to be the following. In July 2007, Pintar purchased a motor vehicle insurance policy with Kingsway General Insurance Company, now Jevco Insurance Company. The policy provided liability insurance coverage from July 20, 2007 until January 20, 2008. The insured vehicle on the policy was a 1991 Acura Legend. The premiums were paid in July of 2007. The standard Ontario Automobile Policy provides a fourteen-day grace period with respect to coverage on personal liability for newly acquired automobiles. On October 26, 2007 Mr. Pintar purchased a new vehicle, namely a 1993 Lexus. The accident occurred on November 1, 2007.

6 Jevco argues that Pintar was driving a motor vehicle that was not insured by Jevco when he was involved in the accident with the plaintiff on November 1, 2007 and that Pintar made no attempt to add the vehicle he was driving at the time of the accident to his insurance policy until six weeks after the accident.

7 Jevco's actions have been consistent with its position that it is not going to defend or indemnify Pintar. Jevco has not defended Pintar. Jevco took the necessary steps to add itself as a statutory third party, as it is entitled to do under section 258(14) of the *Insurance Act*. Jevco exercised its rights as a third party to plead to the plaintiff's action and to raise any defences to the action that Pintar may have been able to raise.

8 There has been no determination with respect to liability between the plaintiff and Pintar nor has there been any judgment or settlement.

9 The proposed amendments to the statement of claim can be grouped into three categories:

a) The plaintiff proposes to add Jevco as a defendant and seek against it various declaratory relief.

b) The plaintiff seeks to increase the amount of damages claimed in paragraph 1.

c) The plaintiff wishes to correct a minor typographical error at paragraph 1 (e).

10 Jevco consents to the amendments as they relate to the increase of the amount of damages claimed and the correction of typographical errors.

11 Jevco objects to being added as a defendant and opposes all such amendments to the statement of claim.

12 The proposed amendments that Jevco opposes are:

1. A. The Plaintiff claims as against the Defendant, Jevco Insurance Company (hereinafter "Jevco"):

(a) a declaration that Jevco is obligated to pay pursuant to Policy Number KGHOAP182454 any Judgment issued in favour of the Plaintiff against the Defendant Zdenko Pintar;

(b) a declaration stating the limits of coverage available under Policy Number KGHOAP182454 and determination of any conditions or exclusions affecting the availability of payment thereunder;

(c) a declaration and determination of the rights of the Plaintiff in respect to payment under Policy Number KGHOAP182454 issued by Jevco; and

(d) enhanced costs for failure to attempt to settle as expeditiously as possible in accordance with Sections 258.5(1) and (5) of the Insurance Act, R.S.O. 1990, c. I.8.

and

3A. The Defendant, Jevco Insurance Company, previously known as Kingsway General insurance Company, is an insurer licensed in the Province of Ontario to sell and administer automobile insurance to the Defendant, Zdenko Pintar under Policy Number KGHOAP182454.

3B. The Plaintiff states that the Defendant Jevco sold a standard automobile policy providing rights to the Plaintiff. The Plaintiff seeks a declaration of her rights of payment in respect to the policy.

13 The main argument of Jevco on this motion is premised on the text of section 258(1) of the *Insurance Act*. Jevco argues that a judgment against the insured is required before a plaintiff has a cause of action against the insurer. Consequently, that in the absence of a judgment, as contemplated at section 258(1), the plaintiff has no relationship, contractual or otherwise with Jevco and therefore no cause of action against Jevco. As a result, Jevco argues that it would be illogical to permit a pleading by way of amendments that would not be permitted in the first place as both Rule 5.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. (addition of a party) and Rule 26.01 (amendment of a pleading) require that the proposed amendment express a claim that is tenable at law.

14 The plaintiff argues that she seeks to add Jevco to claim declaratory relief (in this case a determination of coverage) for which a cause of action (at common law or under the provisions of the *Insurance Act*) is not required provided that the person seeking the declaration and the person opposing the declaration have a true interest.

Issues

15 Should leave be granted to the plaintiff to amend the statement of claim to add Jevco as a defendant?

Analysis

16 Rule 26.01 provides:

On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. [1]

17 Rule 5.04 (2) provides:

At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

18 On a motion to amend a statement of claim, a court will consider the tenability of a proposed claim by applying the principles developed under Rule 21.01 (b) (determination of an issue before trial). The Court of Appeal in *Andersen Consulting v. Canada (Attorney General)* (2001), 150 O.A.C. 177 (Ont. C.A.) has indicated:

> Without diminishing the concerns raised by the motions judge, they cannot be used to emasculate the well-established rule that amendments like those sought in the present case should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action. [Para. 37]

19 A case not referred to be the parties on this motion but which provides an excellent summary of the applicable law is the decision of my colleague, Master MacLeod, in *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Ont. Master). In that case, Master MacLeod confirmed that on such a motion the court is not concerned with a factual consideration of the merits. As a result, on such a motion, evidence surrounding the merits of the claim is not required. As indicated, rule 26.01 requires that a proposed amendment be tenable at law. The test to amend and to add parties are well laid out at paras. 19, 21, 22, 25 and 27 of the *Plante* decision and are reproduced here to ensure consistently on such motions:

> **19** While the court will not therefore conduct a detailed examination of the evidentiary merits of a proposed amendment, the court is required to scrutinize the proposed claim to ensure it is meritorious in the sense of raising a tenable plea. In addition it must be scrutinized to ensure it is a proper pleading complying with Rule 25. Put another way, a pleading amendment should be reviewed to ensure it would withstand scrutiny under Rule 25.11 and 21.01(1)(b) but does not engage a summary judgment analysis under Rule 20. This level of legal technical review is the same whether a master or a judge hears the motion.
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> [...]
>
> **21** The three tests enunciated in Refco may then be restated as follows:
>
> a) The amendments must not result in irremediable prejudice. The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice. *Mota et. al. v. The Regional Municipality of Hamilton Wentworth Police Services Board* (2003), 63 O.R. (3d) 737 (C.A.) at p. 748.
>
> b) The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting: *Atlantic Steel Industries v. CIGNA Insurance* (1997), 33O.R. (3d) 12 (Gen. Div.).
>
> c) The proposed amendments must otherwise comply with the rules of pleading. For example the proposed amendments must contain a "concise statement of material facts" relied on "but not the evidence by which those facts are to be proved" (rule 25.06 (1)), the proposed amendments are not "scandalous, frivolous or vexatious" (rule 25.11 (b)), the proposed amendments are not "an abuse of the process of the court" (rule 25.11 (c)), the proposed amendments contain sufficient particulars - for example of fraud and misrepresentation (rule 25.06 (8)).
>
> **22** In short, Rule 26.01 requires that a properly framed proposed amendment that is tenable at law will be allowed providing it does not result in prejudice that cannot be addressed in costs. This brings a logical consistency to the rules. In the absence of prejudice, it would be peculiar if the mandatory language of the rule were interpreted to prevent a pleading that could have been advanced in the first instance. It would be equally illogical to permit a pleading by way of amendment that would not have been permitted in the first place. That is why the pleading amendment analysis should incorporate the tests in Rules 25.11 and 21.01(1)(b) because those rules are available

before a defendant pleads. Rule 20, on the other hand, the summary judgment rule, is only available after a defence has been delivered. By analogy an evidence-based analysis of the merits is not appropriate on a pleadings motion.

[...]

25 Addition of a party engages a slightly different analysis because Rule 5.04(2) is discretionary and not mandatory. The wording is similar to Rule 26.01 and therefore is subject to the same tests as discussed above. Notwithstanding that those tests may be met, the court retains a discretion to refuse addition of a party. Such discretion of course is not whimsical but based on the principles of fairness and judicial efficiency. It would be appropriate to withhold consent if joinder will unduly complicate or delay the proceeding or if any of the circumstances exist which would justify relief against joinder under Rules 5.03(6) or Rule 5.05. It would also be appropriate to withhold consent if the addition of a party appears to be an abuse of process.

[...]

27 The tests for adding a party under Rule 5.04(2) may therefore be stated as follows:

a) The proposed amendment must meet all of the tests under Rule 26.01

b) Joinder should be appropriate under Rule 5.02(2) or required under Rule 5.03. The addition of the parties should arise out of the same transaction or occurrence (Rule 5.02(2)(a)), should have a question of law or fact in common (Rule 5.02(2)(b)), or the addition of the party should promote the convenient administration of justice (Rule 5.02(2)(e)). Adding a party will be particularly appropriate if it is unclear which of the original defendant or the proposed defendant may be liable (Rules 5.02(2)(c) or (d)) or if it is necessary that the proposed defendant be bound by the outcome of the proceeding or his or her participation is otherwise necessary to allow the court to adjudicate effectively (Rule 5.03(1)).

c) Joinder should not be inappropriate under Rules 5.03(6) or 5.05. The addition of a party should not unduly delay or complicate a hearing or cause undue prejudice to the other party. In a case managed proceeding, it may also be appropriate to withhold consent if it will cause significant disruption to the court ordered schedule. *Belsat Video Marketing Inc. v. Astral Communications Inc.*, 86 C.P.C. (3d) 413, 118 O.A.C. 105 (C.A.)

d) Addition of a party will not be permitted if it is shown to be an abuse of process. Abuse of process will exist where the addition of a party is for an improper purpose such as solely to obtain discovery from them, to put unfair pressure on the other side to settle, to harass the other party or for purely tactical reasons. *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Gen. Div.); *MacRae v. Lecompte* (1983), 143 D.L.R.(3d) 219 (H.C.J.).

20 Jevco argues that under section 258(1) a judgment against the insured is required before a plaintiff has a cause of action against the insurer. Consequently, it argues that in the absence of a judgment, as contemplated in section 258(1), the plaintiff has no relationship, contractual or otherwise with Jevco and therefore has no cause of action against Jevco.

21 I agree in part with this argument but find, for reasons outlined below, that the absence of a cause of action is not dispositive of this motion. Even without a cause of action, the draft amended statement of claim discloses a tenable claim in the form of declaratory relief between interested persons sufficient for such amendments to be allowed applying the above tests.

22 The cases cited by Jevco rely upon *Martin v. Travelers Indemnity Co.*, [1943] O.W.N. 28 (Ont. H.C.)). These cases can be distinguished from the present motion. In *Martin*, the plaintiff, Martin, had recovered judgment at trial. The defendants' appeal to the Court of Appeal had been dismissed and the defendants were now appealing to the Supreme Court of Canada. Despite the pending appeal, the plaintiff started an action for payment by the insurer for the defendants under section 205 of the *Insurance Act*. That action was premature and clearly inconsistent with section 205. The plaintiff's action seeking payment was stayed pending the appeal. The situation is quite different in the case at hand where the

plaintiff is not suing for payment but rather seeking declaratory relief. Similarly, in the other cases cited by Jevco, the focus is on the absence of a cause of action prior to recovering a judgment and not on the potential availability of declaratory relief.

23 Judges of the Court of Appeal and of the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed: *Courts of Justice Act*, R.S.O. 1990, C.43, s. 97 ("*CJA*").

24 A judge of the Superior Court of Justice has a general power to make a declaration whether or not there is a cause of action, at the instance of any party who is interested in the subject-matter of the declaration: *Royal Securities Corp. v. Montreal Trust Co.*, [1966] O.J. No. 1078 (Ont. H.C.) at para. 97 (Ont. H.C.J.). As indicated at paras. 96, 97 and 101 of *Royal Securities Corporation*:

> **96** That section is identical to the present English Rule, O. 15, r. 17, which is virtually the same as that which was dealt with by the English Court of Appeal in *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536. It was decided conclusively in that case that the Court had the power to make a declaration at the instance of a plaintiff who had no other cause of action against the defendant. In so doing, the Court gave a broad, and, I believe, proper meaning to the words "whether or not any consequential relief is or could be claimed". (The wording of the rule at that time was slightly different in that it read [O. XXV, r. 5] "whether any consequential relief is or could be claimed or not". There is really no difference.)
>
> **97** Lord Justice Pickford dealt with the history of the Rule and, at p. 562, concluded as follows:
>
> > I think therefore that the effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration. It does not extend to any stranger to the transaction to go and ask the Court to express its opinion in order to help him in other transactions.
>
> [...]
>
> **101** Here, the plaintiff has raised a real question as to the validity of the promissory note and the rights of all consequent thereto; it is vitally interested in that question for the answers may well determine its rights to relief over as against its principal; and finally, all three defendants have a real interest in opposing its claim. In addition, I might add that all of the interested parties are before the Court and that is essential: See *Fremont Canning Co. et al. v. Wall et al.; Johnson v. Wall*, [1941] O.R. 379, [1941] 3 D.L.R. 96 (C.A.).

25 Judges have broad jurisdiction to make declaratory orders. If a substantial question exists which one person has a real interest to raise, and the other to oppose, then a judge has jurisdiction to resolve it by a declaration: *Solosky v. R.* (1979), [1980] 1 S.C.R. 821 (S.C.C.), at 8. As indicated by Justice Dickson at page 8 of *Solosky v. R.*:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

26 The *Rules of Civil Procedure* provide that a proceeding may be brought where the relief claimed is a determination of rights that depend on the interpretation of a contract: Rule 14.05(3)(d). Further, as far as possible, multiplicity of legal proceedings shall be avoided and the *Rules of Civil Procedure* shall be liberally construed to secure a just, expeditious and least expensive determination of every civil proceeding on its merits: *CJA*, s. 138; Rule 1.04(1).

27 The above is reinforced by the recent decision of the Supreme Court of Canada decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.). In the first paragraph of that decision, Justice Karakatsanis addresses the greatest challenge to the rule of law in Canada today: access to justice. She explains that an effective and accessible means

of enforcing rights is required or else the rule of law is threatened. She counsels, at paragraph 28, that this requires a shift in culture. The principal goal remains a fair process that results in a just adjudication of disputes but that this process must be accessible, proportionate, timely and affordable. She acknowledges that the best forum for resolving a dispute in this manner is not always that with the most painstaking procedure.

28 The legislature recognized the importance of requiring the disclosure of insurance issues well in advance of trial. Parties are entitled to the disclosure of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action, or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment. Furthermore, a party may obtain disclosure of the amount of money available under the policy and any conditions affecting its availability: Rules 30.02(3) and 31.06(4); *Seaway Trust Co. v. Markle* (1992), 11 C.P.C. (3d) 62 (Ont. Gen. Div.)). Plaintiffs must be able to anticipate the availability of any funds which may or may not satisfy judgment. Indeed, the purpose of these disclosure rules:

> ... is to enable the opposite party to have information which is necessary to the making of an informed and sensible decision as to whether to proceed with the suit. Although written about the production of the policy itself under Rule 30.02(3), the analysis of Thorson J.A. in *Sabatino v. Gunning* (1985), 50 O.R. (2d) 171 is to the point:
>
> > In my opinion that purpose, briefly stated, is to assist the making of informed and sensible decisions by parties involved in litigation, in circumstances where the extent, if any, to which recourse can be had by one or more of the parties to any available insurance moneys in the event of their eventual success in the litigation may play a major and even a determinative role in how the litigation is conducted, and through what stages it should be pursued. [*Seway Trust Co.*, at 3.]

29 The amendments sought by the plaintiff in this case are not inconsistent with the provisions of section 258(1). The plaintiff is not seeking to have the insurance money payable under the contract applied in or towards satisfaction of the plaintiff's judgment. She is not maintaining a collection remedy or an action against the insurer to have the insurance money so applied. She is seeking declaratory relief. If successful, she will still have to seek payment from the insurer after recovering a judgment against the defendant/insured. Section 258(1) is not exclusive. It provides how a plaintiff may, upon recovering a judgment, proceed against the insurer of the defendant for payment of available insurance money. It does not provide that a plaintiff may only proceed as provided therein and does not prevent a plaintiff from seeking declaratory relief.

30 As stated by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.), at 505 the *Insurance Act* does not codify the whole law of insurance; it merely imposes minimum standards. As indicated by Justice Major in that decision, the field of equitable relief is not entirely occupied by the *Insurance Act*: at 505.

31 The declarations sought by the plaintiff, in her amended statement of claim, are similar to declarations occasionally obtained on consent of the parties prior to trial or prior to recovery of a judgment: *Winch v. Keogh* (2005), 78 O.R. (3d) 468 (Ont. S.C.J.), aff'd, [2006] O.J. No. 3182 (Ont. C.A.). This sometimes happens when a plaintiff adds her insurer. In such cases, the two insurers may wish to seek a resolution of the coverage issue as a means of resolving the plaintiff's action. In the case at hand, the plaintiff did not have access to automobile insurance and, therefore, could not add her insurer. The plaintiff in this action is pursuing these declarations not to minimize her exposure, as is the case when two insurers move to have this issue resolved, but to uncover whether she can obtain compensation for her injuries through this action. Without being granted these amendments, the plaintiff will not resolve this issue until after she has obtained a judgment in what might be a long and complex personal injury trial. Allowing these amendments may allow the issue of coverage to be resolved by way of motion for summary judgment or other fair process, as recently defined by the Supreme Court of Canada to mean a process that is proportionate, timely and affordable. This, in turn, might result in a just adjudication of this dispute.

32 Consequently, applying the above tests, the amendments sought are allowed with the exception of paragraph 1A (a). That paragraph is not allowed as it is not tenable at law and is not necessary for the declaratory relief sought to be an effective and tenable plea. Such a declaration as sought at paragraph 1 A (a) is not tenable as Jevco cannot be obligated to pay *any* judgment. In any event, it is not necessary for a determination of this issue considering the declaratory relief sought in the other paragraphs.

33 The plaintiff also relied on *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.) and upon *Arora v. Whirlpool Canada LP*, 2013 ONCA 657 (Ont. C.A.) in support of arguing an exception to privity of contract for third party beneficiaries. I did not find that argument convincing. As noted by the Court of Appeal at para. 39 of *Arora*, *Fraser River* recognized an exception to protect a party from liability, not to permit a party to sue. The plaintiff also relied on *Kozel v. Personal Insurance Co.*, 2014 ONCA 130 (Ont. C.A.). I did not find that case helpful for purposes of the applicable tests on a motion to amend.

Conclusion

34 As a result, leave is granted to the plaintiff to amend the statement of claim to add Jevco Insurance Company as a defendant to the main action in the form of the amended statement of claim attached at Tab G of the motion record with the exception of paragraph 1A (a) which is not allowed.

35 The parties agreed that costs would follow the outcome and be fixed in the amount of $2,500.00. Consequently, costs of this motion in the all-inclusive amount of $2,500.00 shall be payable to the plaintiff by Jevco Insurance Company, within the next 30 days.

Motion granted.

Footnotes

1 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

FTI Consulting Canada Inc., in its capacity as Court-appointed monitor	and	ESL Investments Inc. *et al.*	Court File No.: CV-18-00611219-00CL
Plaintiff		Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF THE MONITOR
(Waiver of Privilege Motion)
(returnable March 20, 2019)

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