Clerk's Stamp

COURT FILE NUMBER	25-2965622
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C C-8, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
DOCUMENT	BOOK OF AUTHORITIES
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**GOWLING WLG (CANADA) LLP** Suite 1600, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Telephone: 403-298-1938 / 403-298-1018 Fax: 403-263-9193 Email: tom.cumming@gowlingwlg.com / stephen.kroeger@gowlingwlg.com File No.: A171561 **Attention: Tom Cumming / Sam Gabor / Stephen Kroeger**

APPLICATION BEFORE THE HONOURABLE JUSTICE G.S. DUNLOP
NOVEMBER 8, 2023 AT 2:00 PM ON THE EDMONTON COMMERCIAL LIST

TABLE OF AUTHORITIES

22. *Re Heritage Flooring Ltd.* (2004), 46 CBR (3d) 280

23. *Re Scotian Distribution Services Limited*, 2020 NSSC 131

24. *Re T & C Steel Ltd*, 2022 SKKB 236

25. *Nautican v Dumont*, 2020 PESC 15

26. *Baldwin Valley Investors Inc., Re*, 1994 CarwswellOnt 253

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

28. *Orphan Well Association v Trident Exploration Corp*., 2022 ABKB 839

29. *Re Colossus Minerals*, 2014 ONSC 514

30. *Canada Business Corporations Act,* RSC 1985, c C-44

TAB 1

Bankruptcy and Insolvency Act

R.S.C. 1985, c. B-3, s. 50.4 | Federal

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

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R.S.C. 1985, c. B-3, s. 50.4

s 50.4

Currency

50.4

50.4(1)Notice of intention

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

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

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

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

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

50.4(2)Certain things to be filed

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

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

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

(c) a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

50.4(3)Creditors may obtain statement

Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

50.4(4)Exception

The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that

(a) such release would unduly prejudice the insolvent person; and

(b) non-release would not unduly prejudice the creditor or creditors in question.

50.4(5)Trustee protected

If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

50.4(6)Trustee to notify creditors

Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

50.4(7)Trustee to monitor and report

Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

(a) shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

(b) shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

(i) with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

(ii) with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

(c) shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

50.4(8)Where assignment deemed to have been made

Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

50.4(9)Extension of time for filing proposal

The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

50.4(10)Court may not extend time
Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

50.4(11)Court may terminate period for making proposal
The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

Amendment History
1992, c. 27, s. 19; 1997, c. 12, s. 32(1); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6

Currency
Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

Bankruptcy and Insolvency Act

R.S.C. 1985, c. B-3, s. 65.13 | Federal

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part III — Proposals (ss. 50-66.4)
Division I — General Scheme for Proposals

R.S.C. 1985, c. B-3, s. 65.13

s 65.13

Currency

65.13

65.13(1)Restriction on disposition of assets

An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

65.13(2)Individuals

In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

65.13(3)Notice to secured creditors

An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

65.13(4)Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

65.13(5)Additional factors — related persons

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

65.13(6)Related persons

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

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

65.13(7)Assets may be disposed of free and clear

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

65.13(8)Restriction — employers

The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

65.13(9)Restriction — intellectual property

If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266

Currency

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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Bankruptcy and Insolvency Act

R.S.C. 1985, c. B-3, s. 183 | Federal

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Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Jurisdiction of Courts

R.S.C. 1985, c. B-3, s. 183

s 183.

Currency

183.

183(1)Courts vested with jurisdiction

The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed 2001, c. 4, s. 33(2).]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench of the Province;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

183(1.1)Superior Court jurisdiction in the Province of Quebec

In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

183(2)Courts of appeal — common law provinces

Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

183(2.1)Court of Appeal of the Province of Quebec

In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with the power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

183(3)Supreme Court of Canada

The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Amendment History

R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 2); 1990, c. 17, s. 3; 1993, c. 28, s. 78 (Sched. III, item 6) [Repealed 1999, c. 3, s. 12 (Sched., item 3).]; 1998, c. 30, s. 14(a); 1999, c. 3, s. 15; 2001, c. 4, s. 33(2), (3); 2002, c. 7, s. 83; 2015, c. 3, s. 9

Currency

Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

TAB 2

§ 8:4. Statutory Interpretation, Gap-Filling and Inherent Jurisdiction of the Court

HMPREC § 8:4 | Bankruptcy and Insolvency Law of Canada, 4th Edition | The Bankruptcy and Insolvency Act

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Bankruptcy and Insolvency Law of Canada, 4th Edition § 8:4

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 8. Part VII Courts and Procedure

I. Sections 183-186

§ 8:4. Statutory Interpretation, Gap-Filling and Inherent Jurisdiction of the Court

For carrying out the purposes of the *BIA*, there is deemed to be vested in the court the necessary power and jurisdiction to authorize and sanction acts required to be done by the trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act expressly conferring such power and jurisdiction: Re Tlustie (1923), 3 C.B.R. 654, 23 O.W.N. 622 (S.C.); Re Sims Packing Co. (1924), 4 C.B.R. 367 (P.E.I. S.C.); Re Jacobson (1927), 8 C.B.R. 258, [1927] 2 D.L.R. 363 (N.B. S.C.); Re Wiggins (2003), (2003), 2003 CarswellOnt 3514, 50 C.B.R. (4th) 306, 67 O.R. (3d) 133 (Ont. S.C.J.). This power flows from the words "auxiliary and ancillary jurisdiction" in s. 183(1). Thus, in Re Tlustie (1923), 3 C.B.R. 654, 23 O.W.N. 622 (S.C.), it was held that if there were no inspectors, the court under its jurisdiction could approve the appointment of a solicitor for the bankrupt estate.

The Ontario Superior Court considered a request to exercise its statutory or inherent jurisdiction by reference to an article co-authored by Madam Justice Georgina R. Jackson of the Saskatchewan Court of Appeal and Dr. Janis Sarra of the University of British Columbia Faculty of Law, 2007, Annual Review of Insolvency Law (Carswell, 2008). The analysis proposed by Justice Jackson and Dr. Sarra is such that the first step in the process is to have regard to the scheme of the statute under consideration, its purpose as determined from the statute, its context and the express intention of Parliament. One aspect of judicial power has been referred to as "gap filling". The authors noted that this power has sometimes been referred to as permitting a judge to make explicit what is already implicit in the words of a statute. Alternatively, the authors note "gap filling" may be regarded as a judicial tool when the nature of the legislative scheme requires the court to "make it work". Campbell J. accepted the advice of the authors that the first task of the court is to interpret the statute before it and exercise authority pursuant to the statute, before reaching for other tools in the "judicial toolbox". The exercise of statutory interpretation that allows for what is referred to as "gap filling" will frame and in many circumstances may limit what has been referred to as judicial discretion. In considering the basis for the order as requested in this case, Campbell J. noted that Part XII of the *BIA* was added in 1997 to facilitate customer compensation on the bankruptcy of a securities firm, particularly where there are customer name securities, and to expedite claims. Part XII of the *BIA* presumes that the bankrupt securities firm purchased securities with funds received by it from its customers. The intention of the definition of "net equity" is for the quantum of the claim of each customer to be the market value of the securities purchased and held for him or her by the securities firm as at the date of bankruptcy less any amounts owing by the customer to the securities firm. As a result of the failure of the bankrupt to purchase the securities with the funds received by it from the investors, the misappropriation of the funds and the extensive commingling of the funds received by the bankrupt from the investors and the notes purchased with a portion of those funds on behalf of non-existent trusts, the customers had no assets in their accounts and the customers were unable to trace their funds to either of the notes, the cash or the other property in the hands of the receiver. As a result, according to the definition of "net equity" in s. 253 of the *BIA*, each investor's net equity would be zero. This result would neither be just nor equitable. Part XII of the *BIA* contemplates the establishment of securities accounts for the customers of a securities firm. Part XII does not contemplate a misappropriation of funds received by a securities firm from its customers. The court held that there is a functional gap in the *BIA*. The rationale of Part XII is to provide for recovery by customers of amounts owing to them when their priority is determined. Section 253 of the *BIA* provides the mechanism for determining the amount of the customer priority. Campbell J. was of the view that the

statutory purpose of Part XII would be defeated if a fraud by or on behalf of the securities firm operated to defeat an otherwise legitimate entitlement to recovery by a customer. In these circumstances, Campbell J. was of the view that it is not only just and equitable but within the purpose of Part XII to declare that the net equity of each customer of the consolidated estate is in an amount equal to the amount invested by each customer by or through the bankrupt securities firm, less any amounts received by each customer prior to March 4, 2005. Had it been necessary to employ the tools of judicial discretion or indeed inherent jurisdiction to provide recovery for investors, Campbell J. would have made the order on that basis. However, for the reasons set out above, he was satisfied that the order was more than justified on the basis of statutory interpretation and the court so ordered. The approach used by Campbell J. was, in his view, consistent with a growing judicial preference for a hierarchy of judicial tools, a discussion that will be accelerated and amplified by the work of Justice Jackson and Dr. Sarra: Re Portus Alternative Asset Management Inc. (2007), 2007 CarswellOnt 6774, 37 C.B.R. (5th) 120 (Ont. S.C.J.). For a discussion of the court's exercise of jurisdiction, see Madam Justice Georgina Jackson and Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Annual Review of Insolvency Law, 2007 (Toronto: Carswell, 2008).

If the subject matter of an application comes within the *Bankruptcy and Insolvency Act*, the court may draw upon its authority to give effect to the provisions of the statute: Re Loxtave Buildings of Canada Ltd. (1943), 25 C.B.R. 22, 1943 CarswellSask 3 (Sask. K.B.). In the *Loxtave* case, an inspector purchased assets of the bankrupt estate without a court order; the court made an order permitting the examination of the inspector by a shareholder.

Inherent jurisdiction cannot be exercised if its exercise conflicts with the provisions of the *Bankruptcy and Insolvency Act* or *Rules*. Furthermore, because it is a special and extraordinary power, it should be exercised sparingly and only in a clear case: Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), 20 C.B.R. (N.S.) 240, 1975 CarswellMan 3, [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 57 D.L.R. (3d) 1, 5 N.R. 515 (S.C.C.).

The Alberta Court of Queen's Bench held that the *BIA* expressly preserves the court's equitable and ancillary powers and accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. The court held that there are two preconditions to the court exercising its inherent jurisdiction: the *BIA* must be silent on the point or not have dealt with it exhaustively; and after balancing the competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. The Court held that: "inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfillment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate": Re Residential Warranty Co. of Canada Inc. (2006), [2006] A.J. No. 349, 2006 CarswellAlta 383, 21 C.B.R. (5th) 57 (Alta. Q.B.). The Alberta Court of Appeal, in dismissing an appeal of this decision held that a bankruptcy court has the inherent jurisdiction to order that the fees of a trustee in bankruptcy be paid from the property that is subject to certain disputed trust claims by way of a charge against all of the assets under the trustee's administration, and that such jurisdiction includes the trustee's fees associated with the determination of the validity of the disputed trust claims. The court found that s. 67 of the *BIA* only addresses the division of a bankrupt's property among creditors and does not provide that trust property falls outside of a trustee's administration; and that the issue of whether the trust claims were valid still had to be determined by the lower court: Re Residential Warranty Co. of Canada Inc. (2006), 2006 CarswellAlta 1354, 2006 ABCA 293, 25 C.B.R. (5th) 38, [2006] 12 W.W.R. 213, (*sub nom. Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)*) [2006] I.L.R. I-4552 (Alta. C.A.).

In Re Bearcat Explorations Ltd. (2004), 3 C.B.R. (5th) 167, 2004 CarswellAlta 1183 (Alta. Q.B.), the court exercised its jurisdiction to approve an order in a proposal proceeding that provided for the advancement of debtor in possession (DIP) financing, noting that the Courts have found authority for the use of DIP financing in *CCAA* proceedings through the exercise of their inherent jurisdiction. The brevity of the *CCAA* and its remedial nature has allowed courts to be creative in ensuring that the objectives of that legislation are met. In contrast, the *BIA* proposal provisions are specific and detailed. Nevertheless, in *Bearcat* the court concluded that there was nothing in the *BIA* that precluded super-priority or DIP financing in proposal proceedings in rare and exceptional cases of this kind. The priority financing was allowed to permit meritorious litigation to proceed fairly.

Where the Ontario Superior Court of Justice exercised its jurisdiction to find that a corporation could successfully bring an oppression application to amend a proposal and set aside a unanimous shareholders' agreement, the court held that should it

be found in error of its finding that the corporation was an oppressed complainant within the meaning of the *Ontario Business Corporations Act*, it was satisfied that it was appropriate to draw on the jurisdiction of the court under the *BIA* to terminate the USA and approve the proposal in order to prevent one shareholder to block a restructuring that is in the best interests of the stakeholders. The court held that the use of inherent jurisdiction under the *BIA* must be with caution; however, in the circumstances, it was not extending the concept of inherent jurisdiction; rather, it was preventing one shareholder with no economic interest from holding all of the debtor's stakeholders hostage and preventing a reorganization. In that respect, although most of the case law regarding inherent jurisdiction relates to the general language of the *CCAA* as opposed to the more specific language of the *BIA*, the considerations applicable to the court's exercise of inherent jurisdiction under the *CCAA* were also applicable under the *BIA*, and in the circumstances of the case, there was no practical reason for a distinction to be made between the two statutes: Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1963, 10 C.B.R. (5th) 192 (Ont. S.C.J.), leave to appeal to C.A. allowed (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]). For a discussion of the oppression findings, see § 5:184 "Use of Oppression Remedy to Recover Property of the Bankrupt".

Under the power conferred by s. 183, the court has jurisdiction to add the words "amend" or "vary" to s. 63 of the Act. In adding these words, the court is not usurping jurisdiction but making the Act sensible and workable: Re City Construction Co. (1961), 2 C.B.R. (N.S.) 245, 35 W.W.R. 557, 29 D.L.R. (2d) 568 (B.C. C.A.)

Where it is impossible to comply with some requirement of the Act, the court has an inherent power to provide a remedy: Re Cheerio Toys & Games Ltd. (1971), 15 C.B.R. (N.S.) 77, [1971] 3 O.R. 721, 21 D.L.R. (3d) 533 (S.C.), affirmed [1972] 2 O.R. 845 (C.A.).

The inherent jurisdiction of the court is not limited to what justice requires but can be used to accomplish what practicality requires: Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div.).

The court has authority to order the stay of a bankruptcy order: Re 389179 Ontario Ltd. (No. 2) (1979), 30 C.B.R. (N.S.) 181 (Ont. S.C.). Similarly, even though the Act and *Rules* are silent on stay of proceedings, the court can under s. 183, after the making of a bankruptcy order, order the stay of the administration of the bankruptcy until certain applications have been heard. However, to obtain such an order, the bankrupt must demonstrate that there is an exceptional situation that necessitates the granting of the order and show by concrete evidence that the bankrupt's rights will be endangered by the continuation of the administration: Re Greenbaum (1995), 43 C.B.R. (3d) 313, 1995 CarswellQue 198 (C.S. Qué.).

The court has jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where the conduct constitutes an abuse of the provisions of the Act. Where a person obtained assignments of the claims of a number of creditors in order to defeat a proposal of the debtor, a competitor, and thus to put the debtor out of business and into bankruptcy, the court held that it had authority to order the chair of the meeting of creditors not to count the votes of those jurisdiction of the court under the *BIA* to terminate the USA and approve the proposal in order to prevent one shareholder to block a restructuring that is in the best interests of the stakeholders. The Court held that the use of inherent jurisdiction under the *BIA* must be read with caution; however, in the circumstances, it was not extending the concept of inherent jurisdiction; rather, it was preventing one shareholder with no economic interest from holding all of the debtor's stakeholders hostage and preventing a reorganization. In that respect, although most of the case law regarding inherent jurisdiction relates to the general language of the *CCAA* as opposed to the more specific language of the *BIA*, the considerations applicable to the court's exercise of inherent jurisdiction under the *CCAA* were also applicable under the *BIA*, and in the circumstances of the case, there was no practical reason for a distinction to be made between the two statutes: Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1963, 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271 (Ont. S.C.J.), leave to appeal to C.A. allowed (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]). For a discussion of the oppression findings, see § 5:184 "Use of Oppression Remedy to Recover Property of the Bankrupt".

Under the power conferred by s. 183, the court has jurisdiction to add the words "amend" or "vary" to s. 63 of the Act. In adding these words, the court is not usurping jurisdiction but making the Act sensible and workable: Re City Construction Co. (1961), 2 C.B.R. (N.S.) 245, 35 W.W.R. 557, 29 D.L.R. (2d) 568 (B.C. C.A.)

Where it is impossible to comply with some requirement of the Act, the court has an inherent power to provide a remedy: Re Cheerio Toys & Games Ltd. (1971), 15 C.B.R. (N.S.) 77, [1971] 3 O.R. 721, 21 D.L.R. (3d) 533 (S.C.), affirmed [1972] 2 O.R. 845 (C.A.).

The inherent jurisdiction of the court is not limited to what justice requires but can be used to accomplish what practicality requires: Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176, 1994 CarswellOnt 294 (Ont. Gen. Div.).

Under its inherent powers, the court can order the stay of a receiving order: Re 389179 Ontario Ltd. (No. 2) (1979), 30 C.B.R. (N.S.) 181 (Ont. S.C.). Similarly, even though the Act and *Rules* are silent on stay of proceedings, the court can under s. 183, after the making of a receiving order, order the stay of the administration of the bankruptcy until certain applications have been heard. However, to obtain such an order, the bankrupt must demonstrate that there is an exceptional situation which necessitates the granting of the order and show by concrete evidence that the bankrupt's rights will be endangered by the continuation of the administration: Re Greenbaum (1995), 43 C.B.R. (3d) 313, 1995 CarswellQue 198 (C.S. Qué.).

The court has jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where the conduct constitutes an abuse of the provisions of the Act. Where a person obtained assignments of the claims of a number of creditors in order to defeat a proposal of the debtor, a competitor, and thus to put the debtor out of business and into bankruptcy, the court held that under its inherent jurisdiction, it could order the chair of the meeting of creditors not to count the votes of those creditors in deciding whether or not the proposal had been accepted by creditors: Re Laserworks Computer Services Inc. (1997), 46 C.B.R. (3d) 226, 1997 CarswellNS 179 (N.S. Reg.), affirmed (1997), 48 C.B.R. (3d) 8, 1997 CarswellNS 327 (N.S. S.C.), affirmed (1998), 6 C.B.R. (4th) 69, 1998 CarswellNS 38, 165 N.S.R. (2d) 297, 495 A.P.R. 297 (C.A.).

The Supreme Court of Newfoundland and Labrador held that s. 65.1(1) provides the court with the jurisdiction to determine whether a contract has been terminated solely due to the insolvency of one of the parties, and also to consider the contractual terms surrounding termination as part of the court's jurisdiction in bankruptcy: Re Nautical Data International Inc. (2005), 2005 CarswellNfld 118, 11 C.B.R. (5th) 127, 2005 NLTD 79 (N.L. T.D.).

In Re Dugas Estate (2004), 237 D.L.R. (4th) 143, 2004 CarswellNB 83, 2004 CarswellNB 84, 47 C.B.R. (4th) 205, 2004 NBCA 15 (N.B.C.A.), by reason of the bankrupt's refusal to submit to a full examination concerning his income and expenses and to furnish a meaningful Form 65 to the trustee, the trustee was unable to comply with the provisions of s. 68. The New Brunswick Court of Appeal applied the powers conferred by s. 183(1) to give a remedy.

The court will not, however, use its authority to ride roughshod over business decisions of the trustee and the inspectors: Re Melnitzer (1991), 9 C.B.R. (3d) 30, 87 D.L.R. (4th) 696, 1991 CarswellOnt 221 (Ont. Bktcy.).

There is no room for inherent jurisdiction if the *Act* has dealt with a matter; inherent jurisdiction only comes into play where the legislature has not dealt with a matter or has not dealt with it exhaustively: Re Olympia & York Developments Ltd. (1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657, additional reasons at (1997), 18 C.B.R. (3d) 243, 146 D.L.R. (4th) 382, 39 O.T.C. 396 (Ont. Gen. Div.), affirmed (1998), 113 O.A.C. 82 (C.A.), leave to appeal to S.C.C. refused (1999), 237 N.R. 393 (note) (S.C.C.); Wasserman, Arsenault Ltd. v. Sone (2000), 22 C.B.R. (4th) 153, 2000 CarswellOnt 4934 (Ont. S.C.J. [Commercial List]), affirmed (2002), 33 C.B.R. (4th) 145, 2000 CarswellOnt 989, 157 O.A.C. 183 (Ont. C.A.); Re Wiggins (2003), 67 O.R. (3d) 133 50 C.B.R. (4th) 306, 2003 CarswellOnt 3514 (Ont. S.C.J.).

In determining whether to grant an undischarged bankrupt's application to have the estate provide funds for his criminal defence, there is nothing in the *BIA* that allows the court to depart from the scheme of distribution of estate funds. The court cannot exercise its inherent jurisdiction to order that the cost of an undischarged bankrupt's criminal defence be funded by the bankrupt estate: Bank of Montreal v. Lysyk (2003), 2003 CarswellAlta 1593, 5 C.B.R. (5th) 170, 349 A.R. 294 (Alta. Q.B.).

The New Brunswick Court of Appeal held that s. 183 of the *BIA* is broad enough to authorize the granting of interlocutory relief, such as the granting of a preservation order requiring certain proceeds realized from a bankrupt's property to be held in

trust pending proceedings under the *BIA:* Sunny Corner Enterprises Inc. v. St. Anne-Nackawic Pulp Co. (Receiver of) (2005), 2005 CarswellNB 279, 2005 CarswellNB 280, 12 C.B.R. (5th) 90, 2005 NBCA 54 (N.B. C.A.).

The New Brunswick Court of Queen's Bench held that a group of former non-unionized employees of a bankrupt company (collectively, the "applicant employees") were not entitled to an order appointing them as a committee to represent all non-union employees regarding bankruptcy and pension plan matters and to have such committee's expenses paid out of the assets of the pension fund given that: (1) the non-unionized employees, including the applicant employees, were adequately represented by a trustee in bankruptcy; (2) the applicant employees had failed to exhaust their administrative remedies with the Superintendent of Pensions for New Brunswick; and (3) the payment of the committee's expenses from the pension fund were prohibited by the *Pension Benefits Act* (New Brunswick): Hambly v. St. Anne-Nackawic Pulp Co. (Trustee of) (2006), 2006 CarswellNB 30, 19 C.B.R. (5th) 230, 2006 NBQB 31 (N.B. Q.B.).

The Alberta Court of Queen's Bench held that the court did not have the inherent jurisdiction to permit an immediate transfer of assets from a trustee to a discharged bankrupt even though the assets were not required to satisfy the claims of creditors. Inherent jurisdiction could not be relied on as s.144 of the *BIA* specifically deals with the issue: Van Leenen v. PricewaterhouseCoopers (2008), 2008 CarswellAlta 948, 45 C.B.R. (5th) 50 (Alta. Q.B.).

Where a plaintiff brought an action pursuant to the *Law and Equity Act* and the British Columbia Rules of Court for an order that the defendant return disputed property in its possession under an asset purchase agreement and assignment agreement, the court granted the application. The asset purchase agreement had been approved in advance of its completion by the Québec Superior Court during *CCAA* proceedings through a vesting order. The defendant was aware of the *CCAA* proceedings, and was listed as a creditor, but had not participated in the proceedings. The British Columbia Supreme Court held that the test for return of property under the *Law and Equity Act* and the Rules, where there is no intention to preserve the property, is that the plaintiff might establish a *prima facie* case and the balance of convenience must weigh in favour of granting the order. The court found that the plaintiff had established a *prima facie* case on the facts; there was a serious issue to be tried; the parties agreed that the plaintiff owned the property; and although it was open to doubt that there were communications sufficient to establish that the defendant held a security interest in the property, the low threshold meant that such a finding was not ruled out. The court also strongly doubted that all of the debt alleged to be owed by the plaintiff to the defendant was in fact owed. As to whether the vesting order had the effect of cancelling or waiving the security interest, the court held that it is not beyond the authority of a court to make a *CCAA* order contrary to the express terms of a provincial statute such as the *PPSA*. Relying on Re Skeena Cellulose Inc. (2003), 2003 CarswellBC 1399, 43 C.B.R. (4th) 187 (B.C. C.A.), the court observed that it is not exercising a power that arises from its nature as a superior court, but rather, is exercising the discretion given to it by the *CCAA;* and where there is a direct or express conflict with a provincial statute, the *CCAA* would prevail under the doctrine of paramountcy. The plaintiff was ordered to give an undertaking to pay damages for the notional amount of profit allegedly lost and the property was to be returned to the defendant: SR Télécom & Co. v. Apex-Micro Manufacturing Corp. (2009), 2009 CarswellBC 2780, 52 C.B.R. (5th) 204 (B.C. S.C.).

The Alberta Court of Queen's Bench appointed a receiver over two properties, one of which was an operating hotel. Subsequently, the court amended and expanded the receivership order to include a related entity that was discovered to have operations intrinsically involved with the entities in receivership: Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49, 2011 ABQB 759 (Alta. Q.B.).

The Supreme Court of Canada held that in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements; yet the courts will not read bankruptcy priorities into the *CCAA* at will. The provincial deemed trust under the *Pensions Benefits Act* (*PBA*) continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy. A party relying on paramountcy must demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law. A provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation. The Supreme Court held that in considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation that when a federal statute can be properly interpreted so as not to interfere with a provincial statute,

such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes. A court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the interim financing charge superseded the deemed trust. The Court further held that a corporate employer that chooses to act as plan administrator accepts the fiduciary obligations attached to that function. Since the directors of a corporation also have a fiduciary duty to the corporation, the fact that the corporate employer can act as administrator of a pension plan means that s. 8(1)(a) of the *PBA* is based on the assumption that not all decisions taken by directors in managing a corporation will result in conflict with the corporation's duties to the plan's members. An employer acting as a plan administrator is not permitted to disregard its fiduciary obligations to plan members and favour the competing interests of the corporation on the basis that it is wearing a "corporate hat": Re Indalex Ltd., 2013 CarswellOnt 733, 2013 CarswellOnt 734, [2013] 1 S.C.R. 271, 96 C.B.R. (5th) 171, 2013 SCC 6 (S.C.C.). For a full discussion of this judgment, see § 22:40 "Interim Financing, Generally".

The British Columbia Supreme Court approved a settlement between the trustee and the "net winners" in a "Ponzi" scheme, the net winners being investors that received more money from the scheme than they had invested. Justice Gerow observed that a superior court retains its inherent jurisdiction in proceedings under the *BIA*; and that in order for a court to exercise its inherent jurisdiction in the context of proceedings under the *BIA*, two preconditions must be met: 1) the *BIA* must be silent on a point or not have dealt with the matter exhaustively; and 2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. A trustee is to act with integrity and in a competent and reasonable manner, and the court will show deference to the business decisions made by those professionals entrusted by the creditors and the *BIA* to make such decisions, noting that solutions under the *BIA* take into account the realities of commerce and business efficacy. The court had the inherent jurisdiction to make the requested order; the issue was whether it was an appropriate case in which to exercise that authority. Justice Gerow held that the procedure followed by the trustee in attempting to have the net winners disgorge their profits in exchange for a release was sound and in keeping with the objectives of the *BIA*, which is to ensure that bankruptcies are dealt with expeditiously and efficiently. In this case, not only had the trustee reviewed the proposed settlement and release, but the inspectors had also reviewed and approved it. If the trustee was not able to enter into settlement discussions with investors who were willing to pay back any profit received from the scheme, the trustee would be forced to commence multiple, potentially costly, civil actions against all of the investors who profited from the scheme, even in circumstances where it would otherwise be more beneficial to the creditors to enter into a settlement. The trustee and the inspectors were found to have acted reasonably and the settlement was not contrary to the interests of the creditors generally: Re Samji, 2013 CarswellBC 3522, 7 C.B.R. (6th) 309, 2013 BCSC 2101 (B.C. S.C.).

The Québec Superior Court dismissed a motion to expunge a creditor's proof of claim on account of delay. However, the Court then declared that the creditor's proof of claim contained willfully false statements and willful misrepresentations and consequently disallowed the whole of the proof of claim. Justice Riordan held that nothing in the *BIA* prohibits the court from initiating an intervention, and that it is implicitly authorized to do so in appropriate circumstances. Justice Riordan referenced the article by Madam Justice Jackson and Professor Sarra entitled "Selecting the Judicial Tool To Get The Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Annual Review of Insolvency Law (Toronto: Carswell, 2007), which provides an in-depth analysis of the tools available to a court in this domain. Concerning inherent jurisdiction, they propose the following definition: "The inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them" at 22. Justice Riordan concluded that it simply did not make sense that a court should be barred from acting on its own initiative in situations where the actions to be sanctioned are serious. They would include, at the very least, some level of improper behaviour, and could go as far as fraud or criminal acts. Where the court becomes aware of such circumstances in a proceeding in which it is seized, it cannot sit idly by and allow an injustice to be perpetrated simply because that proceeding is invalid for procedural reasons or otherwise. Justice Riordan held the present matter was, in fact, one of those exceptional cases: Syndic d'Isolation Techno-Pro inc., 2019 CarswellQue 3527, 2019 QCCS 5825, 71 C.B.R. (6th) 285 (C.S. Que.); varied 2021 CarswellQue 4621, 2021 QCCA 672, 90 C.B.R. (6th) 185 (C.A. Que.), the Court of Appeal finding that the trial judge erred in concluding the contractor failed to act in

a timely manner, but did not err in concluding the proof of claim was time barred and ordered that the first conclusion in the judgment be replaced with an order granting the petitioner's motion to expunge the respondent's proof of claim.

The Yukon Court of Appeal held that s. 14.06(7) of the *BIA* grants a government a super-priority charge for the costs it incurs in remediating the real property of the debtor, secured against the affected real property and contiguous real property of the debtor. The Court of Appeal overturned the Yukon Supreme Court decision that found that this priority charge extended to mineral claims. The Court of Appeal held that while s. 243 of the *BIA* permits a court-appointed receiver to take possession and control of an insolvent person's property, that power does not extend to the property of third parties: Yukon (Government of) v. Yukon Zinc, 2021 CarswellYukon 18, 2021 YKCA 2 (Y.T. C.A.), leave to appeal denied by Supreme Court of Canada, Government of Yukon v. Yukon Zinc Corporation et al., 2021 CarswellYukon 83, 94 C.B.R. (6th) 128 (S.C.C.), SCC Docket 39659. For a lengthy discussion of this judgment, see § 2:28 "Liability of Trustee or Receiver for Environmental Damage".

The Newfoundland and Labrador Supreme Court directed certain parties to provide documents to claimants in *CCAA* proceedings. In arriving at its decision, the Court relied on s. 11 of the *CCAA* and inherent jurisdiction: Re Roman Catholic Episcopal Corporation of St. John's, 2022 CarswellNfld 261, 1 C.B.R. (7th) 127, 2022 NLSC 126 (N.L. S.C.). For a discussion of this judgment, see § 22:15 Scope of Order under Subsequent Applications.

The Supreme Court of Canada (SCC) clarified in what circumstances a contractual agreement to arbitrate governed by the *Arbitration Act*, RSBC 1996, c. 55 (*Arbitration Act*), should give way to the public interest in the orderly and efficient resolution of a court-ordered receivership under s. 243 of the *BIA*. While recognizing the importance of freedom of contract, the SCC determined that referral to arbitration in the unique circumstances of this case would jeopardize the receiver's ability to maximize recovery for the creditors. The appellants, a partnership formed to build a hydroelectric dam and their parent corporations agreed to subcontract certain work to the respondent construction company. The parties had executed several agreements providing that disputes arising from their relationship were to be resolved through arbitration. The respondent was subsequently placed into receivership by order of the Alberta Court of Queen's Bench. The receiver brought a civil claim in British Columbia seeking to collect accounts receivable owed to the respondents by the appellants. The appellants applied to stay proceedings under s. 15 of the *Arbitration Act* on the ground that the arbitration agreements governed the dispute. At first instance, the chambers judge agreed with the receiver and dismissed the stay application, upheld by the Court of Appeal. On further appeal, the SCC concluded that the civil claim brought by the receiver may proceed. The SCC held that although s. 15 of the *Arbitration Act* was engaged, an otherwise valid arbitration agreement may, in some circumstances, be inoperative, for example, if enforcing it would compromise the orderly and efficient resolution of court-ordered receivership proceedings under s. 243 of the *BIA*. The fact that a party that is in insolvency proceedings is not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative. The party seeking to avoid arbitration must establish that a stay in favour of arbitration would compromise the integrity of the parallel insolvency proceedings. Justice Côté provided a non-exhaustive list of factors to assist in the court's analysis: the effect of arbitration on the integrity of the insolvency proceedings, which are intended to minimize economic prejudice to creditors; the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; the urgency of resolving the dispute; the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and any other factors the court considers material in the circumstances. The SCC found that the receiver had established that the arbitration agreements were inoperative; there was no basis on which to interfere with the chambers judge's finding that a single judicial process will be faster and less expensive than the multiple overlapping proceedings required by the arbitration agreements: Peace River Hydro Partners v. Petrowest Corp., 2022 CarswellBC 3142, 3 C.B.R. (7th) 163, 2022 SCC 41 (S.C.C.).

TAB 3

Alberta Statutes
Business Corporations Act
Part 1 — Interpretation and Application (ss. 1-4)

R.S.A. 2000, c. B-9, s. 1

s 1. Definitions

Currency

1.Definitions
In this Act,

(a) **"affairs"** means the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate, but does not include the business carried on by those bodies corporate;

(b) **"affiliate"** means an affiliated body corporate within the meaning of section 2(1);

(b.1) **"agent for service"** means an agent for service appointed by a corporation under section 20.1 or by an extra-provincial corporation under section 288;

(c) **"Alberta company"** means a body corporate incorporated and registered under the *Companies Act* or any of its predecessors;

(d) **"articles"** means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution and articles of revival and includes an amendment to any of them;

(e) **"associate"**, when used to indicate a relationship with any person, means

(i) a body corporate of which that person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares carrying more than 10% of the voting rights under all circumstances or under any circumstances that have occurred and are continuing, or a currently exercisable option or right to purchase those shares or those convertible securities,

(ii) a partner of that person acting on behalf of the partnership of which they are partners,

(iii) a trust or estate in which that person has a substantial interest or in respect of which that person serves as a trustee or in a similar capacity,

(iv) a spouse or adult interdependent partner of that person, or

(v) a relative of that person or of that person's spouse or adult interdependent partner if that relative has the same residence as that person;

(f) **"auditor"** includes a partnership of auditors;

(g) **"beneficial interest"** means an interest arising out of the beneficial ownership of securities;

(h) **"beneficial ownership"** includes ownership through a trustee, legal representative, agent or other intermediary;

Business Corporations Act

R.S.A. 2000, c. B-9, s. 21 | Alberta

Document Details

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R.S.A. 2000, c. B-9, s. 21

s 21. Corporate records

Currency

21.Corporate records

21(1) A corporation shall prepare and maintain at its records office records containing

(a) the articles and the bylaws, all amendments to the articles and bylaws, a copy of any unanimous shareholder agreement and any amendment to a unanimous shareholder agreement,

(b) minutes of meetings and resolutions of shareholders,

(c) copies of all notices required by section 106 or 113,

(d) a securities register complying with section 49,

(e) copies of the financial statements, reports and information referred to in section 155(1), and

(f) a register of disclosures made pursuant to section 120.

21(2) Notwithstanding subsection (1), a central securities register may be maintained at an office in Alberta of a corporation's agent referred to in section 49(3)(a), and a branch securities register may be kept at any place in or out of Alberta designated by the directors.

21(3) If a central securities register is maintained under subsection (2) at a place other than the records office, the corporation shall maintain a record of the names and contact information of all agents and the offices at which that register is maintained.

21(4) A corporation that

(a) complies with section 24(2), and

(b) maintains in Canada a register or record referred to in subsection (3)

complies with subsection (1).

21(5) In addition to the records described in subsection (1), a corporation shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committee of the directors.

21(6) For the purposes of subsections (1)(b) and (2), if a body corporate is continued under this Act, **"records"** includes similar records required by law to be maintained by the body corporate before it was so continued.

21(7) The records described in subsection (5) shall be kept at the registered office or records office of the corporation or at any other place the directors think fit and shall at all reasonable times be open to examination by the directors.

21(8) Notwithstanding subsection (1), a corporation may keep all or any of its corporate records referred to in subsection (1) or (2) or its accounting records referred to in subsection (5) at a place outside Alberta only if

(a) the corporation maintains accurate and reasonably updated records,

(b) the records are available for examination by directors at any time by means of computer terminal or other electronic access,

(c) the corporation provides the technical assistance to facilitate an examination referred to in clause (b), and

(d) in the case of accounting records, the corporation also keeps accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy at the registered office, the records office or any other place in Alberta the directors think fit that are open at all reasonable times to examination by the directors.

21(8.1) [Repealed 2021, c. 18, s. 9(b).]

21(9) A corporation that, without reasonable cause, contravenes this section is guilty of an offence and liable to a fine not exceeding $5000.

Amendment History
2005, c. 8, s. 10; 2021, c. 18, s. 9

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Business Corporations Act

R.S.A. 2000, c. B-9, s. 23 | Alberta

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R.S.A. 2000, c. B-9, s. 23

s 23. Access to corporate records

Currency

23.Access to corporate records

23(1) The directors and shareholders of a corporation, their agents and legal representatives may examine the records referred to in section 21(1) during the usual business hours of the corporation free of charge.

23(2) A shareholder of a corporation is entitled on request and without charge to one copy of the articles and bylaws and of any unanimous shareholder agreement, and amendments to them.

23(3) Creditors of a corporation and their agents and legal representatives may examine the records referred to in section 21(1)(a), (c) and (d), other than a unanimous shareholder agreement or an amendment to a unanimous shareholder agreement, during the usual business hours of the corporation on payment of a reasonable fee and may make copies of those records.

23(4) Any person may examine the records referred to in section 21(1)(c) and (d) during the usual business hours of the corporation on payment of a reasonable fee and may make copies of those records.

23(5) If the corporation is a reporting issuer, any person, on payment of a reasonable fee and on sending to the corporation or its agent the statutory declaration referred to in subsection (9), may on application require the corporation or its agent to furnish within 10 days from the receipt of the statutory declaration a list, referred to in this section as the "basic list", made up to a date not more than 10 days before the date of receipt of the statutory declaration setting out

(a) the names of the shareholders of the corporation,

(b) the number of shares owned by each shareholder, and

(c) the address of each shareholder,

as shown on the records of the corporation.

23(6) A person requiring a corporation to supply a basic list may, if the person states in the statutory declaration referred to in subsection (5) that the person requires supplemental lists, require the corporation or its agent on payment of a reasonable fee to furnish supplemental lists setting out any changes from the basic list in the information provided in it for each business day following the date the basic list is made up to.

23(7) The corporation or its agent shall furnish a supplemental list required under subsection (6)

(a) on the date the basic list is furnished, if the information relates to changes that took place prior to that date, and

(b) on the business day following the day to which the supplemental list relates, if the information relates to changes that take place on or after the date the basic list is furnished.

23(8) A person requiring a corporation to supply a basic list or a supplemental list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares in the corporation.

23(9) The statutory declaration required under subsection (5) shall state

(a) the name and address of the applicant,

(b) the name and address for service of the body corporate if the applicant is a body corporate, and

(c) that the basic list and any supplemental lists obtained pursuant to subsection (6) will not be used except as permitted under subsection (11).

23(10) If the applicant is a body corporate, the statutory declaration shall be made by a director or officer of the body corporate.

23(11) A list of shareholders obtained under this section must not be used by any person except in connection with

(a) an effort to influence the voting of shareholders of the corporation,

(b) an offer to acquire shares of the corporation, or

(c) any other matter relating to the affairs of the corporation.

23(12) A person who, without reasonable cause, contravenes this section is guilty of an offence and liable to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

Amendment History
2021, c. 18, s. 71

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

Business Corporations Act

R.S.A. 2000, c. B-9, s. 49 | Alberta

Document Details

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Search Details

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Jurisdiction:	Alberta

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R.S.A. 2000, c. B-9, s. 49

s 49. Securities records

Currency

49.Securities records

49(1) A corporation shall maintain a securities register in which it records the securities issued by it in registered form, showing with respect to each class or series of securities

(a) the name and current contact information of each person who is or has been a security holder,

(b) the number of securities held by each security holder, and

(c) the date and particulars of the issue and transfer of each security.

49(2) A corporation shall keep the information entered in the register referred to in subsection (1) for the period of time prescribed in the regulations.

49(3) A corporation may appoint

(a) one or more trust corporations as its agent or agents to maintain a central securities register or registers, and

(b) an agent or agents to maintain a branch securities register or registers.

49(4) Registration of the issue or transfer of a security in the central securities register or in a branch securities register is complete and valid registration for all purposes.

49(5) A branch securities register shall contain particulars of securities issued or transferred at that branch.

49(6) Particulars of each issue or transfer of a security registered in a branch securities register shall also be kept in the corresponding central securities register.

49(7) Neither a corporation, nor its agent nor a trustee defined in section 81(1) is required to produce

(a) a cancelled security certificate in registered form, an instrument referred to in section 31(1) that is cancelled or a like cancelled instrument in registered form 6 years after the date of its cancellation,

(b) a cancelled security certificate in bearer form or an instrument referred to in section 31(1) that is cancelled or a like cancelled instrument in bearer form after the date of its cancellation, or

(c) an instrument referred to in section 31(1) or a like instrument, irrespective of its form, after the date of its expiry.

Amendment History

2021, c. 18, s. 14

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

TAB 4

Business Corporations Act

S.B.C. 2002, c. 57, s. 42 | British Columbia

Document Details

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B.C. Statutes
Business Corporations Act
Part 2 — Incorporation (ss. 10-51)
Division 5 — Company Records

S.B.C. 2002, c. 57, s. 42

s 42. Records office records

Currency

42.Records office records

42(1) Subject to section 43, a company must keep the following records at its records office:

(a) its certificate of incorporation, certificate of conversion, certificate of amalgamation or certificate of continuation, as the case may be, any certificate of change of name and any certificate of restoration applicable to the company;

(b) [Repealed 2006, c. 12, s. 5(a).]

(c) a copy of each of the following:

(i) each entered order of the court made in respect of the company under this Act;

(ii) each order of the registrar made in respect of the company;

(iii) each order made by the executive director or the Securities Commission under section 91;

(iv) each affidavit deposited in the company's records office under section 277(1), 284(7)(a) or 316(1)(a);

(v) in the case of a financial institution, each order made by the superintendent or the Authority unless the superintendent or the Authority in that order or in another order, orders that that order need not be kept at the records office;

(d) its central securities register unless, under section 111(4), the directors designate a different location, in which case the company must

(i) keep the central securities register at that designated location, and

(ii) keep at its records office a notice identifying the mailing address and delivery address of the location at which that register is available for inspection and copying in accordance with section 111(4.1) or (4.2), as the case may be;

(e) its register of directors;

(f) a copy of each consent to act as a director received by the company;

(g) a copy of each written resignation referred to in section 128;

(h) a copy of any report sent to the company under section 253(1);

(i) the minutes of every meeting of shareholders;

(j) a copy of each consent resolution of shareholders and each consent under section 327(1), and, if the consents of the shareholders are expressed on more than one record, a copy of each of those records;

(k) unless contained in the minutes of the applicable meeting or in a consent resolution,

(i) the complete text of any resolution passed at a meeting of shareholders, and

(ii) a copy of each written record referred to in section 148(3) or (4) or 153 that records a disclosure made to the shareholders under Division 3 of Part 5 by a current director or a current senior officer;

(l) the minutes of every meeting of directors or of a committee of directors, and, unless contained in the minutes of the applicable meeting, a list of every director present at the meeting;

(m) a copy of each consent resolution of the directors or of a committee of directors, and, if the consents of the directors are expressed on more than one record, a copy of each of those records;

(n) unless contained in the minutes of the applicable meeting or in a consent resolution,

(i) the complete text of any resolution passed at a meeting of directors or of a committee of directors,

(ii) a copy of each written record referred to in section 148(3) or (4) or 153 that records a disclosure made to the directors under Division 3 of Part 5 by a current director or a current senior officer, and

(iii) a copy of each written record that records a disclosure under section 195(7)(a);

(o) a copy of each written dissent received under section 154(5) or (8);

(p) a copy of

(i) each of the audited financial statements of the company and its subsidiaries, whether or not consolidated with the financial statements of the company, including the auditor's reports prepared in relation to those financial statements, and

(ii) unless kept under subparagraph (i) of this paragraph, the financial statements referred to in section 185(1) that were prepared in relation to the most recently completed financial year;

(q) a copy of any representations sent to the company under section 209(5) and any response sent to the company under section 209(6);

(q.1) if the company is a community contribution company, a copy of each community contribution report;

(q.2) if the company is a benefit company, a copy of each benefit report;

(r) if the company is an amalgamated company, copies of the records described in the following paragraphs of this subsection for each amalgamating company:

(i) paragraphs (a) to (h);

(ii) paragraphs (i) to (k);

(iii) paragraphs (l) to (o);

(iv) paragraphs (p) and (q);

(v) paragraph (q.1).

(vi) paragraph (q.2).

42(2) In addition to the records referred to in subsection (1), a company must keep the following records at its records office:

(a) in relation to its articles,

(i) subject to subparagraphs (ii) and (iii) of this paragraph,

(A) the set of articles referred to in section 16, 267, 267.3, 282(1)(c) or 307, as the case may be, that apply to the company on its recognition, or

(B) in the case of a pre-existing company, a copy of the set of articles that apply to the company on its compliance with section 370(1)(a) and (b) or 436(1)(a) and (b), as the case may be,

(ii) in the case of a company that has, by operation of this Act, or has adopted, by reference, any or all of Table 1 or Table A as or in its articles,

(A) a copy of that table or, if a copy of that table is otherwise available at that office and is, in relation to the company, available there for inspection and copying in accordance with sections 46 and 48, a record confirming that that table is available at that office for inspection and copying in accordance with sections 46 and 48, and

(B) that part, if any, of its articles that is not included in that table,

(iii) in the case of a company that has wholly replaced its articles,

(A) the replacement set of articles, and

(B) a copy of the set of articles that the company has wholly replaced, and

(iv) a copy of every resolution or other record altering or replacing the articles, which copy must, in the case of records retained under subparagraph (i), (ii)(B) or (iii) of this paragraph, as the case may be, be attached to those records;

(b) if the company was incorporated under this Act, the signed copy of the incorporation agreement referred to in section 15(1)(b);

(c) if the company resulted from the continuation of a foreign corporation into British Columbia under this Act, the records, relating to the period before the continuation of the company, that the foreign corporation was required to keep by the corporate legislation of the foreign corporation's jurisdiction;

(d) if the company resulted from an amalgamation of one or more foreign corporations with one or more companies, the records, relating to the period before the amalgamation, that each of the foreign corporations was, before the amalgamation, required to keep by the corporate legislation of the foreign corporation's jurisdiction;

(e) if the company is a pre-existing company,

(i) copies of the memorandum and articles that applied to the company on the coming into force of this Act, altered as necessary to reflect the information, if any, added under section 434(1)(a),

(ii) subject to subsection (3) of this section and unless kept elsewhere in the manner provided by section 69 or 79 of the *Company Act, 1996*, each of the following, if and to the extent that it relates to the period before the coming into force of this Act:

(A) its register of allotments;

(B) its register of transfers;

(C) its register of members;

(D) its register of debentures;

(E) its register of debentureholders, and

(iii) any records, not otherwise retained by the company under this section, that the company was required to keep under the *Company Act, 1996* that relate to the period before the coming into force of this Act.

(f) if the company is an amalgamated company, copies of the records described in the following paragraphs of this subsection for each amalgamating company:

(i) paragraphs (a) and (b);

(ii) paragraph (c);

(iii) paragraph (d);

(iv) paragraph (e)(i);

(v) paragraph (e)(ii);

(vi) paragraph (e)(iii).

42(3) A pre-existing company need not keep a register of allotments, a register of transfers or a register of members under subsection (2)(e)(ii) or (f)(v) of this section if the whole of the information that was, under section 65, 66 or 67 respectively of the *Company Act, 1996*, required to be kept in that register is included in the company's central securities register.

Amendment History
2003, c. 70, s. 15; 2003, c. 71, s. 5; 2004, c. 62, s. 7; 2006, c. 12, s. 5; 2011, c. 29, s. 5; 2012, c. 12, s. 4; 2015, c. 18, s. 265; 2019, c. 20, s. 2; 2019, c. 39, s. 125

Currency
British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

Business Corporations Act

S.B.C. 2002, c. 57, s. 46 | British Columbia

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B.C. Statutes
Business Corporations Act
Part 2 — Incorporation (ss. 10-51)
Division 5 — Company Records

S.B.C. 2002, c. 57, s. 46

s 46. Inspection of records

Currency

46.Inspection of records

46(1) The following persons may, without charge, inspect all of the records that a company is required to keep under section 42:

(a) a current director of the company;

(b) if and to the extent permitted by the articles,

(i) a shareholder of the company, or

(ii) any other person.

46(2) A former director of a company and, if and to the extent permitted by the articles that were in effect immediately before the person ceased to be a shareholder, a former shareholder of a company may, without charge, inspect all of the records that the company is required to keep under section 42 that relate to the period when that person was a director or shareholder, as the case may be.

46(3) The following persons may, without charge, inspect all of the records that a company is required to keep under section 42, other than the records referred to in section 42(1)(l) to (o) and (r)(iii):

(a) a shareholder or qualifying debentureholder of the company;

(b) a former shareholder of the company to the extent that those records relate to the period when that person was a shareholder.

46(4) Any person may, without charge, inspect all of the records that a company is required to keep under section 42, other than the records referred to in section 42(1)(l) to (o) and (r)(iii), if the company is a public company, a community contribution company, a financial institution or a pre-existing reporting company.

46(4.1) Any person may, without charge, inspect the copy of the benefit report that a benefit company is required to keep under section 42(1)(q.2).

46(5) Subject to subsection (4.1) of this section, in the case of a company that is not one referred to in subsection (4) of this section, on payment, to the person who maintains the records office for the company, of the inspection fee, if any, set by that person or by the company, which fee must not exceed the prescribed fee, any person may inspect all of the records that the company is required to keep under section 42, other than the records referred to in section 42(1)(i) to (q) and (r)(ii) to (iv).

46(6) Despite subsections (1) to (5) of this section but without limiting any obligation to pay the fee, if any, required under this section, a person may inspect a record kept by a company under section 42(2)(c), (d), (e)(ii) or (iii) or (f)(ii), (iii), (v) or (vi) only if and to the extent that,

(a) in the case of a record kept under section 42(2)(c) or (f)(ii), the person was entitled to do so under the corporate legislation of the jurisdiction that, before the continuation, was the foreign corporation's jurisdiction,

(b) in the case of a record kept in the records office of an amalgamated company under section 42(2)(d) or (f)(iii) in relation to an amalgamating foreign corporation, the person was entitled to do so under the corporate legislation of the jurisdiction that, before the amalgamation, was the foreign corporation's jurisdiction, or

(c) in the case of a record kept under section 42(2)(e)(ii) or (iii) or (f)(v) or (vi), the person was entitled to do so under the *Company Act, 1996*.

46(7) Subject to subsection (8) of this section, an inspection of a company's records that is authorized by this section may be conducted during statutory business hours.

46(8)A company may, by an ordinary resolution, impose restrictions on the times during which a person, other than a current director, may inspect the company's records under this section, but those restrictions must permit inspection of those records during the times set out in the regulations.

Amendment History
2003, c. 71, s. 7; 2004, c. 62, s. 8; 2011, c. 29, s. 7; 2012, c. 12, s. 6; 2019, c. 20, s. 4

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Business Corporations Act

S.B.C. 2002, c. 57, s. 49 | British Columbia

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B.C. Statutes
Business Corporations Act
Part 2 — Incorporation (ss. 10-51)
Division 5 — Company Records

S.B.C. 2002, c. 57, s. 49

s 49. List of shareholders

Currency

49.List of shareholders

49(1) A person may apply to a company, or to the person who has custody or control of its central securities register, for a list setting out the following:

(a) the names and last known addresses of the shareholders;

(b) the number of shares of each class or series of shares held by each of those shareholders.

49(2) An application under subsection (1) must be in writing and must include

(a) an affidavit of the person seeking the list

(i) stating the name and mailing address of the applicant or, if the applicant is a corporation, its name and the mailing address, and, if different, the delivery address, of its registered office or equivalent, and

(ii) stating that the list will not be used except as permitted under subsection (3), and

(b) payment of the fee charged under subsection (7).

49(3) A person must not use a list obtained under this section except in connection with an effort to

(a) influence the voting of shareholders of the company at any meeting of shareholders,

(b) acquire or sell securities of the company,

(c) effect an amalgamation or a similar process involving the company or a reorganization of the company,

(d) call a meeting under section 167(8) or 322(4), or

(e) identify the shareholders of an unlimited liability company.

49(4) Promptly after receipt of the application referred to in subsection (1) of this section, the company or the person who has custody or control of its central securities register must provide to the applicant the requested list made up to and including a date, specified in the list, that is not more than 14 days before the date on which the application was received.

49(5) If the applicant so requests in the application, the company or the person who has custody or control of its central securities register must, promptly after receipt of the application, provide to the applicant supplemental lists that meet the requirements of subsection (6).

49(6) Supplemental lists under subsection (5) must

(a) be prepared for the period beginning on the date following the date specified in the basic list provided under subsection (4) and ending on the date on which the application under subsection (1) is received, and

(b) for each day in that period on which there is a change to the information contained in the basic list, set out the changes that occurred to the information in the basic list on that day.

49(7) The company or the person who has custody or control of its central securities register may charge a reasonable fee for any basic list provided under subsection (4), and a reasonable fee for any supplemental list provided under subsection (5).

49(8) A list referred to in subsection (4) or (5) must be provided in the manner agreed to by the company or the person who has custody or control of its central securities register and the applicant or, in the absence of such an agreement,

(a) must, if the applicant so requests, be provided by mailing it to that applicant, or

(b) may, in any other case, be provided to the applicant by making it available for pick-up at the office at which the central securities register is available for inspection and copying in accordance with section 111(4.1) or (4.2), as the case may be.

Amendment History
2003, c. 70, s. 16; 2006, c. 12, s. 9; 2007, c. 7, s. 12

Currency
British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

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Business Corporations Act

S.B.C. 2002, c. 57, s. 111 | British Columbia

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B.C. Statutes
Business Corporations Act
Part 4 — Shares, Registers and Transfers (ss. 106.1-119)

S.B.C. 2002, c. 57, s. 111

s 111. Securities registers

Currency

111.Securities registers

111(1) A company must maintain a central securities register in which it registers

(a) the shares issued by the company, or transferred, after the coming into force of this Act, and

(b) with respect to those shares,

(i) the name and last known address of each person to whom those shares have been issued or transferred after the coming into force of this Act,

(ii) the class, and any series, of those shares,

(iii) the number of those shares held by each of the persons referred to in subparagraph (i),

(iv) in the case of shares issued after the coming into force of this Act, the date and particulars of each such issue, and

(v) in the case of shares transferred after the coming into force of this Act, the date and particulars of each such transfer.

111(2) In addition to its central securities register, a company may maintain branch securities registers.

111(3) A company may appoint agents to maintain the central securities register and any branch securities registers.

111(4) A company must maintain its central securities register at its records office or at any other location inside or outside British Columbia designated by the directors, and may maintain branch securities registers at any locations inside or outside British Columbia designated by the directors.

111(4.1) If, under subsection (4), the directors designate a location outside British Columbia as the location at which the company maintains its central securities register, the central securities register must be available for inspection and copying in accordance with sections 46 and 48 at a location inside British Columbia by means of a computer terminal or other electronic technology.

111(4.2) If, under subsection (4), the directors designate a location inside British Columbia as the location at which the company maintains its central securities register, the central securities register must be available for inspection and copying in accordance with sections 46 and 48 at

(a) that designated location, or

(b) another location inside British Columbia by means of a computer terminal or other electronic technology.

111(5) Registering the issue or transfer of a share in the central securities register or in a branch securities register is complete and valid registration for all purposes.

111(6) A branch securities register must only contain particulars of shares issued or transferred at that branch.

111(7) Particulars of each issue or transfer of a share registered in a branch securities register must also be promptly registered in the central securities register.

111(8) Sections 46 to 48 apply to a company's branch securities register as if it were a central securities register.

111(9) A company must not at any time close its central securities register.

Amendment History
2003, c. 70, s. 25; 2006, c. 12, s. 15

Currency
British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

TAB 5

Companies' Creditors Arrangement Act

R.S.C. 1985, c. C-36, s. 36 | Federal

Document Details

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Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 36

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

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

36(2)Notice to creditors

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

36(3)Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4)Additional factors — related persons

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5)Related persons

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

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

36(6)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7)Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

36(8)Restriction — intellectual property
If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

Currency
Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

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TAB 6

The Corporations Act

R.S.M. 1987, c. C225, s. 20 | Manitoba

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R.S.M. 1987, c. C225, s. 20

s 20.

Currency

20.

20(1)Corporate records

A corporation shall prepare, and maintain at its registered office or at another place in Manitoba designated by the directors, records containing

(a) the articles and the by-laws, and the amendments to them, and a copy of any unanimous shareholder agreement;

(b) the minutes of meetings and resolutions of shareholders;

(c) a register of directors setting out the name, address and other occupation of each person who is or has been a director of the corporation, and the dates on which he or she became and, if applicable, ceased to be a director; and

(d) a securities register that complies with section 46.

20(2)Other records

A corporation shall also prepare, and maintain at its registered office or at another place in Manitoba designated by the directors, adequate accounting records and records containing minutes of meetings and resolutions of the directors and of any committee of directors.

20(3)Directors' access to other records

A director may, at any reasonable time, inspect a record described in subsection (2).

20(4)Records in Manitoba

If the accounting records of a corporation are kept outside Manitoba, the corporation shall keep accounting records, adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis, at the registered office or at another place in Manitoba designated by the directors.

20(5)Exception

Despite subsections (1), (2) and (4), a corporation may keep all or any of the records described in subsections (1) and (2) at a place outside Manitoba if

(a) the records are available to be inspected, by means of a computer terminal or other technology, during regular office hours at the corporation's registered office or another place in Manitoba designated by the directors; and

(b) the corporation provides the technical assistance to facilitate such inspections.

20(6) [Repealed 2006, c. 10, s. 5(2).]

20(7)Duplicate register of securities

The trustee for security holders may maintain at their office a duplicate register of securities.

20(8) [Repealed 2006, c. 10, s. 5(2).]

20(9)Offence
A corporation that, without reasonable cause, fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000.

Amendment History
2000, c. 41, s. 9; 2006, c. 10, s. 5

Currency
Manitoba Current to S.M. 2023, c. 3 and Man. Reg. 74/2023 (June 23, 2023)

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The Corporations Act

R.S.M. 1987, c. C225, s. 21 | Manitoba

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R.S.M. 1987, c. C225, s. 21

s 21.

Currency

21.

21(1)Access to corporate records

Shareholders and creditors of a corporation, their agents and legal representatives, and the Director may examine the records referred to in subsection 20(1) during the usual business hours of the corporation, and may take extracts therefrom free of charge and, where the corporation has made a distribution to the public, any other person may do so upon payment of a reasonable fee.

21(2)Copies of corporate record

A shareholder of a corporation is entitled upon request and without charge to one copy of the articles and by-laws and of any unanimous shareholder agreement.

21(3)Shareholder lists

Shareholders and creditors of a corporation, their agents and legal representatives, the Director and, where the corporation has made a distribution to the public, any other person may, upon payment of a reasonable fee and upon sending to the corporation or its transfer agent the affidavit referred to in subsection (7), require the corporation or its agent to furnish within 10 days from the receipt of the affidavit a list (in this section referred to as the "basic list") made up to a date not more than 10 days before the date of receipt of the affidavit setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.

21(4)Supplemental lists

A person requiring a corporation to supply a basic list may, if he states in the affidavit referred to in subsection (3) that he requires supplemental lists, require the corporation or its agent upon payment of a reasonable fee to furnish supplemental lists setting out any changes from the basic list in the names and addresses of shareholders and the number of shares owned by each shareholder for each business day following the date the basic list is made up to.

21(5)When supplemental lists to be furnished

The corporation or its agent shall furnish a supplemental list required under subsection (4)

(a) on the date the basic list is furnished, where the information relates to changes that took place prior to that date; and

(b) on the business day following the day to which the supplemental list relates, where the information relates to changes that take place on or after the date the basic list is furnished.

21(6)Holders of options

A person requiring a corporation to supply a basic list or a supplemental list, may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares of the corporation.

21(7)Contents of affidavit

The affidavit required under subsection (3) shall state

(a) the name and address of the applicant;

(b) the name and address for service of the body corporate, if the applicant is a body corporate; and

(c) that the basic list and any supplemental lists obtained pursuant to subsection (4) will not be used except as permitted under subsection (9).

21(8)Where applicant a body corporate
If the applicant is a body corporate, the affidavit shall be made by a director or officer of the body corporate.

21(9)Use of shareholder list
A list of shareholders obtained under this section shall not be used by any person except in connection with

(a) an effort to influence the voting of shareholders of the corporation; or

(b) an offer to acquire shares of the corporation; or

(c) any other matter relating to the affairs of the corporation.

21(10)Offence
A person who, without reasonable cause, contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000. or to imprisonment for a term not exceeding six months or to both.

Currency
Manitoba Current to S.M. 2023, c. 3 and Man. Reg. 74/2023 (June 23, 2023)

End of Document

The Corporations Act

R.S.M. 1987, c. C225, s. 46 | Manitoba

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Manitoba Statutes | The Corporations Act
Jurisdiction:	Manitoba

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R.S.M. 1987, c. C225, s. 46

s 46.

Currency

46.

46(1)Securities records

A corporation shall maintain a securities register in which it records the securities issued by it in registered form showing with respect to each class or series of securities

(a) the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder;

(b) the number of securities held by each security holder; and

(c) the date and particulars of the issue and transfer of each security.

46(2)Central and branch registers

A corporation may appoint an agent to maintain a central securities register and branch securities registers.

46(3)Where registers are to be kept

Subject to subsection 20(5), a corporation shall maintain its central securities register at its registered office or at another place in Manitoba designated by the directors. A corporation may maintain a branch securities register at any place designated by the directors, whether in Manitoba or not.

46(4)Effect of registration

Registration of the issue or transfer of a security in the central securities register or in a branch securities register is a complete and valid registration for all purposes.

46(5)Branch register

A branch securities register shall only contain particulars of securities issued or transferred at that branch.

46(6)Central register

Particulars of each issue or transfer of a security registered in a branch securities register shall also be kept in the corresponding central securities register.

46(7)Destruction of certificates

A corporation, its agent or a trustee defined in subsection 77(1) is not required to produce

(a) a cancelled security certificate in registered form, an instrument referred to in subsection 29(1) that is cancelled or a like cancelled instrument in registered form six years after the date of its cancellation;

(b) a cancelled security certificate in bearer form or an instrument referred to in subsection 29(1) that is cancelled or a like cancelled instrument in bearer form after the date of its cancellation; or

(c) an instrument referred to in subsection 29(1) or a like instrument, irrespective of its form, after the date of its expiry.

Amendment History
2006, c. 10, s. 9

Currency
Manitoba Current to S.M. 2023, c. 3 and Man. Reg. 74/2023 (June 23, 2023)

End of Document

TAB 7

Personal Information Protection Act

S.A. 2003, c. P-6.5, s. 1 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

Search Query:	Alberta Statutes | Personal Information Protection Act
Jurisdiction:	Alberta

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Alberta Statutes
Personal Information Protection Act

S.A. 2003, c. P-6.5, s. 1

s 1. Definitions

Currency

1.Definitions

1(1) In this Act,

(a) **"business contact information"** means an individual's name, position name or title, business telephone number, business address, business e-mail address, business fax number and other similar business information;

(b) **"Commissioner"** means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*;

(c) **"credit reporting organization"** means a reporting agency as defined in Part 5 of the *Consumer Protection Act*;

(d) **"domestic"** means related to home or family;

(e) **"employee"** means an individual employed by an organization and includes an individual who performs a service for or in relation to or in connection with an organization

(i) as a partner or a director, officer or other office-holder of the organization,

(i.1) as an apprentice, volunteer, participant or student, or

(ii) under a contract or an agency relationship with the organization;

(f) **"investigation"** means an investigation related to

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) circumstances or conduct that may result in a remedy or relief being available at law,

if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;

(g) **"legal proceeding"** means a civil, criminal oradministrative proceeding that is related to

(i) a breach of an agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) a remedy available at law;

(g.1) **"legislative instrument of a professional regulatory organization"** means a bylaw, resolution or rule that is

(i) enacted or otherwise established by a professional regulatory organization under an Act or a regulation of Alberta, and

(ii) of a legislative nature;

(g.2) **"local government body"** means a local government body as defined in the *Freedom of Information and Protection of Privacy Act*;

(h) **"Minister"** means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(i) **"organization"** includes

(i) a corporation,

(ii) an unincorporated association,

(iii) a trade union as defined in the *Labour Relations Code*,

(iv) a partnership as defined in the *Partnership Act*, and

(v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity;

(j) **"personal employee information"** means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of

(i) establishing, managing or terminating an employment or volunteer-work relationship, or

(ii) managing a post-employment or post-volunteer-work relationship

between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship;

(k) **"personal information"** means information about an identifiable individual;

(k.1) **"professional Act"** means an enactment under which a professional or occupational group or discipline is organized, and that provides for

(i) membership in the professional or occupational group or discipline, and

(ii) the regulation of the members of the professional or occupational group or discipline with respect to more than one of the following:

(A) registration;

(B) competence;

(C) conduct;

(D) practice;

(E) disciplinary matters;

(k.2) **"professional regulatory organization"** means an organization incorporated under a professional Act;

(l) **"public body"** means a public body as defined in the *Freedom of Information and Protection of Privacy Act*;

(m) **"record"** means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or any other form, but does not include a computer program or other mechanism that can produce a record;

(m.1) **"regulation of Alberta"** means a regulation as defined in the *Regulations Act* that is filed under that Act;

(m.2) **"regulation of Canada"** means a regulation as defined in the *Statutory Instruments Act* (Canada) that is registered under that Act;

(m.3) **"service provider"** means any organization, including, without limitation, a parent corporation, subsidiary, affiliate, contractor or subcontractor, that, directly or indirectly, provides a service for or on behalf of another organization;

(n) **"volunteer work relationship"** means a relationship between an organization and an individual under which a service is provided for or in relation to or is undertaken in connection with the organization by an individual who is acting as a volunteer or is otherwise unpaid with respect to that service and includes any similar relationship involving an organization and an individual where, in respect of that relationship, the individual is a participant or a student.

1(2) For the purposes of section 14(c.3), 17(c.3) and 20(c.3), **"audit"** means a financial or other formal or systematic examination or review conducted in accordance with recognized standards for an accepted business purpose, but does not include an examination or review conducted with respect to a business transaction referred to in section 22.

Amendment History
2009, c. 50, s. 2; 2017, c. 18, s. 1(24)

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Personal Information Protection Act

S.A. 2003, c. P-6.5, s. 3 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

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Jurisdiction:	Alberta

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Alberta Statutes
Personal Information Protection Act
Part 1 — Purpose and Application (ss. 3, 4)

S.A. 2003, c. P-6.5, s. 3

s 3. Purpose

Currency

3.Purpose

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Personal Information Protection Act

S.A. 2003, c. P-6.5, s. 20 | Alberta

Document Details

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Alberta Statutes
Personal Information Protection Act
Part 2 — Protection of Personal Information (ss. 5-22)
Division 5 — Disclosure of Personal Information

S.A. 2003, c. P-6.5, s. 20

s 20. Disclosure without consent

Currency

20.Disclosure without consent

An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

(a) a reasonable person would consider that the disclosure of the information is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;

(b) the disclosure of the information is authorized or required by

(i) a statute of Alberta or of Canada,

(ii) a regulation of Alberta or a regulation of Canada,

(iii) a bylaw of a local government body, or

(iv) a legislative instrument of a professional regulatory organization;

(b.1) the disclosure of the information is for a purpose for which the information was collected pursuant to a form that is approved or otherwise provided for under a statute of Alberta or a regulation of Alberta;

(c) the disclosure of the information is to a public body and that public body is authorized or required by an enactment of Alberta or Canada to collect the information from the organization;

(c.1) the disclosure of the information is necessary to comply with a collective agreement that is binding on the organization under section 128 of the *Labour Relations Code*;

(c.2) the disclosure of the information is necessary to comply with an audit or inspection of or by the organization where the audit or inspection is authorized or required by

(i) a statute of Alberta or of Canada, or

(ii) a regulation of Alberta or a regulation of Canada;

(c.3) the disclosure of the information is

(i) to an organization conducting an audit, other than an audit referred to in clause (c.2), by the organization being audited, or

(ii) by an organization conducting an audit, other than an audit referred to in clause (c.2), to the organization being audited

for a purpose relating to the audit and it is not practicable to disclose non-identifying information for the purposes of the audit;

(d) the disclosure of the information is in accordance with a provision of a treaty that

(i) authorizes or requires its disclosure, and

(ii) is made under an enactment of Alberta or Canada;

(e) the disclosure of the information is for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to compel the production of information or with a rule of court that relates to the production of information;

(f) the disclosure of the information is to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding, or

(ii) from which a law enforcement proceeding is likely to result;

(g) the disclosure of the information is necessary to respond to an emergency that threatens the life, health or security of an individual or the public;

(h) the disclosure of the information is for the purposes of contacting the next of kin or a friend of an injured, ill or deceased individual;

(i) the disclosure of the information is necessary in order to collect a debt owed to the organization of for the organization to repay to the individual money owed by the organization;

(j) the information is publicly available as prescribed or otherwise determined by the regulations;

(k) the disclosure of the information is to the surviving spouse or adult interdependent partner or to a relative of a deceased individual if, in the opinion of the organization, the disclosure is reasonable;

(l) the disclosure of the information is necessary to determine the individual's suitability to receive an honour, award or similar benefit, including an honorary degree, scholarship or bursary;

(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;

(n) the disclosure of the information is for the purposes of protecting against, or for the prevention, detection or suppression of, fraud, and the information is disclosed to or by

(i) an organization that is permitted or otherwise empowered or recognized to carry out any of those purposes under

(A) a statute of Alberta or of Canada or of another province of Canada,

(B) a regulation of Alberta, a regulation of Canada or similar subordinate legislation of another province of Canada that, if enacted in Alberta, would constitute a regulation of Alberta, or

(C) an order made by a Minister under a statute or regulation referred to in paragraph (A) or (B),

(ii) Équité Association, or

(iii) the Canadian Bankers Association, Bank Crime Prevention and Investigation Office;

(o) the organization is a credit reporting organization and is permitted to disclose the information under Part 5 of the *Consumer Protection Act*;

(p) the organization disclosing the information is an archival institution and the disclosure of the information is reasonable for archival purposes or research;

(q) the disclosure of the information meets the requirements respecting archival purposes or research set out in the regulations and it is not reasonable to obtain the consent of the individual whom the information is about;

(r) the disclosure is in accordance with section 20.1, 21 or 22.

Amendment History
2009, c. 50, s. 12; 2014, c. 14, s. 7; 2017, c. 18, s. 1(24); 2022, c. 14, s. 11(2)

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

TAB 8

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.28 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

Search Details

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Jurisdiction:	Alberta

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Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

6.28Application of this Division

Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.29 | Alberta

Document Details

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Alta. Reg. 124/2010, s. 6.29

s 6.29 Restricted court access applications and orders

Currency

6.29Restricted court access applications and orders
An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.30 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

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Alta. Reg. 124/2010, s. 6.30

s 6.30 When restricted court access application may be filed

Currency

6.30When restricted court access application may be filed
A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

Amendment History
Alta. Reg. 194/2020, s. 2

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.31 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

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Alta. Reg. 124/2010, s. 6.31

s 6.31 Timing of application and service

Currency

6.31Timing of application and service
An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Currency
Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.32 | Alberta

Document Details

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Alta. Reg. 124/2010, s. 6.32

s 6.32 Notice to media

Currency

6.32Notice to media

When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

Amendment History

Alta. Reg. 163/2010, s. 3

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.33 | Alberta

Document Details

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.33

s 6.33 Judge or applications judge assigned to application

Currency

6.33Judge or applications judge assigned to application

A restricted court access application must be heard and decided by

(a) the judge or applications judge assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or applications judge is not available or no judge or applications judge has been assigned, the case management judge for the action, or

(c) if there is no judge or applications judge available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

Amendment History

Alta. Reg. 194/2020, s. 3; 136/2022, s. 1(5)

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

End of Document

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.34 | Alberta

Document Details

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.34

s 6.34 Application to seal or unseal court files

Currency

6.34Application to seal or unseal court files

6.34(1) An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

6.34(2) The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

6.34(3) The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.35 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

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Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Alta. Reg. 124/2010, s. 6.35

s 6.35 Persons having standing at application

Currency

6.35Persons having standing at application

The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

Alberta Rules of Court — Alta. Reg. 124/2010

Alta. Reg. 124/2010, s. 6.36 | Alberta

Document Details

KeyCite:	KeyCite Green C - This indicates that there are treating cases or other citing references for this legislative provision.

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Alta. Reg. 124/2010, s. 6.36

s 6.36 Confidentiality of information

Currency

6.36Confidentiality of information

Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

Currency

Alberta Current to Gazette Vol. 119:15 (August 15, 2023)

TAB 9

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205 | Ontario Court of Appeal | Ontario | July 3, 1991

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178, 46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

Find Details

Jurisdiction:	Ontario

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Outline

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete

access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the

TAB 10

PaySlate Inc. (Re)

2023 BCSC 608, 2023 CarswellBC 1025 | British Columbia Supreme Court | British Columbia | April 14, 2023

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2023 BCSC 608, 2023 CarswellBC 1025, 2023 A.C.W.S. 1577, 7 C.B.R. (7th) 61

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2023 BCSC 608
British Columbia Supreme Court

PaySlate Inc. (Re)

2023 CarswellBC 1025, 2023 BCSC 608, 2023 A.C.W.S. 1577, 7 C.B.R. (7th) 61

In the Matter of the Notice of Intention to Make a Proposal of PaySlate Inc.

Walker J.

Heard: March 10, 22, 27-28, 31, 2023
Judgment: April 14, 2023
Docket: Vancouver B220504, Estate No. 11-2891281

Counsel: T. Bennett, L. Beatch (Articled Student), for PaySlate Inc.
P. Bychawski, C.I. Hildebrand, for Paysafe Merchant Services Inc.
R. Gurofsky, G.P. Nesbitt, for Proposal Trustee, Grant Thornton Limited
S. Collins, E. Wilson, for Ayrshire Real Estate Management Inc.

Subject: Civil Practice and Procedure; Evidence; Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Debtor filed notice of application seeking approval of bid from lender to purchase shares — Purchase of shares was to be done through reverse vesting order (RVO) — Proposal trustee eventually advised that it approved of proposed transaction — Unsecured creditor sought adjournment of hearing — Creditor claimed they had not received proper notice of RVO — Debtor and lender made amendments to RVO to address creditor's concerns — Application hearing took place — Debtor's application dismissed — Debtor had not established prerequisites for RVO — RVO was not intended to preserve company as going concern — It was not clear whether RVO was disguised attempt by lender to improperly obtain tax asset — Expert evidence of valuation was not provided as it should have — There was no evidence-based rationale to support value of proposed transaction — This was not extraordinary circumstance in which RVO would have been appropriate.

APPLICATION by debtor for reverse vesting order in bankruptcy matter.

***Walker J.*:**

Introduction

1 Reverse vesting orders ("RVOs") are a relatively new method used in insolvency cases to avoid the purchaser assuming the insolvent debtor's unwanted assets and liabilities. Typically, an RVO contemplates the sale of the debtor company's shares through a transaction structured so that "unwanted" assets and liabilities (including in this case, certain unsecured creditor claims) are removed and vended to a residual company while the "good assets" remain with the debtor. RVOs are not the norm. They have been used in appropriate circumstances to preserve non-transferrable assets such as licenses, permits, intellectual property, and non-transferrable tax attributes: see, e.g., Arrangement relatif à Blackrock Metals Inc., 2022 QCCS 2828 at paras. 85-86, leave to appeal ref'd 2022 QCCA 1073; *Quest University Canada (Re)*, 2020 BCSC 1883; *Harte Gold Corp. (Re)*, 2022 ONSC 653; Janis Sarra, "Reverse Vesting Orders—Developing Principles and Guardrails to Inform Judicial Decisions", 2022 CanLIIDocs 431 at 1-2.

2 In this case, the debtor seeking approval of an RVO is PaySlate Inc. ("PaySlate") in the context of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], having filed a notice of intention ("NOI") to make a proposal to creditors pursuant to s. 50.4 on December 5, 2022.

> transactions, thereby achieving third-party releases without creditors being asked to vote on this issue, undermining one of the key criteria for approval that the courts have used.
>
> [Emphasis added]

Factors to be Considered

100 What other factors should be considered on an application to approve an RVO other than those discussed above?

101 In *Quest*, Fitzpatrick J. was clear that RVOs should not be employed or approved in a *CCAA* restructuring "simply to rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests", nor should it be used to expedite the debtor's desired result without regard to the remedial objectives of the *CCAA*": para. 171. The analysis should consider whether the relief is appropriate in the circumstances and whether the stakeholders are treated fairly and reasonably as the circumstances permit.

102 After considering the balance between competing interests and the good faith of the debtor Quest who acted with due diligence to promote the best outcome for all stakeholders, Fitzpatrick J. determined, in the absence of any other offers, that the proposed RVO in that case was the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group that includes Southern Star and Dana [who opposed the RVO]": para. 172.

103 In *Harte Gold*, Penny J. said at para. 23, factors to consider when an RVO is sought in a *CCAA* context include those set out in s. 36(3) of the CCAA, excerpted below:

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

104 Justice Penny also said the s. 36(3) CCAA criteria correspond to the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137, 1991 CanLII 2727 (C.A.) for the approval of asset sales in an insolvency context. He did not confine his remarks to *CCAA* cases:

> [21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:
>
> > (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
> >
> > (b) the interests of all parties;
> >
> > (c) the efficacy and integrity of the process by which offers have been obtained; and
> >
> > (d) whether there has been unfairness in the working out of the process:
>
> see *Target Canada Co. (Re)*, 2015 ONSC 1487, at paras. 14-17.
>
> [Emphasis added]

TAB 11

White Birch Paper Holding Co., Re

2010 QCCS 4915, 2010 CarswellQue 10954 | Cour supérieure du Québec | Quebec | September 24, 2010

Document Details

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2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193
A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

In the Matter of the Plan of Arrangement and Compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Petitioners) v. Ernst & Young Inc. (Monitor) and Stadacona Limited Partnership, F. F. Soucy Limited Partnership and F. F. Soucy Inc. & Partners, Limited Partnership (Mises en cause) and Service d'impartition Industriel Inc., KSH Solutions Inc. and BD White Birch Investement LLC (Intervenant) and Sixth Avenue Investment Co. LLC, Dune Capital LLC and Dune Capital International Ltd. (Opposing parties)

Robert Mongeon, J.C.S.

Heard: 24 september 2010
Oral reasons: 24 september 2010 *
Written reasons: 15 october 2010
Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Corporation experienced financial difficulties and placed itself under protection of Companies' Creditors Arrangement Act — In context of its restructuring, corporation contemplated sale of all its assets — Bidding process was launched and several investors filed offers — Corporation entered into asset sale agreement with winning bidder — US bankruptcy court approved process without modifications — Court approved process with some modifications and set date of September 17, 2010, as limit to submit bid — On September 17, unsuccessful bidder filed new bid — At outcome of bidding process, corporation decided to sell its assets once again to winning bidder — On September 24, corporation brought motion seeking court's approval of sale — Motion granted — Evidence showed that no stakeholder objected to sale and that all parties agreed to participate in bidding process — Once bidding process was started, there was no turning back unless process was defective — Court was not convinced that winning bid should be set aside just because unsuccessful bidder lost — Court was of view that bidding process met criteria established by jurisprudence — In addition, monitor supported position of winning bidder — Therefore, sale should be approved as is.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Société a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la société a considéré vendre tous ses actifs — Processus d'appel d'offres a été lancé et plusieurs investisseurs ont déposé leurs offres — Société a signé une entente de vente d'actifs avec le soumissionnaire gagnant — Tribunal américain de faillite a approuvé le processus sans modifications — Tribunal a approuvé le processus avec quelques modifications et a fixé la date du 17 septembre 2010 comme étant la date limite pour soumettre une soumission — Soumissionnaire déçu a déposé une nouvelle offre le 17 septembre — Au terme du processus d'appel d'offres, la société a décidé de vendre ses actifs une fois de plus au soumissionnaire gagnant — Société a déposé, le 24 septembre, une requête visant

à obtenir l'approbation de la vente par le tribunal — Requête accueillie — Preuve démontrait qu'aucune partie intéressée ne s'était opposée à la vente et que toutes les parties avaient convenu de participer au processus d'appel d'offres — Une fois le processus d'appel d'offres lancé, il n'était pas question de l'interrompre à moins que le processus ne s'avère déficient — Tribunal n'était pas convaincu que le soumissionnaire gagnant devrait être exclu simplement parce que le soumissionnaire déçu avait perdu — Tribunal était d'avis que le processus d'appel d'offres satisfaisait aux critères établis par la jurisprudence — De plus, le contrôleur était en faveur de la position défendue par le soumissionnaire gagnant — Par conséquent, la vente devrait être approuvée telle quelle.

MOTION by corporation seeking court's approval of sale.

***Robert Mongeon, J.C.S.*:**

BACKGROUND

1 On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

2 On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

3 On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process (« SISP ») for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

4 The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC (« BDWB »). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

5 BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

6 On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

7 On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

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

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

48 The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

49 The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.*decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the

process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one « Stalking Horse » bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words « preferable to a bankruptcy » must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

51 Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

52 In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

53 In *Nortel Networks Corp., Re*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), at paragraph 35):

> The duties of the Court in reviewing a proposed sale of assets are as follows:
>
> 1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> 2) It should consider the interests of all parties;
>
> 3) It should consider the efficacy and integrity of the process by which offers have been obtained;
>
> 4) and it should consider whether there has been unfairness in the working out of the process.

54 I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

55 I will make no comment as to the standing of the « bitter bidder ». Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

56 I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

57 There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the « Stalking Horse » bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the

TAB 12

Feronia Inc. (Re)

2020 BCSC 1372, 2020 CarswellBC 2271 | British Columbia Supreme Court | British Columbia | September 15, 2020

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2020 BCSC 1372, 2020 CarswellBC 2271, 323 A.C.W.S. (3d) 14, 82 C.B.R. (6th) 222

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Outline

2020 BCSC 1372
British Columbia Supreme Court

Feronia Inc. (Re)

2020 CarswellBC 2271, 2020 BCSC 1372, 323 A.C.W.S. (3d) 14, 82 C.B.R. (6th) 222

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, As Amended

In the Matter of the Notice of Intention to Make a Proposal of Feronia Inc., of the City of Vancouver, in the Province of British Columbia

Milman J.

Heard: September 3, 2020
Judgment: September 15, 2020
Docket: Vancouver B200352

Counsel: M.C. Sennott, K.B. Plunkett, for Applicant, Feronia Inc.
C.M. Cheuk, E. Newbery, for Proposal Trustee, Ernst & Young Inc.
E. Lamek, for Attendee, Feronia KKM
L. Williams, J. Enns, for Attendee, Gregory Steers
A.E. Kauffman, for Attendee, Mafuta Investment Holding Ltd.
E. Cobb, for Attendee, CDC Group PLC
B. Burland, for Attendees, Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden N.D., Nederlandse Financiernigs-Maatschappij Voor Ontwikkelingslanden N.V., Deutsche Investitions- und Entwicklungsgesellschaft mbH, Societe Belge D'Investissement Pour Les Pays en Development Sa, and Emerging Africa Infrastructure Fund Ltd.

Subject: Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Debtor was formed for purpose of raising funds to bid on and acquire company PHC — PHC continued to operate at loss and debtor, and PHC had to borrow extensively from third parties to fund PHC's infrastructure investments and operations — Debtor entered into sponsor support agreement — Debtor retained independent financial advisors to assist it in marketing and selling its assets — Debtor filed notice of intention to make proposal to creditors under Bankruptcy and Insolvency Act (BIA) — Debtor applied for approval of sale of its assets to affiliate of shareholder — Application granted — Factors to consider were set out in s. 65.13(4) of BIA — Sale process was reasonable in circumstances — While sale process was of relatively short duration, it was driven primarily by terms of sponsor support agreement which had imposed short time limit because PHC had run out of cash and was rapidly losing money, and parties had to balance cost of allowing for additional time to sell assets against likely benefit that would flow from such extension — Fact that sales process that was followed was not approved by court in advance was factor to be weighed in considering whether it was reasonable, but debtor engaged advisors to assist with sale process prior to filing and followed their advice — Once proposal trustee became involved it took view that process that had been followed prior to its involvement was reasonable in circumstances, and favourable opinion of proposal trustee was factor that weighed in favour of approval — Proposal trustee filed report stating that in its opinion sale or disposition would be more beneficial to creditors than sale or disposition under bankruptcy — Sale process was conducted in consultation with creditors holding vast majority of debt, but debenture holders were not formally consulted before debtor entered into sponsor support agreement, which was factor that must be weighed — Importance of factor depended on degree to which there was ever realistic prospect of recovery for them, which there was not — Proposal trustee identified significant advantages to stakeholders that would flow from allowing proposed sale to proceed, and while debentures would be rendered worthless, evidence suggested that debenture holders would be in no worse position as result of sale — Consideration to be received in proposed transaction was reasonable

and fair — Debtor made good faith efforts to sell its assets to unrelated party — Consideration to be paid for debtor's assets in proposed sale was superior to any other offer made through sales process, given that there were no other offers — Factors set out in s. 65.13 of BIA overwhelmingly favoured approval of sale.

APPLICATION by debtor for approval of sale of its assts to affiliate of shareholder.

***Milman J.*:**

I. Introduction

1 On September 3, 2020, I made an order that, among other things, approved the sale of the assets of the debtor, Feronia Inc. ("Feronia"), to an affiliate of one of its two largest shareholders. Feronia had recently filed a notice of intention to make a proposal to its creditors under Part III, Division 1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], and therefore needed court approval under s. 65.13 of the *BIA* in order to proceed with the sale.

2 The application was opposed by one of Feronia's convertible unsecured subordinated debenture holders, who argued that, among other things, the process leading to the sale was flawed and inadequate and, as a result, the assets were being sold for far less than their real value.

3 Because the matter was urgent, I granted the order immediately after hearing the application and advised the parties that I would provide written reasons for my decision at a later date. The following are those reasons.

II. The Background Facts

A. Feronia and its Assets

4 Feronia is a public company with a registered office in Vancouver. Its head office is in Kinshasa, in the Democratic Republic of the Congo (the "DRC"). Although its shares are listed on the TSX Venture Exchange, it has, since July 22, 2020, been subject to a cease trading order by the Ontario Securities Commission for having failed to file certain periodic disclosure material.

5 Its largest shareholders are the CDC Group PLC ("CDC") and KKM 2 Limited ("KKM"), who own 42% each. The remainder of its shares are held by others, including members of the public. It has issued various debentures, options and deferred share units, among other forms of convertible securities.

6 Feronia is essentially a holding company with no employees. It holds all but one of the shares in a Belgian subsidiary, known as Feronia Maia Sprl ("FM"). Between them, Feronia and FM hold a 76.16% equity interest in a DRC company known as Plantations et Huileries du Congo SA ("PHC"). PHC operates three palm oil plantations in the DRC, the government of which holds the remaining 23.84% interest in PHC.

7 Over 8,000 unionized permanent and temporary employees, on a full-time equivalent basis, work at those plantations. The plantations are said to be an important pillar of the local community in the DRC, providing employment, amenities, healthcare and education to approximately 100,000 people who live in and around them.

8 Apart from those shares and certain intercompany claims (against PHC, in the case of Feronia, and against Feronia, in the case of FM), neither Feronia nor FM have any other assets of significance.

9 Feronia was formed in 2008 for the purpose of raising funds to bid on and acquire PHC, which was then owned by the Unilever group. It was originally incorporated under Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16, but was on August 18, 2016 continued into British Columbia under the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57.

10 Feronia acquired its interest in PHC in 2009. Before then, PHC was having difficulty attracting investment due at least in part to civil unrest and instability in the PRC. Feronia has since invested in replanting and infrastructure upgrades at the

f) EY Corporate Finance has extensive experience in marketing other kinds of business assets, including agribusinesses, although admittedly not specifically in palm oil related assets;

g) EY Corporate Finance did not contact the two potential purchasers identified by Mr. Sood but Feronia did issue a press release on June 2, 2020 announcing the sale;

h) EY Corporate Finance chose not to contact one of those potential purchasers, because it is also one of PHC's two major customers, and Feronia had expressed concerns about being subjected to pricing pressure were that customer to gain access to PHC's sensitive commercial information; and

i) no parties requested an extension to the bid deadline.

36 On those grounds, the Proposal Trustee reiterated its conclusion that:

a) the sales process was fair, adequate and reasonable in the circumstances;

b) the proposed transaction would be beneficial or neutral to the creditors compared to a disposition under a bankruptcy;

c) the most compelling indication of value is that generated by the market through the sales process; and

d) the consideration to be paid for the assets is therefore fair and reasonable in light of their market value.

37 At the hearing, I also heard oral submissions from counsel for Feronia, the Proposal Trustee and CDC in support of the application. Those submissions generally reiterated the observations in the supplemental report, adding that:

a) neither Mr. Steers nor Mr. Sood were properly qualified as expert witnesses so as to render their opinions admissible in court;

b) Mr. Steers' suggestion in oral argument that Feronia should have explored other sources of financing, rather than entering into the Sponsor Support Agreement, was unrealistic, given the circumstances it faced;

c) Feronia's press releases gave adequate notice of the sales process to potential bidders who were not specifically targeted;

d) the trustee for the debenture holders was duly served with Feronia's notice of intention to make a proposal;

e) no potential bidders, including Mr. Steers, ever approached the Proposal Trustee during the sales process to seek more time to prepare and put forward a bid;

f) if the sale is not approved, there is no guarantee that Feronia's lenders will continue to fund PHC's operations, in which case PHC may be forced to cease operations for lack of cash;

g) a shutdown of PHC's operations would not only reduce the value of the assets to be sold but also devastate the communities in the DRC that depend on the plantations for their livelihood; and

h) even if the proposed transaction had been presented to the creditors in the context of a conventional proposal to restructure Feronia's debt, as Mr. Steers says it should have been, the creditors supporting the present application would have sufficient votes to approve it.

IV. Discussion

38 The test to be applied in determining whether to authorize a sale of a debtor's assets in these circumstances is set out in s. 65.13 of the *BIA*, which states, in relevant part, as follows:

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

. . .

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

. . .

39 In *Veris Gold Corp., Re*, 2015 BCSC 1204 (B.C. S.C.), Fitzpatrick J. had occasion to consider a similar application under s. 36(3) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 , the provision in that statute that parallels

s. 65.13 of the *BIA*. After setting out that legislation, she described the principles emerging from the related jurisprudence as follows, at paras. 23-25:

> [23] A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para. 49, 72 C.B.R. (5th) 49, leave to appeal ref'd 2010 QCCA 1950.
>
> [24] In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are helpful in considering whether to approve a sale:
>
> > 1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
> >
> > 2. The interests of all parties;
> >
> > 3. The efficacy and integrity of the process by which offers were obtained; and
> >
> > 4. Whether there has been any unfairness in the sales process.
>
> [25] Various authorities support that, in considering the test under s. 36 of the CCAA, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Re Canwest Publishing Inc.*, 2010 ONSC 2870 at para. 13; *White Birch* at para. 50; *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367 at para. 54.

40 In the discussion that follows, I will consider each of the statutory factors enumerated in ss. 65.13(4), as well as those in ss. 65.13(5), given that the proposed purchaser in this case is clearly a "related person" as that term is defined in s. 65.13(6).

A. Was the sales process reasonable in the circumstances?

41 Mr. Steers' criticisms of the sales process focus on two main concerns: its relatively short duration and the degree to which it failed to expose the assets sufficiently to the niche market that may exist for them.

42 With respect to the duration of the process, it is not disputed that the 30-day time limit was driven primarily by the terms of the Sponsor Support Agreement. Mr. Steers argues that Feronia did not explore other restructuring alternatives before committing to the draconian strictures of that agreement. In that regard, he cites *Komtech Inc., Re*, 2011 ONSC 3230 (Ont. S.C.J.), as an example of a case in which an asset sale was approved under s. 65.13 of the *BIA* on the stated basis that, among other things, the debtor had "made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business" (at para. 9) — something he argues is entirely missing here.

43 I do not find that argument persuasive.

44 If the Sponsor Support Agreement had imposed the 30-day time limit arbitrarily, for no apparent reason, then Mr. Steers' argument would be more persuasive. In fact, however, the timelines were kept short because PHC had run out of cash and had been losing more than US$1.4 million every month in the months immediately preceding the finalisation of that agreement.

45 In those circumstances, the parties had to balance the cost of allowing for additional time to sell the assets against the likely benefit that would flow from any such extension. It was not necessarily unreasonable to allow the sales process to run only for so long as the business could continue to operate with the cash available. While one can argue, as Mr. Steers does, that the sponsors should have provided even more funding in order to enable Feronia to run a longer process, the evidence does not show that a process lasting more than 30 days would have been likely to yield any better results.

46 While I accept that potential bidders cannot be assumed to have been alerted to the sales process by the press releases alone, the target audience was a small one and an effort was made to solicit interest from a carefully compiled list of 49 potential targets. I am not persuaded by the suggestion that other, more specialised brokers in Europe would have compiled a very different list or that they would have succeeded in generating greater interest from the same or other targets. The assets on offer were

> Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.
>
> [79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.
>
> [80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

54 I agree with Mr. Steers that the fact that the sales process that was followed in this case was not approved by the Court in advance is a factor to be weighed in considering whether it was reasonable. Nevertheless, in approving the sale that was in issue before her, Romaine J. also took account of the fact that the debtor had engaged financial advisers during the pre-filing SISP and that the monitor, once it became involved, believed that the process, with the professionals engaged, had been reasonable.

55 This case is similar in that sense. Feronia had engaged EY Corporate Finance to assist with the sales process prior to the filing and, having done so, followed its advice. The Proposal Trustee, once it became involved, came to the view that the process that had been followed prior to its involvement was a reasonable one in the circumstances.

56 As Romaine J. stated, ultimately it is the "specific details of the [sales process] as conducted that will be scrutinized". Like her, I have found the favourable opinion of the Proposal Trustee, although arrived at *post facto*, to be helpful in scrutinising the sales process at issue before me.

57 The favourable opinion of the Proposal Trustee on that question is therefore another factor that weighs in favour of approval.

C. Has the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy?

58 There is such a report before me. Mr. Steers argues that the Proposal Trustee's opinion in that regard should not be relied upon, however, because it is unsupported by any analysis.

59 I disagree. The Proposal Trustee considered the likely impact of a bankruptcy. It concluded that the creditors would be likely to see a diminished recovery in a bankruptcy scenario, principally because the business would not be sold as a going concern, as it is now, and the additional debt relief that has been made available under the terms of the proposed sale would not otherwise be available.

60 I find that opinion persuasive.

D. To what extent were the creditors consulted?

61 The sales process was conducted in consultation with the creditors holding the vast majority of Feronia's debt. It is not disputed, however, that the debenture holders were not formally consulted through the indenture trustee before Feronia entered into the Sponsor Support Agreement and then carried out and essentially completed the sales process. They would not even have become aware of those developments unless they happened to review Feronia's relevant press releases at the time. By the time the indenture trustee was given formal notice of the filing of Feronia's intention to make a proposal, the sales process had essentially run its course.

62 The lack of consultation with the debenture holders is a factor that, I accept, must be weighed in the analysis. But the importance of that factor depends on the degree to which there was ever a realistic prospect of any recovery for them. The evidence suggests that there was not.

TAB 13

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 ONCA 508, 2019 CarswellOnt 9683 | Ontario Court of Appeal | Ontario | June 19, 2019

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2019 ONCA 508, 2019 CarswellOnt 9683, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

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2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11,
306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable

of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

> ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

TAB 14

Sierra Club of Canada v. Canada (Minister of Finance)

2002 SCC 41, 2002 CSC 41, 2002 CarswellNat 822 | Supreme Court of Canada | Federal | April 26, 2002

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2002 SCC 41, 2002 CSC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal

— Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including

the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation

de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the

> *require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that

TAB 15

Sherman Estate v. Donovan

2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339 | Supreme Court of Canada | Ontario | June 11, 2021

Document Details

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2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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Ewa Krajewska, for Intervener, Income Security Advocacy Centre
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Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

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

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It

could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service

of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire

pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

TAB 16

2009 ABQB 748
Alberta Court of Queen's Bench

Allard v. Shaw Communications Inc.

2009 CarswellAlta 2128, 2009 ABQB 748, [2010] A.W.L.D. 1867, 183 A.C.W.S. (3d) 737, 68 B.L.R. (4th) 184

Peter Andrew Allard (Applicant) and Shaw Communications Inc. (Respondent)

Sal J. LoVecchio J.

Heard: December 7, 2009
Judgment: December 17, 2009
Docket: Calgary 0901-09821

Counsel: David de Vlieger for Applicant, Peter Andrew Allard
Tamela J. Coates for Respondent, Shaw Communications Inc.

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.vi Miscellaneous
Headnote
Business associations --- Specific corporate organization matters — Shareholders — Shareholders' remedies — Miscellaneous issues
Shareholder made request for access to shareholders lists of S — S did not comply with that request or subsequent requests — Shareholder brought application for order compelling S to provide shareholders lists to him — Application dismissed — There was evidence shareholder intended to use shareholders lists for purpose connected to business of S, which was unlawful use under s. 23(11) of Alberta Business Corporations Act.
Table of Authorities
Cases considered by *Sal J. LoVecchio J.*:
EnCana Corp. v. Douglas (2005), 2005 CarswellAlta 1872, 2005 ABCA 439, [2006] 7 W.W.R. 59, 11 B.L.R. (4th) 198, 54 Alta. L.R. (4th) 130, 262 D.L.R. (4th) 279 (Alta. C.A.) — considered
Transportaction Lease Systems Inc. v. Weaver (2007), 77 Alta. L.R. (4th) 179, 2007 CarswellAlta 539, 2007 ABQB 246, 35 C.B.R. (5th) 110, 418 A.R. 178 (Alta. Q.B.) — considered
Statutes considered:
Business Corporations Act, R.S.A. 2000, c. B-9
Generally — referred to

s. 1(a) "affairs" — considered

s. 23 — considered

s. 23(11) — considered

s. 23(11)(a) — considered

s. 23(11)(b) — considered

8 "Affairs" is defined in s. 1(a) of the ABCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of those bodies corporate, but *does not include the business carried on by those bodies corporate*." (emphasis added)

9 "Business" is not defined in the ABCA, but Bruce Welling distinguishes "business" and "affairs" (See *Corporate Law in Canada: The Governing Principles*, 3rd edition, at p. 540), when he says "affairs" relates to the internal governing of the corporation, while "business" refers to the corporation's dealings with outsiders.

10 My colleague Justice Murray found a similar distinction between "business" and "affairs" in *Transportaction Lease Systems Inc. v. Weaver*[4]. He said at para. 42:

> "Business" is not defined in the A.B.C.A. However, if the term "affairs" appears to address the internal relationships within the corporation, "business" may address the corporation's dealings with other entities. The term "business" should be given its plain and ordinary meaning to include generally, trade, commercial transactions or other commercial engagements.

11 Shaw submits it has independent information that Mr. Allard would use the shareholders lists for a purpose that falls outside of s. 23(11) of the ABCA. More specifically, Shaw submits it obtained information from Mr. Allard himself that he wanted to use the lists to notify other Shaw shareholders of Allarco's concern that Shaw was not honouring the terms of its CRTC licence and was unfairly promoting Shaw's Star Choice paid movie channel over Allarco's Super Channel. Shaw says this is a business dispute.

12 Mr. Allard asserts, first, that he did not have a defined purpose in mind when he requested the shareholders lists from Shaw, and, second, even if he did want to communicate with the other shareholders about the Allarco/CRTC licence dispute, such communication falls under the head of corporate governance and therefore within the definition of affairs.

13 Shaw's submission that Mr. Allard wanted to communicate about a business dispute is based on Mr. Allard's equivocal responses to questions in cross-examination on his affidavit on August 6, 2009. At that time, Mr. Allard did not deny that he wanted the Shaw shareholders lists to communicate with other shareholders about the Allarco dispute. Rather, he essentially admitted as such.

14 Mr. Allard said at p. 54 of his cross-examination that he wanted to contact Shaw shareholders after Allarco received the results of a survey of Shaw's customer service representatives, which Allarco believed revealed that Shaw was inadequately promoting Super Channel. Mr. Allard suggests he only wants to communicate with the shareholders in respect of a "corporate governance" issue. However, in his cross-examination he defined this governance matter as being in relation to Shaw's marketing of Super Channel (p. 8 of the transcript) and later as Shaw "upholding the obligations and requirements of the CRTC licences" (p. 54 of the transcript).

15 When questioned about why he asked his investment broker Stewart Hayashi to obtain the shareholders lists from Shaw, Mr. Allard confirmed bringing the CRTC issue to the attention of Shaw shareholders was "a possibility" (p. 56 of the transcript). However, when asked for other specific possibilities, Mr. Allard was unable to clearly define alternate reasons for wanting the lists except to see who the other shareholders were. He agreed that he did not have any other specific governance issues in mind when he requested the lists from Mr. Hayashi (p. 57 of the transcript).

16 This matter originally came before me on October 9, 2009. In that hearing, I indicated to Mr. de Vlieger, Counsel for Mr. Allard, that these equivocal responses were problematic and that I was prepared to hear vive voce evidence on this Application to possibly clarify matters. Counsel for Shaw Ms. Coates indicated some displeasure with this course of action, as she was concerned that I seemed to be giving Mr. de Vlieger a chance to bolster his case. I indicated that with cross examination that might be a two-edged sword. The matter was then adjourned sine die so Mr. de Vlieger could review this possibility with his client.

TAB 17

EnCana Corp. v. Douglas

2005 ABCA 439, 2005 CarswellAlta 1872 | Alberta Court of Appeal | Alberta | December 15, 2005

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2005 ABCA 439, 2005 CarswellAlta 1872, [2005] A.J. No. 1744, [2006] 7 W.W.R. 59, [2006] A.W.L.D. 612, [2006] A.W.L.D. 715, 11 B.L.R. (4th) 198, 144 A.C.W.S. (3d) 861, 262 D.L.R. (4th) 279, 490 A.R. 152, 497 W.A.C. 152, 54 Alta. L.R. (4th) 130

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Outline

2005 ABCA 439
Alberta Court of Appeal

EnCana Corp. v. Douglas

2005 CarswellAlta 1872, 2005 ABCA 439, [2005] A.J. No. 1744, [2006] 7 W.W.R. 59, [2006] A.W.L.D. 612, [2006] A.W.L.D. 715, 11 B.L.R. (4th) 198, 144 A.C.W.S. (3d) 861, 262 D.L.R. (4th) 279, 490 A.R. 152, 497 W.A.C. 152, 54 Alta. L.R. (4th) 130

EnCana Corporation (Respondent / Applicant) and Robert Hewitt Douglas (Appellant / Respondent)

Conrad, Picard, Paperny JJ.A.

Heard: September 12, 2005
Judgment: December 15, 2005
Docket: Calgary Appeal 0401-0306-AC

Proceedings: reversing *EnCana Corp. v. Douglas* (2004), 2004 CarswellAlta 1973 (Alta. Q.B.)

Counsel: R.H. Douglas for himself
L.A. Goldbach for Respondent

Subject: Corporate and Commercial; Public; Civil Practice and Procedure; Municipal

Headnote

Business associations --- Specific corporate organization matters — Shares — Registration — General principles

D was sole director, officer and shareholder of D Inc. — One of business activities of D Inc. was to identify potentially lost, misplaced or forgotten shares in corporation — Once lost shares are identified, D Inc. sells information about lost shares to rightful shareholder or to heirs or beneficiaries of such shareholder for fee — D was shareholder of E Inc. — D requested access to common securities registers of E Inc.'s predecessor companies — E Inc. refused and commenced application by way of originating notice to clarify its obligations to D — Chambers judge correctly identified main issue as whether D's intended use of securities register fell outside of scope of s. 21(9)(c) of Canada Business Corporations Act ("CBCA") — Chambers judge found that intended use was too broad given privacy concerns evidenced by privacy legislation — As result, chambers judge held that E Inc. was not required to provide access to securities register — D appealed — Appeal allowed — Scheme of CBCA requires that corporation provide applicant with names, number of shares and addresses of all shareholders in securities register upon receipt of reasonable fee, request by shareholder and affidavit in compliance with ss. 21(7) and (8) of CBCA — Privacy legislation does not modify that obligation where information is being provided as required by law — Word "affairs" as used in s. 21(9)(c) of CBCA relates to relationships between corporation, shareholders, directors and officers — Any use of securities register that involves communication between shareholders as shareholders, or regarding corporation, directors and/or officers is allowable use — E Inc. must provide D access to securities register — D's proposed use as shareholder, on face of it, fell within meaning of "affairs of the corporation" — D must use information he obtained from securities register in manner that was consistent with both CBCA and privacy legislation.

Privacy and freedom of information --- Provincial privacy legislation — Miscellaneous

D was sole director, officer and shareholder of D Inc. — One of business activities of D Inc. was to identify potentially lost, misplaced or forgotten shares in corporation — Once lost shares are identified, D Inc. sells information about lost shares to rightful shareholder or to heirs or beneficiaries of such shareholder for fee — D was shareholder of E Inc. — D requested access to common securities registers of E Inc.'s predecessor companies — E Inc. refused and commenced application by way of originating notice to clarify its obligations to D — Chambers judge identified main issue as whether D's intended use of securities register fell outside of scope of s. 21(9)(c) of Canada Business Corporations Act ("CBCA") — Chambers judge found that intended use was too broad given privacy concerns evidenced by privacy legislation — As result, chambers judge held

that E Inc. was not required to provide access to securities register — D appealed — Appeal allowed — Scheme of CBCA requires that corporation provide applicant with names, number of shares and addresses of all shareholders in securities register upon receipt of reasonable fee, request by shareholder and affidavit in compliance with ss. 21(7) and (8) of CBCA — Privacy legislation does not modify that obligation where information is being provided as required by law — Word "affairs" as used in s. 21(9)(c) of CBCA relates to relationships between corporation, shareholders, directors and officers — Any use of securities register that involves communication between shareholders as shareholders, or regarding corporation, directors and/or officers is allowable use — E Inc. must provide D access to securities register — D's proposed use as shareholder, on face of it, fell within meaning of "affairs of the corporation" — D must use information he obtained from securities register in manner that was consistent with both CBCA and privacy legislation.

APPEAL by respondent shareholder from judgment reported at *EnCana Corp. v. Douglas* (2004), 2004 CarswellAlta 1973 (Alta. Q.B.), with respect to access to securities register of applicant corporation.

***Conrad J.A.*:**

I. Introduction

1 This appeal involves the proper interpretation of s. 21 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), and the obligation of the respondent, EnCana Corporation ("EnCana"), to furnish the appellant, Robert Hewitt Douglas ("Douglas"), with its securities register.

2 Douglas is the sole director, officer and shareholder of the company, Douglas Resources Ltd. ("Douglas Resources"). One of the business activities of Douglas Resources is to identify potentially lost, misplaced or forgotten shares ("lost shares") in a corporation. Once lost shares are identified, Douglas Resources sells information about the lost shares to the rightful shareholder or, more frequently, to the heirs or beneficiaries of such shareholder, for a fee. EnCana applied for, and received, relief from any obligation imposed upon them by s. 21 of the *CBCA* to provide information from its securities register on the basis that Douglas' intended use of the information was unlawful. Douglas appeals.

II. Issues

3 This appeal raises two main issues:

A. What is the obligation on a corporation to provide its securities register under s. 21 of the *CBCA*?

B. Is the intended use of the securities register by Douglas an allowable use under s. 21(9)(c) of the *CBCA*?

III. Decision

4 I would allow the appeal. The scheme of the *CBCA* requires that a corporation provide an applicant with the names, number of shares and addresses of all shareholders in the securities register upon receipt of the reasonable fee, a request by a shareholder and an affidavit in compliance with ss. 21(7) and (8). Privacy legislation does not modify that obligation where the information is being provided as required by law. The statute does not place the onus of protecting against misuse of information on the corporation, but on the applicant. To protect against misuse, the statute requires an applicant provide an undertaking to confine use of the information to the lawful uses enumerated in s. 21(9). In the event an applicant misuses the information, he or she is subject to prosecution under s. 21(10).

5 The word "affairs" as used in s. 21(9)(c) relates to the relationships between the corporation, shareholders, directors and officers. Any use of the securities register that involves communication between shareholders — as shareholders, or regarding the corporation, directors and/or officers is an allowable use.

IV. Background Facts

without interference by the corporation. Any restriction on a shareholder's right to access the register requires clear wording in the legislation.

23 In summary, once there is technical compliance with ss. (7) and (8); the corporation must provide access to the register. Having said that, I recognize circumstances may arise where a corporation has independent information that demonstrates an applicant's intention to use the information for an unlawful purpose — one that clearly falls outside of s. 21(9). Suppose, for instance, that when requesting the securities register the applicant says that he wants to use the information to solicit investments from wealthy individuals for another enterprise. In such a case, it may be proper to seek directions from the court as to whether it is relieved of its duty to provide access to the register.

4. the effect of privacy legislation on a corporation's obligation to disclose

24 *MacMillan Bloedel Ltd., Re* was decided prior to the enactment of privacy legislation. EnCana submits that privacy legislation modifies its obligations under s. 21 of the *CBCA*. Both the federal legislation, *PIPEDA*, and the Alberta legislation, *PIPA*, apply here. *PIPA* applies to all commercial activities within Alberta, while *PIPEDA* applies to those activities outside of Alberta. The general structure of the statutes is similar. The acts apply to organizations, and both state that their purpose is to balance the rights of an individual to have his/her personal information protected and the need for an organization to collect, use or disclose that information for purposes that are reasonable: *PIPEDA*, s. 3; *PIPA*, s. 3.

25 Both statutes define personal information as "information about an identifiable individual" (*PIPEDA*, s. 2(1); *PIPA*, s. 1(k)). As none of the exclusions limiting personal information apply, the information within a securities register is personal information. Both statutes place responsibilities on organizations to protect the privacy of personal information: *PIPEDA*, s. 5; *PIPA*, s. 5. Under both federal and provincial privacy legislation, an organization may collect, use and disclose personal information without consent in certain situations: *PIPEDA*, s. 7; *PIPA*, ss. 14, 17 and 20. Under these provisions, both statutes allow for the disclosure and use of personal information if the disclosure and use are provided for by another statute or regulation — in other words, personal information may be disclosed or used without consent if authorized by law.

26 Although privacy legislation has increased the awareness regarding personal information, in my view, the privacy argument in this situation is a circular one. If the *CBCA* authorizes the release of the information to Douglas, then disclosure by EnCana is allowed under both *PIPEDA* and *PIPA*. Similarly, if Douglas uses the information for a purpose allowed under s. 21(9), his use is lawful. Privacy legislation does not modify the obligations on EnCana to provide access to the securities register. A corporation cannot hide behind general privacy law to deprive shareholders access to the securities register, nor can it use such concerns to fish for information.

27 In conclusion on this first issue, the *CBCA* requires a corporation to provide the securities register upon receipt of an application in compliance with s. 21. Because the disclosure of that information is required by law, the corporation does not breach privacy laws by so disclosing. Responsibility for the protection of personal information then moves to the person receiving the information. This person can only use it for the purposes outlined in s. 21(9), or risk prosecution pursuant to s. 21(10).

28 I want to re-emphasize that if Douglas wants to use this information as Douglas Resources, he must re-swear the affidavit in compliance with s. 21(8). While Douglas in his personal capacity is entitled to the share register, he cannot simply transfer the information to Douglas Resources to use to locate lost shares. Both privacy legislation and the *CBCA* place obligations on Douglas. Douglas, and Douglas Resources, will be protected only if they use the information for the purposes allowed by the *CBCA*.

29 Here, EnCana learned from communicating with Douglas, and from subsequent cross-examination on his affidavit, that he wanted to use the list for what it considered to be an improper purpose. For the purposes of this decision, I will assume that EnCana had sufficient outside information to cause it legitimate concern as to whether Douglas' intended use was lawful, thereby justifying an application for directions from the court.

B. Is the intended use of the securities register by Douglas an allowable use under s. 21(9)(c) of the CBCA?

TAB 18

Jot It! Software Corp. v. Plant Software Inc.

1998 CarswellBC 471 | British Columbia Supreme Court [In Chambers] | British Columbia | March 5, 1998

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	1998 CarswellBC 471, 77 A.C.W.S. (3d) 1336

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1998 CarswellBC 471
British Columbia Supreme Court [In Chambers]

Jot It! Software Corp. v. Plant Software Inc.

1998 CarswellBC 471, 77 A.C.W.S. (3d) 1336

Jot it! Software Corp., Petitioner and The Plant Software Inc., Respondent

Morrison J.

Judgment: March 5, 1998
Heard: March 4, 1998
Docket: Vancouver A980408

Counsel: *Barry Fraser*, for the Petitioner.
Edward E. Bowes, for the Respondent.

Subject: Corporate and Commercial

Headnote

Corporations --- Books and returns — General

Petitioner applied for order that company make available register of its members for examination and copying — Company Act provided that any person may examine and take extracts from records of non-reporting company — Records include register of members — Act also provides that company must furnish to any person list of members upon delivery of affidavit — Petitioner failed to provide affidavit — Petitioner could rely on former provision without having to comply with requirement of affidavit — Latter provision was for convenience of person who does not wish to attend company's records office at specified time — Application granted — Company Act, R.S.B.C. 1996, c. 62, ss. 164(4), 164(5), 167.

APPLICATION for order that company make available register of its members for examination and copying.

***Madam Justice Morrison* (In Chambers):**

1 This is a petition to the court for a final order, pursuant to s. 206 of the *Company Act*, R.S.B.C. 1996, c. 62, that the respondent make available to the petitioner a register of members of the respondent company for examination and for the purpose of taking extracts, and that the respondent furnish the petitioner with a copy of the register of members of the respondent. The petitioner claims entitlement to this relief pursuant to s. 164(4) of the *Company Act*.

2 The respondent opposes the application, on the grounds that s. 167 of the *Company Act* requires the petitioner to deliver an affidavit referred to in s. 167(d), which affidavit must state, amongst other things, that the list is required and will be used only for corporate purposes.

3 Under s. 163 of the *Company Act*, every company must keep at its records office a number of records, including a register of members. That is set out in s. 163(d).

4 Section 164(4) and (5) state as follows:

> **Sec. 164. Examination of records**.
>
> . . . . .
>
> (4) If a company is not a reporting company, any person may examine and take extracts from the records, documents and instruments of that company referred to in section 163(1), except those referred to in paragraphs (k), (l), (q), (r), and (t)(ii) and (iii), on payment of the charge mentioned in subsection (3).

> With respect to the argument that s. 191 [now s. 167] must have been intended to refer to something more than a copy of the register of members maintained under s. 67 and available for examination by members under s. 188, it should be recalled that s. 191 [now s. 167] was enacted some years after ss.187 and 188 [ss. 164 and 165] - presumably to address the inconvenience experienced by persons wanting a list of the names of members of a reporting company, but entitled only to attend at its records office or transfer agent, at certain times of the day, to examine, take extracts, and request copies of the register. [emphasis added]

9 In my opinion, any person making an application or request for a list of members under s. 164(4) of the *Company Act* does not have to fulfil the requirements of s. 167, and provide an affidavit, as suggested by the respondent. The *Act* clearly says that any person can go to view the register of members, if a company is not a reporting company. However, if that person wants the *company* to provide the list, as set out in s. 167, then the affidavit is required, pursuant to that section.

10 There will be an order that the respondent make available to the petitioner the register of members of the respondent for examination and for the purpose of taking extracts on payment by the petitioner to the respondent of .50 cents or such lesser sum as the respondent prescribes for the examination of the record. There will be a further order that the respondent furnish the petitioner with a copy of the register of members of the respondent on payment of a reasonable charge, not exceeding the sum of .50 cents for every page copied. There will be a further order that the respondent comply with these orders no later than the close of business, 5:00 p.m., of March 12, 1998, at a time to be agreed upon between counsel or the parties. The respondent will make the said records available either at the records office of the company, or at some other location, provided the parties agree in advance. If there is failure to agree, then the register of members will be made available for examination at the records office of the respondent.

11 There will be costs to the petitioner, Scale 3.

Application granted.

End of Document

TAB 19

Mathieu v. J.R. Stephenson Mfg. Ltd.

2013 MBQB 64, 2013 CarswellMan 177 | Manitoba Court of Queen's Bench | Manitoba | March 12, 2013

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2013 MBQB 64, 2013 CarswellMan 177, [2013] 12 W.W.R. 573, 228 A.C.W.S. (3d) 323, 292 Man. R. (2d) 13

Find Details

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Outline

2013 MBQB 64
Manitoba Court of Queen's Bench

Mathieu v. J.R. Stephenson Mfg. Ltd.

2013 CarswellMan 177, 2013 MBQB 64, [2013] 12 W.W.R. 573, 228 A.C.W.S. (3d) 323, 292 Man. R. (2d) 13

Alain Mathieu and Mathieu-Bernier Management Consultants Ltd., Applicants and J.R. Stephenson MFG. Ltd., John Matthew Tuhkanen, Hawkesbury Capital Corp. Inc., Kamran Ansari, 5222681 Manitoba Ltd., Mark Albert Slikker and KCR Enterprises Ltd., Respondents

Mainella J.

Judgment: March 12, 2013
Docket: Winnipeg Centre CI 11-01-71758

Counsel: Faron J. Trippier, for Applicants
Jamie A. Kagan, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Contracts

Headnote

Alternative dispute resolution --- Practice and procedure — General principles

Respondent J Ltd. was closely held Manitoba corporation — Four principals of J Ltd. entered into unanimous shareholder agreement (USA) — Relationship of four principals eventually soured over commercial leasing dispute — Claim of shareholder oppression arose over ostracism of one of principals of J Ltd. by others — USA required parties to resolve their disagreements by arbitration pursuant to Arbitration Act — Arbitrator ordered respondents to produce financial statements and accounting records of J Ltd. to applicants before hearing merits of shareholders' dispute — Respondents sought to appeal arbitrator's decision pursuant to Act — Appeal dismissed — Act created presumption against judicial intervention in arbitration process for reasons of policy — Arbitrator had clear authority under Act to require respondents to produce financial records of J Ltd. relevant to conduct of arbitration — Such order to facilitate discovery was of interlocutory nature — Appeal of it under Act did not lie to this court.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Access to corporate documents

Business associations --- Specific matters of corporate organization — Directors and officers — Miscellaneous

RULING concerning respondents seeking to appeal certain decision of arbitrator pursuant to *Arbitration Act*.

***Mainella J.*:**

I. Introduction

1 J.R. Stephenson Mfg. Ltd. (JRS) is a closely held Manitoba corporation. In 2006 the four principals of JRS entered into a unanimous shareholder agreement (the USA) within the meaning of s. 140(2) of *The Corporations Act*, C.C.S.M., c. C225. The relationship of the four principals eventually soured over a commercial leasing dispute. A claim of shareholder oppression has arisen over the ostracism of one of the principals of JRS by the others.

2 The USA required the parties to resolve their disagreements by arbitration pursuant to *The Arbitration Act*, C.C.S.M., c. A120 (the *Act*).

3 The arbitrator has ordered the respondents to produce financial statements and accounting records of JRS to the applicants before hearing the merits of the shareholders' dispute.

63 As this court lacks jurisdiction to hear this appeal, it is not necessary to decide the question of leave to appeal pursuant to s. 44(2) of the *Act*. However, at the hearing of this appeal, the court raised with the parties the fact that because Mathieu also wore the "hat" as a director of JRS, much of the parties' skirmishing about the arbitrator's ruling on the applicants' access to the financial statements and accounting records as a shareholder of JRS was unnecessary.

64 In my view, ss. 20(3) and 153(2) of *The Corporations Act* provided the applicants with lawful authority to access the financial statements and accounting records of JRS they sought, independent of the arbitration process.

65 The parties do not dispute that given the nature of the legal issue and the expertise of the arbitrator, his interpretation of a shareholder's rights to access corporate information under *The Corporations Act* is reviewable on a standard of correctness. See *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at para. 60.

66 The arbitrator was correct in his interpretation of ss. 149(1) and 153(2) of *The Corporations Act*. Mathieu's company, a shareholder of JRS, was entitled to a copy of the 2010 and 2011 financial statements of JRS on demand.

67 A shareholder does not require a special interest to obtain corporate information where a statutory right exists. All that is required is that the shareholder's request technically complies with the statute's requirements. See *Davies v. Gas Light & Coke Co.*, [1909] 1 Ch. 708 (Eng. C.A.), at 711, *EnCana Corp. v. Douglas*, 2005 ABCA 439, 262 D.L.R. (4th) 279 (Alta. C.A.) at para. 23, and *Lawrence v. Toronto Humane Society* (2006), 271 D.L.R. (4th) 329 (Ont. C.A.) at paras. 70 and 87-89.

68 The applicants' request for the financial statements of JRS for 2010 and 2011 met the two requirements of s. 153(2) of *The Corporations Act*:

(a) a demand was made for the financial statements; and

(b) it was made by a shareholder.

69 The right of access to information granted to a shareholder by statute is a personal right; it exists independent of any consent of the corporation. See *Cooper v. Premier Trust Co.* (1944), [1945] O.R. 35 (Ont. C.A.), at 43.

70 Section 20(3) of *The Corporations Act* deals with access to the accounting records of JRS which are the remaining items the applicants seek in their motion for production.

71 The arbitrator considered and applied the common law doctrine of a shareholder's reasonable expectations that flows from the oppression remedy. See *Cholakis v. Cholakis*, 2006 MBQB 91, 203 Man. R. (2d) 1 (Man. Q.B.), at 16, aff'd at 2007 MBCA 156, 225 Man. R. (2d) 53 (Man. C.A.). That was unnecessary given Mathieu's status as a director.

72 Given my determination that the respondents cannot appeal the arbitrator's decision as it is not an "award", it is unnecessary to address the standard of review of the arbitrator's determination that the applicants were entitled to the accounting records of JRS or whether it is a question of law for the purposes of s. 44(2) of the *Act*. Rather, as I noted at the hearing of this appeal, it is important for the parties and the arbitrator, when the arbitration resumes, to not lose sight of the fact that the four principals in JRS each wore multiple "hats" in the corporation.

73 At common law a director has a right to inspect the accounting records of a company and take copies of them in order to carry out his or her duty as a director. See *Burn v. The London & South Wales Coal Company* (1890), 7 T.L.R. 118 (Q.B.). The USA in no way altered Mathieu's right as a director of JRS to inspect its accounting records at any reasonable time. Sections 20(2) and (3) of *The Corporations Act* codify this common law right of directors. See *Conway v. Petronius Clothing Co.*, [1978] 1 All E.R. 185 (Eng. Ch. Div.), at 201.

74 At common law a civil right of action exists to enforce a director's right to inspect a corporation's accounting records. See *Conway* at 201. Section 240 of *The Corporations Act* codifies the civil remedy to enforce a director's right of inspection of corporate accounting records.

75 The right of a director to access the information of a private company is much broader than the corresponding rights of shareholders under *The Corporations Act*. The ordinary meaning of ss. 20(2), 20(3), 21(1) and 153(2) of *The Corporations Act* is that a director of a corporation has access to the accounting records of a corporation, while a shareholder does not. See *Roles v. 306972 Saskatchewan Ltd.* (1993), 105 Sask. R. 300 (Sask. C.A.) at para. 5.

76 Under *The Corporations Act*, subject to express disclosure of specific information required by a constating document of a corporation, such as the by-laws, the only type of financial information shareholders have a right to access are the annual financial statements of the corporation and report of the auditor. Shareholders do not have a statutory entitlement to the various types of accounting records corporations keep. While there are exceptions to this limited statutory right of shareholders to access financial information of a corporation at common law, it is not necessary to consider them in this case given Mathieu's status as a director. See Dennis H. Peterson and Matthew J. Cummings, *Shareholder Remedies in Canada*, loose-leaf (consulted on January 24, 2013), 2nd ed. (Markham, Ont: LexisNexis, 2009), at pp. 11-17 to 11-19.

77 It would be a rare situation where a sitting director such as Mathieu would be denied relief to inspect a corporation's accounting records. Absent clear proof that the director intended to abuse the confidence to materially injure the corporation, it can be assumed he or she is exercising their right of inspection for a proper purpose. See *Conway*, *supra*, at 201, *Roles*, *supra*, at para. 14, and *Klianis v. Poole* (1992), 33 A.C.W.S. (3d) 1228 (Ont. Gen. Div.) [1992 CarswellOnt 3204 (Ont. Gen. Div.)].

78 The arbitrator's findings of fact at page 27 of his decision are important in this regard:

> The Respondents argue that Mathieu will in all likelihood share the financial information with JRS' competitors with a view to causing injury to JRS. That is entirely speculative. There is no evidence upon which to conclude that Mathieu would do this. Nor were any such specific suggestions put to him in the cross-examination on his affidavit.

79 In summary, if the arbitrator's order of production could be appealed, I fail to see how the respondents have an arguable case for leave. *The Corporations Act* sets out the applicants' ability, as either a shareholder or director of JRS, to access the financial statements and accounting records of JRS that were sought on the preliminary motion in the arbitration. This lawful authority is independent of the applicants' right to the records under the *Act* for the purposes of the arbitration of the shareholders' dispute.

V. Conclusion

80 As the decision of the arbitrator was not an award within the meaning of s. 41 of the *Act*, but rather a procedural order, this court lacks jurisdiction to determine the appeal. Therefore the appeal is dismissed.

81 At the hearing of the appeal, the applicants brought a motion asking the court to enforce the arbitrator's decision. Counsel for the respondents advised that such a motion was not necessary. If the appeal was dismissed, his clients would comply with the arbitrator's decision. Accordingly, this court remains seized with the applicants' motion for enforcement of the arbitrator's decision on the motion for production in the event a disagreement arises about enforcement of the arbitrator's decision.

82 The respondents asked for a "protection order" if the arbitrator's decision is not disturbed, setting limits on Mathieu's use of the financial information disclosed to him. I am satisfied that is not necessary. The decision of *Kiar*, *supra*, that the respondents rely upon was a situation of a lawsuit by an ex-employee and former shareholder who at the time of the litigation was already in competition with the defendant. The plaintiff owed no duty to the defendant corporation. The facts of *Kiar* are distinguishable with the case at bar. Mathieu owes a duty of loyalty to JRS and he is not in competition with it.

83 At the hearing of the appeal, counsel for the respondents raised concern about the implied undertaking rule and the potential Mathieu may breach it. See *Penner v. P. Quintaine & Son Ltd.*, 2007 MBCA 159, 225 Man. R. (2d) 44 (Man. C.A.) at paras. 18-20.

84 Again, it is important to remember the "hats" Mathieu wears in relation to JRS. Mathieu and his company have rights as set out in *The Corporations Act* to the financial records of JRS independent of the arbitration, based on their status as a shareholder

TAB 20

Residential Warranty Co. of Canada Inc., Re

2006 ABCA 293, 2006 CarswellAlta 1354 | Alberta Court of Appeal | Alberta | October 10, 2006

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
All Citations:	2006 ABCA 293, 2006 CarswellAlta 1354, [2006] 12 W.W.R. 213, [2006] I.L.R. I-4552, [2006] A.W.L.D. 3143, 153 A.C.W.S. (3d) 273, 25 C.B.R. (5th) 38, 275 D.L.R. (4th) 498, 410 W.A.C. 153, 417 A.R. 153, 65 Alta. L.R. (4th) 32

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Outline

2006 ABCA 293
Alberta Court of Appeal

Residential Warranty Co. of Canada Inc., Re

2006 CarswellAlta 1354, 2006 ABCA 293, [2006] 12 W.W.R. 213, [2006] I.L.R. I-4552, [2006] A.W.L.D. 3143, 153 A.C.W.S. (3d) 273, 25 C.B.R. (5th) 38, 275 D.L.R. (4th) 498, 410 W.A.C. 153, 417 A.R. 153, 65 Alta. L.R. (4th) 32

Kingsway General Insurance Company (Appellant / Applicant) and Deloitte & Touche Inc., Trustee In Bankruptcy of Residential Warranty Company of Canada Inc. and Residential Warranty Insurance Services Ltd. (Respondent)

J. Côté, M. Paperny JJ.A., D. Sulyma J. (ad hoc)

Heard: September 5, 2006
Judgment: October 10, 2006 *
Docket: Edmonton Appeal 0603-0093-AC

Proceedings: affirming *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.)

Counsel: E.A. Dolden, B.D. Rhodes for Appellant
K.A. Rowan for Respondent

Subject: Insolvency; Estates and Trusts

Headnote

Bankruptcy and insolvency --- Administration of estate — Trustees — Remuneration of trustee — General principles

Bankrupts were in process of winding up home warranty business — Trustee was appointed interim receiver in context of minority shareholder's oppression remedy — Creditor was insurance underwriter of home warranty policies brokered or administered by bankrupts — Creditor filed proofs of claim in estates for approximately $11 million pursuant to contractual, statutory and common law trusts and brought related concurrent action against bankrupts — Trustee gave notice that trust claim was disputed — Trustee maintained that all or substantially all insurance premiums collected by bankrupts for insurance policies were paid to creditor and that balance of estate of bankrupts was income derived from business operations — Creditor appealed trustee's decision — Creditor also brought application for order that trustee was not entitled to utilize realizations of assets and property of bankrupts for purpose of fees and expenses — Application was dismissed and charge for trustee's fees was granted against property that was subject to conflicting, undetermined trust claims — Creditor appealed — Appeal dismissed — There was no basis to disturb case management judge's exercise of discretion — Inherent jurisdiction exists to grant charge on property subject to undetermined trust claims in appropriate circumstances — Case management judge considered relevant factors and applicable law, and carefully constructed limited charge that she viewed as suitable in circumstances — Unique circumstances of case and centrality of trust claims to bankruptcies underscored necessity of trustee's involvement and payment of its fees from property subject to disputed trusts.

APPEAL by creditor from judgment, reported at *Residential Warranty Co. of Canada Inc., Re* (2006), 2006 ABQB 236, 2006 CarswellAlta 383, 62 Alta. L.R. (4th) 168, 21 C.B.R. (5th) 57 (Alta. Q.B.), granting charge for trustee's fees against property subject to undetermined trust claims.

***M. Paperny J.A.*:**

Introduction

13 The trustee anticipates future costs arising from dealing with the validity and priority of the trust claims of Kingsway and various builders.

14 The trustee asserts that because Kingsway's trust claims encompass the entirety of the property under the trustee's administration, the ultimate determination of Kingsway's claim is critical to the administration of these bankruptcies. The trustee is concerned about prejudice to other creditors and competing trust claimants if it is unable to respond to Kingsway's appeal of the disallowance due to lack of funding.

Decision Below

15 The case management judge denied Kingsway's application and granted the trustee's application for a retrospective charge. She also granted the trustee's application for a prospective charge, subject to the trustee filing an interim report with the court confirming the inspectors approved the actions proposed by the trustee, including its involvement in the proceedings to determine Kingsway's trust claim. She stipulated that both the retrospective and prospective charges were subject to challenge by builders with trust claims who had not been given notice of the applications before her. She further ordered the trustee to minimize general estate administration, not to pursue further asset realization without Kingsway's consent or the court's approval, and that Kingsway's appeal from the trustee's disallowance proceed on an expedited basis.

Issues on Appeal

16 This appeal raises the following issues:

1. Does a bankruptcy judge have jurisdiction to order that a trustee's fees be paid from property that is subject to undetermined trust claims?

2. If so, does that jurisdiction include the trustee's fees associated with determination of a trust claim?

3. If jurisdiction exists, what factors should a court consider in exercising its discretion to make such orders?

4. If jurisdiction exists, did the case management judge properly exercise the discretion?

Standard of Review

17 The first three issues raise a question of law, subject to the standard of correctness: *Murphy Oil Co. v. Predator Corp.* (2006), 384 A.R. 251, 2006 ABCA 69 (Alta. C.A.). The fourth issue involves the exercise of discretion of a case management justice and cannot be interfered with in the absence of a palpable or overriding error: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.* (2002), 36 C.B.R. (4th) 272, 2002 ABCA 201 (Alta. C.A.).

Discussion

1. Jurisdiction to order trustee's fees be paid from property subject to undetermined trust claims

18 The *BIA* does not address the ability of a trustee to obtain a charge for its fees on property that is subject to undetermined trust claims. The trustee submits that the jurisdiction to do so is found in the inherent jurisdiction of the bankruptcy court.

19 Section 183(1) of the *BIA* preserves the inherent jurisdiction of the Court of Queen's Bench of Alberta sitting in bankruptcy, stating in part:

> 183. (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancilliary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . . . .
>
> (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;...

20 Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480; *Wasserman, Arsenault Ltd. v. Sone* (2002), 33 C.B.R. (4th) 145 (Ont. C.A.). In *Wasserman*, the trustee applied for an increase in fees in a summary administration bankruptcy. Rule 128 of the *BIA* Rules caps the trustee's fees in summary administration bankruptcies with no permissive or discretionary language. The Ontario Court of Appeal concluded that inherent jurisdiction could not be used to conflict with that legislative expression.

21 Further limitations are based on the nature of the *BIA* - it is a detailed and specific statute providing a comprehensive scheme aimed at ensuring the certainty of equitable distribution of a bankrupt's assets among creditors. In this context, there should not be frequent resort to the power. However, inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*: *Tlustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.); *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 27 C.B.R. (3d) 148 (Ont. Gen. Div. [Commercial List]). It has also been used where there is no other alternative available: *Olympia & York Developments Ltd., Re* (1997), 18 C.B.R. (4th) 243 (Ont. Bktcy.); *City Construction Co., Re* (1961), 2 C.B.R. (N.S.) 245 (B.C. C.A.) and to accomplish what justice and practicality require: *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*.

22 Kingsway asserts that s. 67(1) of the *BIA* prohibits such a charge. That section states:

> 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...

23 Kingsway relies on s. 67 to assert that property held by a bankrupt in trust for others does not form part of the estate and therefore use of inherent jurisdiction to grant a charge on that property would be contrary to the Act. Section 67 does not mean, however, that trust property does not fall within a trustee's administration. It only addresses the division of the bankrupt's property among the creditors; it does not address what property forms the estate that must be administered by the trustee.

24 The Supreme Court of Canada addressed this issue in *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.) at para. 61:

> Unlike provisions of the [BIA] such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property...the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). *While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.*
>
> (Emphasis added)

25 In any event, Kingsway's argument in regard to s. 67 rests on the premise that the property is in fact trust property, a proposition that remains undetermined.

26 Kingsway also asserts that there is no jurisdiction to order that a trustee's fees be paid from property subject to a statutory trust, citing *P.A.T., Local 1590 v. Broome* (1986), 61 C.B.R. (N.S.) 233 (Ont. S.C.) and *C.J. Wilkinson Ford Mercury Sales Ltd., Re* (1986), 60 C.B.R. (N.S.) 289 (Ont. S.C.).

27 In both of those cases, however, the validity of the trusts in question was clear and accepted by the trustee. Further, the question of fees for sorting out their validity was not squarely in issue in either decision. Here, a statutory trust as well as several other trust claims have been asserted but not accepted by the trustee and all remain to be determined by the Court of Queen's Bench.

TAB 21

2004 CarswellAlta 1183
Alberta Court of Queen's Bench

Bearcat Explorations Ltd., Re

2004 CarswellAlta 1183, 3 C.B.R. (5th) 167

In the Matter of the Bankruptcy of Bearcat Explorations Ltd.

In the Matter of Bankruptcy of Stampede Oils Inc.

In the Matter of the Proposals of Bearcat Explorations Ltd. and Stampede Oils Ltd.

Romaine J.

Heard: May 27, 2004
Judgment: May 27, 2004
Docket: Calgary BK01-084659, BK01-084660

Counsel: K. Barr for Proposal Trustee
C. Russell for Bearcat Exploration, Stampede Oils
Ms A. Moulton, J. Kruger, D. Vermette for Knox LLC
R. Beeman for Anadarko
T. Czechowskyj for Locke, Stock & Barrel
Ms J. McJannet for Interim Receiver
B. Davison for Trican

Subject: Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.13 Miscellaneous

Headnote

Bankruptcy and insolvency --- Administration of estate — Miscellaneous issues

Creditor applied for order granting approval for it to advance debtor-in-possession ("DIP") financing of up to $450,000 to bankrupt oil companies — Application allowed — Court has inherent jurisdiction under Bankruptcy and Insolvency Act to order DIP financing — Funds were to be used only for purpose of funding bankruptcy proceedings, allowing bankrupt companies to continue in business during proposal process and for preservation of bankrupts' assets for benefit of creditors.

Table of Authorities

Cases considered by *Romaine J.*:

Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — considered

Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 988 (Ont. Gen. Div. [Commercial List]) — considered

United Used Auto & Truck Parts Ltd., Re (1999), 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

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

Generally — considered

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

Generally — considered

APPLICATION by creditor for order granting approval for it to advance debtor-in-possession financing to bankrupt oil companies.

Romaine J. **(orally):**

1 Through the efforts of Mr. Czechowskyj, I have received a letter from the office of the Superintendent of Bankruptcy, Ms. Maj, the Division Assistant Superintendent, that advises me that the Senate Committee on Banking Trade and Commerce issued a report in the fall of 2003 recommending that amendments be made to both the *Bankruptcy and Insolvency Act* and the *Company's Creditors Arrangement Act* to specifically provide for DIP financing in corporate reorganizations. However, she also advises that the Superintendent of Bankruptcy wishes to remain neutral on this issue at this time.

2 Further to my refusal last week to allow DIP financing that would rank in priority to Knox LLC, Locke, Stock & Barrel Company Ltd. now applies for an order granting approval for it to advance debtor-in-possession financing of up to $450,000 to Bearcat Exploration Ltd. and Stampede Oils Inc. to be a second charge on the assets of Bearcat and Stampede, ranking after the security of Knox but prior to all other secured and unsecured creditors.

3 This application is supported by the secured creditors other than Knox, and, albeit reluctantly, by the unsecured creditors who were represented at the hearing. It is opposed by Knox and Anadarko, for many of the same reasons they opposed the previous application.

4 The Proposal Trustee supports the application on the basis that, without this funding, the issues between Knox and Bearcat and Stampede will not be resolved through a trial process, and that finality on these issues is important to the creditors generally.

5 The first issue, which I did not decide at the time of the last application, is whether DIP financing is available or appropriate under proposal proceedings pursuant to the *Bankruptcy and Insolvency Act*, or whether it should only be available pursuant to the *Companies' Creditors Arrangement Act*. Counsel have been unable to refer a case to me where DIP financing was considered by a court overseeing a bankruptcy proposal process, other than *AgriBio Tech Canada Inc.*, which I have previously indicated is not helpful due to its unusual facts.

6 The courts have found authority for the use of DIP financing in CCAA scenarios both under the legislation and through the exercise of their inherent jurisdiction. The brevity of the CCAA and its remedial nature has allowed the courts to be creative in ensuring the objects of the legislation are met.

7 In contrast, the BIA proposal provisions are specific and detailed. They are designed to provide a quick and inexpensive process for an insolvent debtor to resolve issues with its unsecured creditors and emerge from the proposal process. However, there is nothing in these provisions that precludes the concept of super-priority financing, nor would DIP financing be in conflict with the proposal provisions under the BIA.

8 Inherent jurisdiction is a "residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular, to ensure the observance of the due process of law ... to do justice between the parties and to secure a fair trial between them.": in *Royal Oak Mines Inc., Re* (14 March 1999) Ontario Court File No. 98-CL-3278 (O.S.C.J.) (Com. List) [1999 CarswellOnt 988 (Ont. Gen. Div. [Commercial List])], Farley J. at paragraph 22, citing Halsbury, Volume 37, 4th edition, at paragraph 14. Because it is an extraordinary power, it should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480.

9 I am satisfied that I have the authority through the exercise of inherent jurisdiction to order DIP financing in an appropriate case involving a proposal under the BIA, although such cases may be rare. This is an extraordinary case.

10 As in the previous application, the most important factor to consider is whether the benefit of the financing clearly outweighs the prejudice to the creditors whose security is being subordinated to financing: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]). Given that the proposed financing would no longer have priority over the secured interests of Knox, the balance of equities now rests with granting the order rather than refusing it.

TAB 22

Plancher Heritage Ltée / Heritage Flooring Ltd., Re

2004 NBBR 168, 2004 NBQB 168, 2004 CarswellNB 358 | New Brunswick Court of Queen's Bench | New Brunswick | July 20, 2004

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2004 NBBR 168, 2004 NBQB 168, 2004 CarswellNB 358, [2004] N.B.J. No. 286, 279 N.B.R. (2d) 1, 3 C.B.R. (5th) 60, 732 A.P.R. 1

Outline

Find Details

Search Query:	advanced: NA(Re /3 Heritage /3 Flooring /3 Ltd.)
Jurisdiction:	New Brunswick

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Date:	November 3, 2023 at 1:10 p.m.
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2004 NBBR 168, 2004 NBQB 168
New Brunswick Court of Queen's Bench

Plancher Heritage Ltée / Heritage Flooring Ltd., Re

2004 CarswellNB 358, 2004 NBBR 168, 2004 NBQB 168, [2004]
N.B.J. No. 286, 279 N.B.R. (2d) 1, 3 C.B.R. (5th) 60, 732 A.P.R. 1

In the Matter of The Proposal of Plancher Heritage Ltée / Heritage Flooring Ltd.

Glennie J.

Judgment: July 20, 2004
Docket: 10543, Estate No. 51-114608

Counsel: G. Patrick Gorman, Q.C. for Heritage Flooring Ltd.
Stephen J. Hutchinson, Jeffrey R. Parker, Lee C. Bell-Smith for Royal Bank of Canada

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Proposal — General principles

Test for whether insolvent company would be able to make viable proposal, if granted extension of stay, is whether it would likely, as opposed to certainly, be able to present viable proposal — Test is not whether or not specific creditor would be prepared to support proposal — Purpose of stay provisions under Bankruptcy and Insolvency Act is to preserve and protect status quo at moment when insolvent party files Notice of Intention to Make Proposal — Intention of stay provisions is to allow insolvent party to continue its business in accordance with its existing authorized credit agreements — Secured creditor cannot unilaterally amend loan or credit agreement relating to secured revolving line of credit by capping available line of credit.

MOTION by insolvent company for extension of stay under s.69 of *Bankruptcy and Insolvency Act* and for order that bank return to it all funds taken from its operating accounts.

***Glennie J.*:**

1 On February 11, 2004, Plancher Heritage Ltee / Heritage Flooring Ltd. ("Heritage") filed a Notice of Intention To Make A Proposal (the "Notice of Intention") pursuant to Subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (the "BIA"). A.C. Poirier & Associates Inc. (the "Trustee") consented to act as Trustee under the proposal. Section 69 of the BIA grants a stay (the "Stay") of all creditor actions and remedies against the insolvent person, which stay in this case was to expire on March 12, 2004. On March 12, 2004, I extended the Stay in this matter to Thursday, March 25, 2004 and advised that I would file written reasons for the granting of such an extension. These are those reasons.

2 There is also another issue, namely whether Heritage's banker, Royal Bank of Canada (the "Bank") operated contrary to the stay by sweeping Heritage's operating account and capping its available line of credit or whether the Bank is authorized to do so by virtue of Section 65.1(4)(b) of the BIA.

Background

3 Heritage manufactured hardwood flooring at its plant in Kedgwick, New Brunswick. It had annual gross sales in the range of five to six million dollars.

4 On January 30, 2001, Heritage accepted an offer from the Bank's Asset Based Finance Division to establish a revolving credit facility in favour of Heritage with a credit limit of two million dollars subject to the limitation that the aggregate amount

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

31 I am satisfied, on a balance of probabilities, that as of March 12, 2004 Heritage met the following criteria to grant an extension: a) It had acted, and continued to act, in good faith and with due diligence; b) It would likely be able to make a viable proposal if the extension were to be granted; and, c) no creditor of Heritage would be materially prejudiced if the extension were to be granted.

32 The test for whether Heritage would likely be able to make a viable proposal, if granted the extension, is whether it would likely, as opposed to certainly, be able to present a viable proposal. The test is not whether or not a specific creditor would be prepared to support the proposal. In *Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]), Justice Farley was of the opinion that "viable" means "reasonable on its face" to a reasonable creditor and that "likely" did not require certainty but meant "might well happen", "probable" or "to be reasonably expected." See also *Scotia Rainbow Inc. v. Bank of Montreal* (2000), 18 C.B.R. (4th) 114 (N.S. S.C.).

33 In support of its motion, the Bank relied on Section 50.4(11)(c) of the BIA and argued that Heritage would not be able to make a proposal before the expiration of the 30-day period that would be accepted by the majority of its creditors. It relied upon *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]) in support of its argument. In *Cumberland Trading Inc.*, Skyview International Finance Corporation represented 95 percent of the value of the claims of secured creditors of Cumberland and 67 percent of all creditors' claims. Skyview therefore had a veto power on any vote on a proposal and it asserted that there was no proposal which Cumberland could make that it would approve. Justice Farley allowed Skyview's motion and declared terminated the 30-day period in which to file a proposal.

34 Similarly, in *Com/Mit Hitech Services Inc., Re*, [1997] O.J. No. 3360 (Ont. Bktcy.), Toronto Dominion Bank ("TD Bank") was owed more than 90 percent of the debtor's total indebtedness and brought a motion pursuant to Section 50.4(11) of the BIA requesting a declaration that the 30-day period provided in Section 50.4(8) be terminated. Justice Farley allowed TD Bank's application, recognizing that TD Bank was the overwhelming creditor and thus was in a veto position with respect to any proposal.

35 However, in the present case, the Trustee has advised that the Bank would be outside the terms of any proposal and would in fact be paid out. As well, Gilbert LeBlanc testified that Group Savoie, which has expressed an interest in acquiring all of the outstanding shares of Heritage, understands that the Bank would have to be paid out. Accordingly, the Bank's argument that it is in a position to veto any proposal put forth by Heritage must fail since the Trustee has advised that the Bank will not be in a position to veto any proposal since it will be outside the terms of any proposal and would not be included in any class of creditors of Heritage.

36 In granting an extension of the stay, I relied on the fact that Groupe Savoie Inc. expressed a desire to negotiate with the shareholders of Heritage for the purpose of structuring a transaction whereby it would acquire all of the outstanding shares of Heritage. It was anticipated that negotiations would take place from March 15th to March 17, 2004 "*with a formal letter of intent to be provided no later than Monday, March 22, 2004 and open for acceptance by the shareholders of the Company until 5:00 p.m. on Tuesday, March 23, 2004*." Groupe Savoie is an arms length corporation with substantial assets.

37 At the time of the hearing of Heritage's motion, I was satisfied that Heritage established on a balance of probabilities that an extension was justified. Accordingly, I allowed Heritage's application for an extension of the Stay to March 25, 2004.

The Availability of Credit

38 The next issue to be addressed is whether the Bank acted contrary to the Stay provisions of Section 69 of the BIA by sweeping Heritage's operating account and capping its operating facility subsequent to the date Heritage filed its Notice Of Intention. Heritage argues that by so doing the Bank in effect executed a remedy contrary to Section 69.(1) of the BIA.

TAB 23

Scotian Distribution Services Limited (Re)

2020 NSSC 131, 2020 CarswellNS 256 | Nova Scotia Supreme Court | Nova Scotia | April 6, 2020

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	2020 NSSC 131, 2020 CarswellNS 256, 318 A.C.W.S. (3d) 12, 78 C.B.R. (6th) 258

Find Details

Jurisdiction:	Nova Scotia

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2020 NSSC 131
Nova Scotia Supreme Court

Scotian Distribution Services Limited (Re)

2020 CarswellNS 256, 2020 NSSC 131, 318 A.C.W.S. (3d) 12, 78 C.B.R. (6th) 258

In the Matter of: The Proposal of Scotian Distribution Services Limited

Reg. Raffi A. Balmanoukian

Heard: March 27, 2020
Judgment: April 6, 2020
Docket: 43999, Estate No. 51-2624515

Counsel: Tim Hill, Q.C., for Applicant

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Provincial court adopted essential services model in response to Covid-19 pandemic — Only matters deemed urgent or essential by presiding jurist would be heard and they would be heard by method of least direct personal interaction — Debtor had brought application for extension of time to file proposal, pursuant to s. 50.4(9) of Bankruptcy and Insolvency Act — Application granted — Time to file proposal was extended — Matter was heard by teleconference — Urgent or essential threshold was met — Limitation period in s. 50.4(8) of Act was nigh — Lack of extension would result in deemed assignment in bankruptcy — Deemed assignment would at least potentially have impacts that ran beyond solely individual interests of corporate debtor — Evidence of current status of process established good faith requirement — Debtor had employees and contracts and its operations included transportation which were important and perhaps essential on both micro and macroeconomic basis — No creditor objected and there was no evidence that extension would cause material prejudice to any creditor — Debtor had to demonstrate that it was likely to be able to make viable proposal with extension in place but in current context benefit of any doubt should be accorded to debtor — In current environment, creditor would be well advised to consider viability and desirability of proposal Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 50.4(9).

APPLICATION by debtor for extension of time to file proposal.

***Reg. Raffi A. Balmanoukian*:**

1 The word "Bankrupt" is derived from the Italian "*banca rotta*." In times of yore, an insolvent merchant's place of business would be trashed by irate creditors; the result was a "broken bench."

2 In Nova Scotia, the Bench will not break.

3 During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

4 In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

5 As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

6 It is not business as usual. Virtually nothing is.

16 I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

17 I have granted the order based on the following factors:

18 First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

19 Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; *and* that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

20 The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

21 It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

22 No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the *extension* would be prejudicial, not whether the proposal *itself* would be.

23 This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

24 To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

25 I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish, and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

26 This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

27 The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Application granted.

End of Document

TAB 24

T & C Steel Ltd., Re

2022 SKKB 236, 2022 CarswellSask 534 | Saskatchewan Court of King's Bench | Saskatchewan | October 28, 2022

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2022 SKKB 236, 2022 CarswellSask 534

Find Details

Jurisdiction:	Saskatchewan

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Outline

2022 SKKB 236
Saskatchewan Court of King's Bench

T & C Steel Ltd., Re

2022 CarswellSask 534, 2022 SKKB 236

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, AS AMENDED, OF T & C STEEL LTD. AND T & C REINFORCING LTD.

T & C STEEL LTD. and T & C REINFORCING LTD. (Applicants)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER SECTION 50.4 OF THE BANKRUPTCY AND INSOLVENCY ACT, RSC 1985, C B-3, ASAMENDED, OF UNDER THE SUN GROWERIES INC.

UNDER THE SUN GROWERIES INC. (Applicant)

Scherman J.

Judgment: October 28, 2022
Docket: BKY-RG-00228-2022

Counsel: Travis K. Kusch, David J. Smith, for Applicants
Kelsey J. Meyer, Andrew Basi, for Proposal Trustee

Subject: Insolvency
Headnote
Bankruptcy and insolvency

***Scherman J.*:**

1 Each of T & C Steel Ltd. [TCS], T & C Reinforcing Ltd. [TCR] and Under the Sun Groweries Inc. [UTSG] had given Notices of Intention to Make a Proposal [NOI] to their unsecured creditors. On the filing thereof, Grant Thornton was named as the Proposal Trustee for each. The applications did not include proposals to their secured creditors.

2 On September 13, 2022, Gabrielson J. made an order consolidating the proceedings in BKY-RG-00228-2022 and BKY-RG-00229-2022 respecting TCS and TCR into the court file BKY-RG-00228-2022 and granted, pursuant to s. 50.4(9) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 [BIA], a first extension of the time for those applicants to file their proposal to 11:59 p.m. on October 28, 2022, along with ordering other interim measures. He also made a similar extension order in respect of UTSG.

3 Each of the applicants now asks the court to order an extension of the time to file their respective proposals to creditors to December 9, 2022.

Applicable Legislation and Authorities

4 Section 50.4(9) of the BIA states as follows:

> **Extension of time for filing proposal**

19 The Proposal Trustee then end their Second Reports with the following conclusion:

> 28. The Proposal Trustee believes that granting an extension of time to file a proposal and the continuation of these proceedings is in the best interests of the stakeholders, and preferable to a liquidation in a bankruptcy and/or receivership.

and recommend the Court approve the stay extensions sought.

20 I find the evidentiary and informational basis provided to the Court in support of the extension application to barely meet the test of a likelihood of being able to make a viable proposal. As stated in *Scotian Distribution*, on a first extension, the test "will likely not be a difficult standard to meet". But this is not a first extension.

21 It is only by giving regard to:

> a. the statement in *Enirgi Group* to the effect that "'likely' means 'such as might well happen'";
>
> b. the direction in *Cantrail* quoted above to the effect that is important for the Court to take a broad approach and look at a number of interested and potentially affected parties, including employees and unsecured creditor;
>
> c. recognizing that Grant Thornton is, in providing to the Court their reports, effectively an officer of the court in respect of the conclusions and recommendations they provide, notwithstanding my concerns about the limitations inherent in their reports; and
>
> d. my opinion that the creditors should, where a reasonable possibility of acceptance of a proposal exists, be given the opportunity to decide, since they are the ones who will be primarily affected;

that I am able to conclude that I am satisfied that the applicants "would likely be able to make a viable proposal" if given additional time. I recognize that creditors might view what I might perceive as unviable as to them being viable and acceptable.

22 Accordingly, I am granting the extensions sought and direct that orders shall issue in the form of the draft orders filed on October 21, 2022, on each of the files.

23 In granting the requested second extensions, I wish to make it clear that should the applicants fail to complete their proposals within the time limits set forth in the orders I have made and come to the Court seeking a further extension, they should expect the Court will be requiring better and focused evidence and information on the likelihood of a viable proposal, given the problematic cash flow projections in turn based on unknown "probable and hypothetical assumptions".

24 Because of the attention I have given to these matters and the concerns expressed herein, and in the interests of judicial efficiency, I will remain seized of any future application for a further extension of time.

End of Document

TAB 25

Nautican v. Dumont

2020 PESC 15, 2020 CarswellPEI 30 | Prince Edward Island Supreme Court | P.E.I. | May 8, 2020

Document Details

KeyCite:	KeyCite Green C - This indicates that the decision has no history, but there are treating cases or other citing references to the decision.
All Citations:	2020 PESC 15, 2020 CarswellPEI 30, 319 A.C.W.S. (3d) 18, 79 C.B.R. (6th) 243

Outline

Find Details

Jurisdiction:	P.E.I.

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Date:	November 3, 2023 at 1:12 p.m.
Delivered By:	Natalie Gillespie
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2020 PESC 15
Prince Edward Island Supreme Court

Nautican v. Dumont

2020 CarswellPEI 30, 2020 PESC 15, 319 A.C.W.S. (3d) 18, 79 C.B.R. (6th) 243

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by NAUTICAN RESEARCH AND DEVELOPMENT LTD. Pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Notice of Intention to Make a Proposal filed by CARELI MARINE CORPORATION LIMITED pursuant to Section 50.4 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

IN THE MATTER OF: a Motion by NAUTICAN RESEARCH AND DEVELOPMENT LTD. and by CARELI MARINE CORPORATION LIMITED for Orders pursuant to Sections 50.4(9), 64.2(1), 64.2(2), 50.6(1) and 50.6(3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

James W. Gormley J.

Heard: October 31, 2019
Judgment: May 8, 2020
Docket: S1-GS-28836

Counsel: Michael G. Drake, Sean Corcoran, for Nautican Research and Development Ltd. and Careli Marine Corporation Ltd.
David W. Hooley, Q.C., Melanie McKenna, for David Dumont and Outboard Engineering Group LLC

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Consolidation orders and orderly payment of debts

Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Consolidation would avoid multiplicity of proceedings thereby providing most just, expeditious and least expensive determination of issues — Debtors were closely aligned, as one was holding company that held all issued shares in other and had no employees, no bank account, and no active business activities — Managing director for both debtors was same and both companies shared same major secured creditor — No prejudice in granting consolidation — Creditor agreed to consolidation.

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Creditor brought action against debtor corporations — Debtor corporations entered proceedings under Bankruptcy and Insolvency Act, and trustee was appointed — Debtors brought application for consolidation of bankruptcy proceedings and other relief — Application granted in part — Consolidation of bankruptcy proceedings ordered — Extension of time to file proposal granted — Not shown that debtors were acting in bad faith and it was not shown that funds were being diverted to other entity — There was evidence that viable proposal could be filed — No prejudice to creditor from extension — Tangible assets were subject to seizure order, and intangible assets would be diminished if bankruptcy declared — Administrative charge approved — Debtor in possession loan not authorized — Loan was offered by sole shareholder of debtors and terms requested included super priority over interest of all creditors — Loan was not offered by creditor or non-arm's length party.

APPLICATION by debtors for relief in proceedings under *Bankruptcy and Insolvency Act*.

***James W. Gormley J.*:**

13 I note the following actions have been undertaken by Nautican and Careli:

i) they have retained the professional services of David Boyd of PWC as proposal trustee;

ii) they have retained Mr. Drake of McInnes Cooper to assist in their restructuring; and

iii) since the stay commenced, they are addressing current lease requirements, assessing current employee levels and reviewing client contracts. They have also reduced operating costs and worked with PWC to assess options and formulate viable proposals to creditors.

14 I also note that the proposal trustee states that the debtors have been acting in good faith and have prepared projected statements of cash flow, which have been provided to their creditors.

15 Outbound and Mr. Dumont have raised their concerns of the "possibility" that Nautican may have or is attempting to divert contracts to its US subsidiary to avoid its creditors. Mr. Dumont also has a "feeling" that he was not receiving the same good faith bargaining from Nautican and Careli that he was offering. Although the creditors have concerns, which may or may not be based in fact, they have not produced sufficient evidence to overcome the evidence provided by Nautican and Careli that their activities have been demonstrative of acting in a good faith manner and with due diligence with respect to the preparation of a viable proposal. I find Nautican and Careli have met the first prong of the three part test.

Sub-issue B - Will Nautican and Careli likely be able to make a viable proposal if the extension is granted?

16 I refer again to *Convergix Inc., Re* wherein Glennie J. states as follows:

> [40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

17 Clearly, this creates an objective standard for the court to consider, which is not tied to a specific creditor and particularly in this case, the creditor opposing the request for an extension.

18 The test requires me to consider what a reasonable creditor might expect to happen or what might reasonably be expected to occur. This test requires a dispassionate evaluation, not the position of an advocate of a specific creditor. Nautican and Careli are seeking 45 days to allow the process a chance at success. They have retained consultants, one of which has expressed his opinion that the debtors will likely be able to make a viable proposal if the extension is granted. Nautican and Careli have made efforts in the first 30 days of the stay. This is not a situation of inactivity by the debtors. Although the evidence is not overwhelming on this aspect of the test, it is sufficient to meet the legislative requirement on a balance of probabilities.

19 Although it is clear that Nautican, Careli and Outbound have been involved in lengthy, contentious negotiations and that Outbound believes no viable proposal will be made during the term of the extension, the test is not a subjective one and I find that the evidentiary record provided by Nautican and Careli is sufficient to meet this aspect of the test.

Sub-issue C - If the extension is granted, will any creditors be materially prejudiced?

20 It is clear from the affidavit of Dumont that the major creditors of Nautican and the major creditor of Careli vehemently oppose the motion and argue their position will be materially prejudiced if I order an extension.

21 I note the decision of *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.) wherein Goodfellow J. stated as follows:

TAB 26

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253 | Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy | Ontario | February 3, 1994

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
All Citations:	1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Find Details

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1994 CarswellOnt 253
Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Baldwin Valley Investors Inc., Re

1994 CarswellOnt 253, [1994] O.J. No. 271, 23 C.B.R. (3d) 219

Re proposal of BALDWIN VALLEY INVESTORS INC. and of VARION INCORPORATED

Farley J.

Judgment: February 3, 1994 *
Docket: Doc. 32-65038

Counsel: *Frank Bennett* , for debtor companies.
Larry Crozier , for secured creditor, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Proposal — General

Proposals — Notice of intention — Extension of time — Debtor companies applying for extension of time to file proposal and failing to file within extended time — Companies again applying for extension — Registrar dismissing application upon finding that companies would not be able to make viable proposal — Companies' appeal from registrar's decision dismissed.

Two related debtor companies defaulted on their obligations to their bank. The bank demanded payment from the companies and served notice of intention to enforce its security. The companies filed a notice of intention to file proposals, and each subsequently received an extension to file a proposal. When they failed to file a proposal by the extended time, the companies again applied for an extension of time to file.

The Registrar in Bankruptcy dismissed the applications, upon a finding that the bank, which held about 92 per cent of one company's debt and almost 100 per cent of the other, had lost all confidence in the companies and wanted only to enforce its security. As a result, a viable proposal was not possible. The companies were, therefore, unable to satisfy the statutory burden imposed upon them by s. 50.4(9) of the *Bankruptcy and Insolvency Act* .

The companies appealed.

Held:

The appeal was dismissed.

The registrar did not err in finding that the companies had not satisfied the onus imposed on them by s. 50.4(9).

Appeal from decision of Registrar in Bankruptcy [reported at 23 C.B.R. (3d) 219 at 223] dismissing second application for extension of time to file proposal under *Bankruptcy and Insolvency Act* .

***Farley J.*:**

1 Baldwin Valley Investors Inc. ("Baldwin") and Varion Incorporated ("Varion"), the debtor companies appealed the dismissal of their extension of time to file proposals requests heard January 27, 1994 by Registrar Ferron. The Registrar indicated that he had refused extensions that day with reasons to follow shortly [reported at 23 C.B.R. (3d) 219 at 223]. The matter came before me on January 28th and on consent was adjourned to be heard today when it was expected that reasons would be available, as they in fact were. The Registrar was of the view that the debtor companies had failed to meet all three tests under s. 50.4(9) of the *Bankruptcy and Insolvency Act* , R.S.C. 1985, c. B-3 as amended ("BIA"). That section provides that:

> (9) The insolvent person may, before the expiration of the thirty day period mentioned in subsection (8) or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not

> exceeding in the aggregate five months after the expiration of the thirty day period mentioned in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

This should be contrasted with the termination provisions of s. 50.4(11) which provide that:

> (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (*a*) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (*b*) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question.
>
> (*c*) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (*d*) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that period expired.

2 The facts are as set out in the Registrar's reasons released today. Counsel were agreed that the standard of review was that I had to be satisfied that the Registrar either erred in law or in principle.

3 Let me deal with the middle test of s. 50.4(9)(*b*) that the debtor companies must show that they "would likely be able to make a viable proposal if the extension being applied for were granted". The Registrar appeared to focus on the fact that the Bank, as the 92% creditor of Baldwin and almost 100% creditor of Varion, had lost all confidence in the debtor companies and would not vote for any proposal put forth. However, in my view this is not the test of s. 50.4(9)(*b*). This becomes clear when one examines s. 50.4(11)(*b*) and (*c*); it appears that Parliament wished to distinguish between a situation of a viable proposal (s. 50.4(9)(*b*) and (11)(*b*)) versus a situation in which it is likely that the creditors will not vote for this proposal, no matter how viable that proposal (s. 50.4(11)(*c*) but with no corresponding clause in s. 50.4(9)).

4 It seems to me that "viable proposal" should have to take on some meaning akin to one that seems reasonable on its face to the "reasonable creditor"; this ignores the possible idiosyncrasies of any specific creditor. However, it does appear to me that the draft proposal being floated by the debtor companies is one which proposes making the Bank (which has lost faith with the management of the debtor companies) a partner with the owners of the debtor companies, failing which (a likely certainty in these circumstances) the debtor companies propose that third parties become equity participants instead of the Bank; yet there is no indication of the names and substance of these fallback partners. It does not appear to me that the debtor companies have shown that they are likely to be able to make a viable proposal. While that need not be a certainty: see my views at pp. 10-11 in *Re Cumberland Trading Inc.* released January 24, 1994 [now reported at 23 C.B.R. (3d) 225 , at p. 231]. "Likely" as defined in *The Concise Oxford Dictionary of Current English* , 7th ed. (1987; Oxford, The Claredon Press) means:

> *likely* 1. such as *might well happen* , or turn out to be the thing specified; *probable* . 2. to be *reasonably expected* . [emphasis added]

I do not see the conjecture of the debtor companies' rough submission as being "*likely* ".

TAB 27

Orphan Well Association v. Grant Thornton Ltd.

2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141 | Supreme Court of Canada | Alberta | January 31, 2019

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
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Outline

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

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

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
Adrian Scotchmer, for Intervener, Ecojustice Canada Society
Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-

applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.

Natural resources --- Oil and gas — Constitutional issues — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use

of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Natural resources --- Oil and gas — Statutory regulation — General principles

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.

Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de

la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA was in operational conflict with the provisions of the BIA that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): There is no conflict between Alberta's regulatory regime and the BIA requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the

BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. Only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires

de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif.

Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic

de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 ("EPEA"), s. 1(ddd), and Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 ("OGCA"), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the BIA empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the BIA did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.), which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are

based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

167 The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of

TAB 28

Orphan Well Association v. Trident Exploration Corp

2022 ABKB 839, 2022 CarswellAlta 3672 | Alberta Court of King's Bench | Alberta | December 13, 2022

Document Details

KeyCite:	KeyCite Blue H - This indicates that the decision has some history.
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2022 ABKB 839
Alberta Court of King's Bench

Orphan Well Association v. Trident Exploration Corp

2022 CarswellAlta 3672, 2022 ABKB 839, [2023] A.W.L.D. 259,
[2023] A.W.L.D. 260, 2022 A.C.W.S. 4922, 4 C.B.R. (7th) 258

Orphan Well Association (Applicant) and Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp. (Respondents)

R.A. Neufeld J.

Heard: September 20, 2022
Judgment: December 13, 2022
Docket: Calgary 1901-06244

Counsel: Kelsey J. Meyer, Adam Williams, for Pricewater House Coopers Licence Insolvency Trustee, court appointed receiver and manager of Trident Exploration Corp. and other Trident entities
Kelly J. Bourassa, for ATB Financial
Gregory Plester, Curtis J. Auch, for Woodlands County and Stettler County
Shauna N. Finlay, Moira Lavoie, for Kneehill County
Robyn Gurofsky, Jessica Cameron, Garrett Finegan, for Orphan Well Association
Candice A. Ross, for Alberta Energy Regulator

Subject: Insolvency; Natural Resources; Property; Municipal

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — General principles

Post-receivership taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be assumed by applicant Orphan Well Association (OWA) — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — OWA's entitlement was addressed outside of insolvency regime because it was non-monetary obligation which could not be reduced to provable claim through test in Abitibi, not because it was non-provable — Municipal taxes, on other hand, were neither non-monetary obligation nor incompatible with Abitibi test — Essence of AER super priority was that it was not subject to prioritization because obligation must have been met before distribution could be made to anyone else — Assets subject to AER super priority were not limited to licenced oil and gas wells, pipelines and production facilities — It made no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in Manitok to carve out economic licensed assets from uneconomic ones.

Bankruptcy and insolvency --- Priorities of claims — Claims for municipal taxes and public utilities rates — Secured claims — Taxes

Post-insolvency taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be

assumed by applicant OWA — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — Treatment of municipal taxes was part of sales process presented to and approved by court — Sale of marketable assets without adjustment for municipal taxes, pre- or post-insolvency, was also approved by court as insolvency progressed, with notice to affected municipalities — Municipalities did not oppose sales process application, nor any subsequent application for approval of specific assets sales — It followed that payment of post-insolvency municipal taxes was not necessary to preserve bankrupt's exploration and production assets.

REQUEST by receiver for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership.

***R.A. Neufeld J.*:**

I. The Trident Insolvency

1 Trident is a group of privately-owned oil and gas exploration and production companies and partnerships. As of May 2019, it held interests in approximately 4500 petroleum and natural gas wells across Alberta, of which 3700 were licenced to Trident as operator.

2 On April 30, 2019, Trident issued a press release which advised that:

1) It had been engaged in discussions with the Alberta Energy Regulator (AER) and its lenders regarding restructuring, but without success;

2) As of April 30, 2019, its directors and management had resigned, and Trident had ceased operations and terminated all employees and contractors.

3 Trident's primary obligations at the time consisted of:

1) Abandonment and reclamation obligations (ARO) associated with wells, facilities and pipelines estimated at $407,000,000;

2) Secured debt in the amount of $71,106,000;

3) Unsecured trade debts in the amount of $18,920,921.

4 The effect of Trident's decision was to walk away from its obligations. Its licences were turned back to the AER, and its ARO would be assumed by the Orphan Well Association (OWA) : Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001, s 3(1).

5 The AER, assisted by former (and unpaid) Trident employees and contractors attended to the immediate task of safely suspending Trident's field operations.

6 The OWA took the unusual step of applying to this Court for an order appointing a Receiver.

7 Historically, such an order would have been sought by secured creditors, but with the evolution of case law recognizing a "super priority" for environmental remediation (including ARO for oil and gas operations) and the magnitude of Trident's ARO, a different approach was considered appropriate.

II. Mandate of the Receiver

on end-of-life obligations, but that cost is what is necessary to satisfy the obligations of producers and ensure that wells are safely abandoned and reclaimed. The cost is not levied to generate revenue for the program. That is why the OWA entitlements "define the contours of the bankrupt estate available for distribution": *Redwater* at para 160.

63 Municipal taxes, on the other hand, are neither a non-monetary obligation nor incompatible with the *Abitibi* test. The purpose of municipal taxes is to generate revenue for the municipality: Smoky River Coal Ltd, Re, 2001 ABCA 209 at para 32. The only obligation on the taxpayer is to pay tax. There is no other corresponding regulatory obligation. And, indeed, the *MGA* makes clear that taxes "are recoverable as a debt due to the municipality" and that a taxpayer is a debtor: s. 348, s. 348.1. Taxes are evidently a monetary obligation.

64 Even if I accepted that this case described a competition between claims, the legislation provides instruction about the order in which claims are to be paid. The Municipalities' claims "take priority over the claims of every person except the Crown": *MGA*, s. 348(c). On a plain reading of the *MGA*, the legislature has contemplated where the claims of the Municipalities rank in the priority scheme. And that is second to the Crown.

65 There are those who might characterize the outcome of *Redwater* as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.

66 In my view, *Redwater* shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.

67 I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in *Manitok* to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

B. Are Post Insolvency Municipal Taxes a Necessary Cost of Preservation of Assets?

68 The Municipalities argue that municipal taxes can and should be paid by a Receiver as part as "necessary cost of preservation of assets," and the public interest: See Toronto Dominion Bank v Usarco Ltd (1997), 50 CBR (3d) 127, 1997 CanLII 12417*; Hamilton Wentworth Credit Union Ltd v Courtcliffe Parks Ltd (1995)*, 23 OR (3d) 781, 1995 CanLII 7059; Robert F Kowal Investments Ltd et al v Deeder Electric Ltd (1975) 9 OR (2d) 84, 59 DLR (3d) 492 [Kowal Investments]. The Municipalities conclude that:

> The unique difficulty here is that because both unpaid post-insolvency taxes and unfunded ARO constitute non-provable claims, we essentially have a priorities contest involving two interests that dwell outside the priorities scheme.
>
> The Municipalities agree with the Receiver that there is no legislation nor reported court decisions which give guidance as to how these non-provable claims should be treated as against each other. This makes allocating funds between these claims, which are not "provable claims", a somewhat novel exercise.

69 The AER/OWA dispute that the payment of post-insolvency municipal taxes was a necessary cost of preservation of estate assets. They say that such costs were not necessary to allow assets to be operated, as the Receiver chose not to operate any of the assets — whether marketable or otherwise. Among other considerations, the Receiver did not want to be exposed to any liabilities as an operator. They also argue it cannot be said that payment of property taxes was necessary to preserve assets as that concept is discussed in the case law.

TAB 29

Colossus Minerals Inc., Re

2014 ONSC 514, 2014 CarswellOnt 1517 | Ontario Superior Court of Justice | Ontario | February 7, 2014

Document Details

KeyCite:	KeyCite Yellow Flag - This decision has not been reversed or overruled, but either has some negative history or citing references. (A yellow flag may also indicate citing references that have not yet been editorially analyzed.)
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2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Miscellaneous

Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

TAB 30

R.S.C. 1985, c. C-44, s. 20

s 20.

Currency

20.

20(1)Corporate records

A corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, records containing

(a) the articles and the by-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement;

(b) minutes of meetings and resolutions of shareholders;

(c) copies of all notices required by section 106 or 113; and

(d) a securities register that complies with section 50.

20(2)Directors records

In addition to the records described in subsection (1), a corporation shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committee thereof.

20(2.1)Retention of accounting records

Subject to any other Act of Parliament and to any Act of the legislature of a province that provides for a longer retention period, a corporation shall retain the accounting records referred to in subsection (2) for a period of six years after the end of the financial year to which the records relate.

20(3)Records of continued corporations

For the purposes of paragraph (1)(b) and subsection (2), where a body corporate is continued under this Act, **"records"** includes similar records required by law to be maintained by the body corporate before it was so continued.

20(4)Place of directors records

The records described in subsection (2) shall be kept at the registered office of the corporation or at such other place as the directors think fit and shall at all reasonable times be open to inspection by the directors.

20(5)Records in Canada

If accounting records of a corporation are kept outside Canada, accounting records adequate to enable the directors to ascertain the financial position of the corporation with reasonable accuracy on a quarterly basis shall be kept at the registered office or any other place in Canada designated by the directors.

20(5.1)When records or registers kept outside Canada

Despite subsections (1) and (5), but subject to the *Income Tax Act*, the *Excise Tax Act*, the *Customs Act* and any other Act administered by the Minister of National Revenue, a corporation may keep all or any of its corporate records and accounting records referred to in subsection (1) or (2) at a place outside Canada, if

(a) the records are available for inspection, by means of a computer terminal or other technology, during regular office hours at the registered office or any other place in Canada designated by the directors; and

(b) the corporation provides the technical assistance to facilitate an inspection referred to in paragraph (a).

20(6)Offence
A corporation that, without reasonable cause, fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars.

Amendment History
1994, c. 24, s. 8; 2001, c. 14, s. 10

Currency
Federal English Statutes reflect amendments current to June 20, 2023
Federal English Regulations Current to Gazette Vol. 157:20 (September 27, 2023)

End of Document

R.S.C. 1985, c. C-44, s. 21

s 21.

Currency

21.

21(1)Access to corporate records

Subject to subsection (1.1), shareholders and creditors of a corporation, their personal representatives and the Director may examine the records described in subsection 20(1) during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee.

21(1.1)Requirement for affidavit — securities register

Any person described in subsection (1) who wishes to examine the securities register of a distributing corporation must first make a request to the corporation or its agent or mandatary, accompanied by an affidavit referred to in subsection (7). On receipt of the affidavit, the corporation or its agent or mandatary shall allow the applicant access to the securities register during the corporation's usual business hours, and, on payment of a reasonable fee, provide the applicant with an extract from the securities register.

21(2)Copies of corporate records

A shareholder of a corporation is entitled on request and without charge to one copy of the articles and by-laws and of any unanimous shareholder agreement.

21(3)Shareholder lists

Shareholders and creditors of a corporation, their personal representatives, the Director and, if the corporation is a distributing corporation, any other person, on payment of a reasonable fee and on sending to a corporation or its agent or mandatary the affidavit referred to in subsection (7), may on application require the corporation or its agent or mandatary to provide within 10 days after the receipt of the affidavit a list (in this section referred to as the "basic list") made up to a date not more than 10 days before the date of receipt of the affidavit setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.

21(4)Supplemental lists

A person requiring a corporation to provide a basic list may, by stating in the affidavit referred to in subsection (3) that they require supplemental lists, require the corporation or its agent or mandatary on payment of a reasonable fee to provide supplemental lists setting out any changes from the basic list in the names or addresses of the shareholders and the number of shares owned by each shareholder for each business day following the date the basic list is made up to.

21(5)When supplemental lists to be provided

The corporation or its agent or mandatary shall provide a supplemental list required under subsection (4)

(a) on the date the basic list is furnished, where the information relates to changes that took place prior to that date; and

(b) on the business day following the day to which the supplemental list relates, where the information relates to changes that take place on or after the date the basic list is furnished.

21(6)Holders of options
A person requiring a corporation to furnish a basic list or a supplemental list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares of the corporation.

21(7)Contents of affidavit
The affidavit required under subsection (1.1) or (3) shall state

(a) the name and address of the applicant;

(b) the name and address for service of the body corporate, if the applicant is a body corporate; and

(c) that the basic list and any supplemental lists obtained pursuant to subsection (4) or the information contained in the securities register obtained pursuant to subsection (1.1), as the case may be, will not be used except as permitted under subsection (9).

21(8)Idem
If the applicant is a body corporate, the affidavit shall be made by a director or officer of the body corporate.

21(9)Use of information or shareholder list
A list of shareholders or information from a securities register obtained under this section shall not be used by any person except in connection with

(a) an effort to influence the voting of shareholders of the corporation;

(b) an offer to acquire securities of the corporation; or

(c) any other matter relating to the affairs of the corporation.

21(10)Offence
A person who, without reasonable cause, contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.

Amendment History
2001, c. 14, ss. 11(1)-(3), (5), 135 (Sched., s. 2); 2011, c. 21, s. 16

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R.S.C. 1985, c. C-44, s. 50

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50(1)Securities records

A corporation shall maintain a securities register in which it records the securities issued by it in registered form, showing with respect to each class or series of securities

(a) the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder;

(b) the number of securities held by each security holder; and

(c) the date and particulars of the issue and transfer of each security.

50(2)Central and branch registers

A corporation may appoint an agent or mandatary to maintain a central securities register and branch securities registers.

50(3)Place of register

A central securities register shall be maintained by a corporation at its registered office or at any other place in Canada designated by the directors, and any branch securities registers may be kept at any place in or out of Canada designated by the directors.

50(4)Effect of registration

Registration of the issue or transfer of a security in the central securities register or in a branch securities register is complete and valid registration for all purposes.

50(5)Branch register

A branch securities register shall only contain particulars of securities issued or transferred at that branch.

50(6)Central register

Particulars of each issue or transfer of a security registered in a branch securities register shall also be kept in the corresponding central securities register.

50(7)Destruction of certificates

A corporation, its agent or mandatary, or a trustee as defined in subsection 82(1) is not required to produce

(a) a cancelled security certificate in registered form, an instrument referred to in subsection 29(1) that is cancelled or a like cancelled instrument in registered form six years after the date of its cancellation;

(b) a cancelled security certificate in bearer form or an instrument referred to in subsecton 29(1) that is cancelled or a like cancelled instrument in bearer form after the date of its cancellation; or

(c) an instrument referred to in subsection 29(1) or a like instrument, irrespective of its form, after the date of its expiration.

Amendment History
2011, c. 21, s. 30

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