COURT FILE NUMBER	1901-06027
JUDICIAL CENTRE	CALGARY
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
DEFENDANTS	SOLO LIQUOR STORES LTD., SOLO LIQUOR HOLDINGS LTD., GENCO HOLDINGS LTD., PALI BEDI, JASBIR SINGH HANS and TARLOK SINGH TATLA
PROCEEDING	IN THE MATTER OF THE RECEIVERSHIP OF SOLO LIQUOR STORES LTD. and SOLO LIQUOR HOLDINGS LTD.
APPLICANT	FTI CONSULTING CANADA INC. in its capacity as Court-appointed Receiver and Manager of the assets, undertakings and properties of SOLO LIQUOR STORES LTD. and SOLO LIQUOR HOLDINGS LTD.
DOCUMENT	**BENCH BRIEF of the APPLICANT**
HEARING	**Before Madam Justice C. Dario of the Commercial List, at the Calgary Courts Centre on June 17, 2019 at 2:00 p.m.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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INTRODUCTION

1. FTI Consulting Canada Inc. ("**FTI**") in its capacity as the Court-appointed receiver and manager (the "**Receiver**") of the assets, undertakings and properties (the "**Property**") of Solo Liquor Stores Ltd. ("**Solo Liquor**") and Solo Liquor Holdings Ltd. ("**Solo Holdings**", and together with Solo Liquor, the "**Debtors**"), pursuant to its application dated June 10, 2010 (the "**Application**"), seeks, *inter alia*: (i) authorization, approval and ratification of the sale of the assets (the "**Assets**") of the Debtors (the "**Sale Transaction**") pursuant to the asset purchase agreements (the "**Sale Agreements**", and each a "**Sale Agreement**") attached to the First Report of the Receiver, dated June 7, 2019 and filed June 10, 2019 (the "**First Report**"), between the Receiver, in its capacity as Court-appointed receiver of the Debtors,

and the purchasers identified in each of the Sale Agreements, or their respective nominees (the "**Purchasers**", and each a "**Purchaser**"), on the terms set forth in the Sale Agreements and in accordance with sections 3(k), 3(l) and 3(m) of the receivership order granted on May 1, 2019 by the Honourable Mr. Justice C.M. Jones (the "**Receivership Order**") in these proceedings (the "**Receivership Proceedings**"); and (ii) the assignment of the rights and obligations of the Debtors under the Leases (defined below) to the Purchasers pursuant to this Court's discretion to grant a comparable order to that under its statutory / inherent jurisdiction, namely, section 84.1(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**").

KEY FACTS

Sale Transactions and Assignment of Leases

2. The Receiver has duly marketed and arranged for a sale of the Debtors' Assets through a lengthy and robust sales process, in compliance with the Receivership Order, as set out and described in the First Report, and has entered into eleven Sale Agreements involving the sale of the of Debtors' Assets, including without limitation, lease agreements (the "**Leases**") for the premises upon which the Debtors carried on their business to the respective Purchasers.

3. The Receiver has made significant efforts to obtain the best price for the Assets being sold in the circumstances and therefore, the assignment of the Leases that are included in the Sale Agreements, is just, appropriate and in the best interest of the administration of the Debtors' receivership estate and the stakeholders affected thereby.

4. The Sale Agreements contemplate the assignment of 46 Leases to the Purchasers. The going concern value represents a significant asset of the estate of the Debtors. In order for the Receiver to obtain the going concern value, the Leases must be assigned to the Purchasers as the Purchasers are purchasing the liquor retail business that operates out of these stores. All of the Sale Agreements require, as a condition to completion, that the Leases be assigned to the Purchaser. In the event that there is a counter-party to a Lease that opposes the subject assignment, the Receiver is seeking a court order compelling the assignment of same.

5. Without the ability to assign the Leases to the Purchasers, the Receiver would have no ability to sell the stores as a going concern and would therefore, be effectively liquidating inventory. The going concern value of the Sale Agreements is estimated to be approximately $20.2

million, allocated as follows: (i) $15.2 million for going concern value; and, (ii) $5.1 million for inventory. If the Receiver was simply liquidating inventory, the estate would lose the $15.2 million of going concern value generated through the Sale Agreements. The going concern value represents 75% of the total recoveries.

6. The transfer of the Assets, specifically the Leases, is a crucial component of the Sale Transaction. In the event that the Receiver is unable to obtain the consent to any Lease that requires it, the Receiver hereby submits to this Honourable Court that an approval of the assignment of these agreements, pursuant to this Court's discretion to grant a comparable order to that under its statutory / inherent jurisdiction under section 84.1(1) of the BIA, be granted for the reasons set forth herein.

7. ATB Financial ("**ATB**") and Crown Capital Partner Funding, LP ("**Crown Capital**") support the proposed sale to the Purchasers.

Bankruptcy

8. The Receiver has respectfully requested this Court to declare and adjudge that the Receiver be appointed as trustee in bankruptcy of each of the Debtors, as bankruptcy with respect to the remaining property of the Debtors, *inter alia*, will allow for an efficient and orderly winding down of their respective estates, and will allow for an alignment of priority claims and the crystallizing of various creditor claims

9. Deryck Helkaa, of the City of Calgary, in the Province of Alberta, is a personal qualified to act as trustee in bankruptcy (the "**Proposed Trustee**") of the Assets and has agreed to act as such.

10. ATB and Crown Capital, supports the proposed Bankruptcy and supports Deryck Helkaa of FTI to act as the Proposed Trustee.

ISSUE TO BE DECIDED

11. One of the issues for determination before this Court is whether this Honourable Court should grant an order assigning the Leases in favour of the Purchasers. The rest of the issues for determination before this Court will be via oral submissions.

LAW AND ANALYSIS

12. As the Receiver has requested that this Court exercise its discretion to grant a comparable order to that under its statutory jurisdiction under section 84.1(1) of the BIA, the legal analysis conducted herein will follow an analysis that would be conducted under section 84.1(1) of the BIA. Section 84.1(1) of the BIA authorizes the Court, upon submission of an application by a *trustee* and on notice to every party to an agreement, to make an order assigning the rights and obligations of a bankrupt under an agreement to any person who is specified by the Court and agrees to the assignment, provided that none of the exclusions in section 84.1(3) apply.

- Section 84.1(1) of the BIA **[Tab 1]**

13. As a preliminary matter:

(a) although section 84.1(1) of the BIA and section 8(2)(b) of the *Landlord's Rights on Bankruptcy Act*, RSA 2000, c L-5 (the "**LRB Act**") grant certain rights to a *trustee* which are not expressly granted to a receiver, the Receiver notes that there is a pending application to put the Debtors into bankruptcy, and the Receiver will likely therefore, also become a trustee as relates to the subject proceedings; thus, the Receiver respectfully submits that it should be able to rely on the application of section 84.1(1) of the BIA and the distinction between a receiver and a trustee is an artificial one in the subject circumstances, and the insolvency statute should be read in a harmonious fashion so not to create differences that practically will not exist;

- Section 84.1(1) of the BIA **[Tab 1]**

- Section 8(2)(b) of the LRB Act **[Tab 2]**

(b) as the thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, ("**CCAA**") and the BIA (*Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 ("***Century Services***"), at para 24, and the assignment of agreement provisions set forth in the subject statutes are analogous, in that they provide the courts discretion to order the assignment of agreements

provided certain prerequisites are met, the Receiver will reference jurisprudence related to the assignment of agreements under the CCAA herein; and

- *Century Services* **[Tab 3]**

(c) the Receiver respectfully submits that as orders assigning agreements are acceptable and have been granted in other insolvency proceedings, namely, under the BIA (section 84.1(1)) and CCAA (section 11.3(1)), it is difficult to comprehend why the same power to grant such an order would not be encompassed in the Court's jurisdiction in receivership. In addition, as the receiver's powers nor the court's authority (including the type of orders that the court may grant) are codified, including without limitation, arguably approval and vesting orders, and because the BIA and CCAA provide for such orders, the Receiver respectfully submits that the courts in receivership have authority to grant such orders even though there is no statutory codification of that power. It is form over substance to require that the receiver become a trustee simply in order to make an application under Section 84.1. For clarity, the Receiver submits that a receiver should be able to do directly what it may do indirectly.

14. The assignment of the Leases is not prohibited under section 84.1(3): (i) the Leases are not by their nature non-assignable; (ii) each of the Leases was entered into prior to the date of bankruptcy; and (iii) the Leases are neither eligible financial contracts nor collective agreements – all of which would be an exception to the Receiver exercising its rights under section 84.1(1) of the BIA.

15. In granting an order comparable to that under section 84.1(1) of the BIA, this Honourable Court should consider:

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

(b) whether it is appropriate to assign the rights and obligations to that person.

- Section 84.1(4) of the BIA **[Tab 1]**

- *Hutchingame Growth Capital Corporation v Independent Electricity System Operator*, 2019 ONSC 259 at para 99 **[Tab 4]**

16. Section 66(1) of the BIA imports the provisions of the BIA with respect to bankruptcy into the proposal scheme. Section 66(1.1) specifically refers to assignments under section 84.1(1) and, in addition to the considerations set forth in Paragraph 15(a) and (b) above, imports a third consideration for the Court in making an order assigning assets, namely (c) whether the trustee approves the proposed assignment.

- Sections 66(1) and 66(1.1) of the BIA **[Tab 5]**

17. In *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd.*, 2011 ABCA 158 ("***Ford***"), the Alberta Court of Appeal considered the purpose and interpretation of section 84.1 in the context of the assignment of an agreement that was opposed by the counter-party. The Alberta Court of Appeal held:

> [30] The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors … are compromised.
>
> …
>
> [37] Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.
>
> [38] The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.
>
> [39] The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.
>
> [Emphasis added]

- *Ford* **[Tab 6]**

18. In *Ford*, the Alberta Court of Appeal upheld the decision of a chambers judge granting an order pursuant to section 84.1(1) of the BIA, authorizing the assignment of an auto dealership agreement over the objections of the non-debtor counter-party to the agreement:

> [71] In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights and remedies under the agreement would carry on unchanged. That decision was reasonable; deference should be accorded to it.

- *Ford* **[Tab 6]**

19. The Receiver submits that each of the three factors set out in the BIA is satisfied and the assignment of the Leases is consistent with the purpose of section 84.1 of the BIA for the reasons that follow.

A. The Purchasers are able to perform the obligations under the Leases

20. As a preliminary matter, the *"CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another…[and]… [t]he desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required"* (*Dundee Oil and Gas Limited (Re)*, 2018 ONSC 3678 at paras 29 and 38 ("***Dundee***")). Thus, any requirement of a counter-party opposing the assignment for financial covenants and safeguards not previously required as relates to the Lease, should not be taken into consideration when assessing the Purchasers' ability to perform the obligations under the Leases.

- *Dundee* **[Tab 7]**

21. The uncontroverted evidence before this Honourable Court supports the conclusion that the Purchasers will be able to comply with the obligations under the Leases. The Purchasers are solvent and adequately capitalized, and are able and willing to perform the obligations they will assume under the agreements to be assigned pursuant to the Application. Specifically, as

set out in greater detail in Paragraph 56(c)(ii) of the First Report, the following facts are relevant:

(a) the Purchasers have paid substantial deposits;

(b) each Purchaser will be required to, and are able to, fund the full purchase price, which will fund any rental arrears related to the respective Lease(s) it will be acquiring, prior to the applicable Lease(s) being assigned; and

(c) the Purchasers have at least as strong of credit and ability to perform the obligations under the respective Leases than the Debtors, which are insolvent and have been insolvent for an extended period of time.

22. In addition, the obligations created under the Leases are not particularly onerous and are not out of the ordinary for a commercial lease, and the operation of a liquor store does not require a high degree of sophistication or brand recognition.

B. It is appropriate that the Leases be assigned to the Purchasers

23. The Receiver submits that each Purchaser is an appropriate person for the assignment of the applicable Lease(s). The following facts support this conclusion:

(a) There is no evidence of any prejudice to the counter-parties to the Leases, and it would be disruptive to the Sale Transaction if the Leases were not transferred to the Purchasers. Having received no other qualified bid, failure to conclude the Sale Transaction would result in lower realization by creditors, and other stakeholders.

(b) The assignment of the Leases to the Purchasers is a condition precedent to the obligations of the Receiver under the Sale Agreements. Without such assignment, the Receiver runs the risk of being unable to close the Sale Transaction.

(c) Either the Receiver or the Purchaser will cure any monetary defaults under the Leases on or before the date that the Lease is assigned to the Purchaser and therefore, all monetary defaults that have occurred under the subject Leases, with the exception of those arising by reason only of the Debtors' insolvency, the commencement of the

Receivership Proceedings or failure to perform a non-monetary obligation, will be remedied.

- Section 84.1(5) of the BIA **[Tab 1]**

(d) The assignment will benefit creditors by protecting and enhancing the value of the estate of the Debtors.

(e) Given the large number of consents required to assign the 46 Leases to the Purchasers, it would be appropriate to assign the Receiver's rights and obligations to the Purchasers under the Leases. It would be extremely inefficient, and significantly extend the timeframe if the Receiver was required to obtain the consents of each of the counter-parties to the 46 Leases. If such consents are required, the Receiver respectfully submits that during the extended period of time that the Receiver will require to obtain the consents, the value of the Assets will erode as the Receiver only has access to limited funds to operate the business of the Debtors. In addition, the lengthier the Receivership Proceedings, the greater the loss to the customer goodwill. The requested assignment under this Court's right to exercise its discretion to grant a comparable order to that under its statutory jurisdiction under section 84.1(1) of the BIA would allow the Receiver to obtain the maximum benefit for creditors, and as noted herein, a counter-party to a Lease will be in a better position to have a Purchaser as its counter-party to the subject Lease than the Debtors, who are insolvent, as the Purchaser will be in at least a better financial position than the Debtor, the landlord's arrears will be paid up, and the subject landlord will be in the same position as its rights and remedies under the relevant Lease will survive.

(f) Assignment of the Leases will allow the Purchasers to step into the shoes of the Receiver, ensuring a smooth transition for the benefit of counter-parties and other stakeholders.

24. In addition, as noted above, insolvency statutes should be read in a harmonious fashion so not to create differences that do not exist, and given that the assignment of agreements provisions set forth in the BIA (section 84.1(1)) and CCAA (section 11.3(1)) closely mirror one another, it is therefore noteworthy to consider the additional reasons of Justice Spence of the Ontario

Superior Court of Justice in *Playdium Entertainment Corp., Re,* 2001 CanLII 28282 (ONSC), 2001 CarswellOnt 4109 ("***Playdium Supplemental***"), in which case the Court approved the assignment of a material agreement against the wishes of the counter-party to the agreement (para 44), as the assignment was appropriate in the circumstances and in keeping with the purposes and sprit of the CCAA:

> [42] Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

- Section 84.1(1) of the BIA **[Tab 1]**
- Section 11.3(1) of the CCAA **[Tab 8]**
- *Playdium Supplemental* **[Tab 9]**

25. In *Playdium Entertainment Corp., Re,* 2001 CanLII 28281 (ONSC), 2001 CarswellOnt 3893 ("***Playdium***") the subject agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld (para 16). Famous Players argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding, *inter alia*, how their agreement would be brought into good standing (para 16). With exception of the CCAA Order in place, the Court concluded that there could be no assignment but that the CCAA Order affords *"...a context in which the court has jurisdiction to make the order"* (para 23) even if it would not have been unreasonable for Famous Players to withhold its consent to the assignment – a path that the Supreme Court of British Columbia was prepared to adopt in *Hayes Forest Services Limited (Re),* 2009 BCSC 1169 (CanLII) at para 31 ("***Hayes***") — a case which involved CCAA proceedings.

- *Playdium* **[Tab 10]**
- *Hayes* **[Tab 11]**

26. The question to ask when determining the reasonableness of withholding consent to assignment is whether a reasonable person would have withheld consent in the circumstances,

taking into account such factors as the commercial realities of the marketplace, the economic impact of the assignment and the financial position of the proposed assignee.

- *Hayes*, at para 32 **[Tab 11]**

27. Applying the test from *Hayes*, the Receiver respectfully submits that a reasonable person in the subject circumstances would not withhold consent. The commercial reality of a liquor store is that tenants ought to be substitutable, the economic impact of the assignment is preferable to liquidation given the potential prejudice to creditors, and the financial position of the Purchasers is better than the financial position of the Debtors. The landlords will retain their remedies against the Purchasers as provided for in the Leases and applicable law if the relevant Purchaser fails to carry out its obligations. The commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed Purchasers all support the conclusion that withholding consent is unreasonable in the circumstances. Given the foregoing, the Receiver submits that the opposing counter-parties are unreasonably withholding consent.

28. In *Ford*, the Chambers Judge concluded that Ford had unreasonably withheld its consent as it had not taken into account the merits of the proposed assignee. As noted above, the Purchasers, *inter alia*, have paid substantial deposits, and have a stronger credit and ability to perform the obligations under the respective Leases than the Debtors.

- *Ford*, at para 67 **[Tab 6]**

29. Furthermore, pursuant to section 8(2)(b) of the LRB Act, a trustee, notwithstanding absence of consent from the landlord, even where such consent is required, can assign a leasehold interest to a successful tenderer. The purpose of section 8(2)(b) of the LRB Act is set forth in the Court of Appeal of Alberta decision in *Re Robinson, Little & Company*, 1987 ABCA 241 (CanLII), 67 CBR. (NS) 23 ("***Re Robinson***"):

> [8] ... the purpose of ss.(b) is to permit the trustee to put his assignee in the same legal position *vis-à-vis* the landlord under the lease as that held by the bankrupt lessee immediately before bankruptcy. The intent is to enable the trustee...to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease than it would have been in *vis-à-vis* its lessee before bankruptcy. The landlord's protection is in the requirement of s. 8(2)(b)(iii) that the assignee be a person found by the court to be fit and proper

> to take the position of the former lessee. The trustee is but a conduit in effecting this substitution.
>
> [Emphasis added]

- Section 8(2)(b) of the LRB Act **[Tab 2]**
- *Re Robinson* at para 8 **[Tab 12]**
- *Bank of Montreal v Phoenix Rotary Equipment Ltd*, 2007 ABQB 86 at para 1 ("***Phoenix***") **[Tab 13]**

30. The Standing Senate Committee on Banking, Trading and Commerce, tabled a report ("**Senate Committee Report**") reviewing the BIA and CCAA in November 2003, pursuant to which the Committee made the following recommendation:

> [137-138] [T]rustees, Court-appointed receivers and monitors should be able to assign executory contracts where doing so would enhance the value of the assets and, thereby, moneys available for distribution to creditors. We recognize that while this circumstance would not permit the co-contracting party to choose its commercial partner, we feel that if the co-contracting party is no worse off financially, it would suffer no prejudice.

- Senate Committee Report **[Tab 14]**

31. Honourable Madam Justice M.B. Beilby in *Phoenix* acknowledged the application of section 8(2)(b) of the LRB Act to the Receiver by expressly stating:

> [51] … to prevent the Receiver/Trustee from realizing upon the most valuable asset of the companies in receivership would be to defeat the Legislature's intent in passing the LRB Act. That intent was described by Belzil, J.A. in ***Re Robinson***, *supra*, where he stated in paragraph 8: "The intent is to enable the trustee...to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease as it would have been in a *vis-a-vis* its lessee before bankruptcy."

- *Phoenix* **[Tab 13]**

32. Given that either the Receiver or the Purchaser will cure any monetary defaults under the Lease(s) on or before the date that the Lease is assigned to the Purchaser and therefore, all monetary defaults that have occurred under the subject Lease(s), with the exception of those arising by reason only of the Debtors' insolvency, the commencement of the Receivership Proceedings or failure to perform a non-monetary obligation, will be remedied, the landlord will not be put in a worse position under the Lease(s) than it would have been in *vis-à-vis* its

lessee before bankruptcy; rather, the landlord will be in a better position as all monetary defaults will have been cured and it will suffer no prejudice. The Receiver respectfully submits that, to prevent the Receiver from realizing on the most valuable assets of the Debtors would be to defeat the Legislature's intent in passing the LRB Act and section 84.1(1) of the BIA.

33. For the foregoing reasons, it is respectfully submitted that this Honourable Court should find it appropriate to make an order assigning the Leases, if necessary. As the Receiver only received a formal opposition on Thursday June 13th, 2019 from one landlord, namely, 1684909 Alberta Ltd., who is the successor in title to Bruce Hagel and Nathalic Hagel from which Solo Liquor Store (Stony Plan) Ltd. carried on business, and as the Receiver has not presently received any other *formal* objection to assignment from any other counter-party, if any such objection is received, the Receiver may provide supplemental materials or argue the merits of the objection at the hearing of the motion.

C. The Receiver and the Proposed Trustee approve of the Assignments to the Purchasers

34. The Proposed Trustee has informed the Receiver that, if the order is required, it supports the Receiver's request that this Court exercise its discretion to order the assignment of the applicable Leases, on the terms of the Approval and Vesting Order sought *vis-à-vis* the Application.

D. The Assignment is consistent with the purpose of section 84.1

35. The assignment of the Leases is a condition precedent to the closing of the Sale Transaction. Without such assignments, the Receiver would be unable to close the Sale Transaction, the estate would lose the $15.2 million of going concern value granted through the Sale Agreements, and the Receiver would lose the benefit of the purchase price as well as being relieved of the landlords' claims in the proposal.

36. In *Ford*, it was noted that the purpose of section 84.1 of the BIA is to permit the realization of an asset of the insolvent person's estate notwithstanding the objections of the counter-party (para 30). The mere fact that the counter-party to the Lease objects to the assignment of same, as a result of its contractual right to do so or otherwise, does not prevent this Honourable

Court from ordering the assignment, provided that the other factors under section 84.1 of the BIA are met. In this instance the test is met and the Leases should be assigned.

- *Ford* **[Tab 6]**

37. *Ford* set forth three important propositions: (i) section 84.1 should be interpreted in the context of its role as remedial legislation; (ii) to be insulated from assignment, the Lease(s) must be truly personal in nature; and (iii) contracting parties, in this case the landlords to the Leases, must provide strong evidence to establish that the Purchasers are not capable of performing the assignment.

- *Ford*, at paras 36, 43, 52 and 62 **[Tab 6]**

38. Any counter-parties attempting to oppose an assignment under section 84.1 of the Leases must marshal evidence demonstrating that the subject Purchaser is not up to the job (*Ford*, at para 62). No opposing co-contracting party has marshalled strong evidence to establish that a proposed Purchaser is not capable of performing the assignment and the requirement to be "able to perform the obligations" does not *"give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor"* (*Dundee*, at para *30*).

- *Ford* **[Tab 6]**

- *Dundee* **[Tab 7]**

SUMMARY

39. The Receiver respectfully requests that this Honourable Court consider: (i) the unreasonableness of a landlord's refusal to consent, if any; (ii) the uncontroverted evidence that the Purchasers are able, capable, and willing to perform the obligations under the Leases; (iii) the fact that the completion of the Sale Transaction will substantially cure earlier breaches of the Purchased Agreements; (iv) the fact that co-counter-parties rights and remedies under the agreement will carry on unchanged; (v) the co-contracting party is no worse off financially and would not suffer prejudice; (vi) the opposing co-contracting parties have not brought evidence demonstrating how they could be prejudiced by the assignment; and (vii) this

Honourable Court has the discretion to approve the assignment of the Leases in spite of the objections of the counter-party in order to retain the value of the Leases for the estate and its creditors.

40. The purpose of the BIA and the discretion provided to the court under section 84.1, as well as the Court's ability to exercise its discretion in receivership proceedings, support the conclusion that, where appropriate, a Receiver should be able to apply to have the Purchased Agreements assigned notwithstanding the absence of consent from a landlord and/or a landlord opposing such assignment. As noted above, having received no other qualified bid, failure to conclude the Sale Transaction would result in lower realization by creditors, and other stakeholders, and for the reasons set forth above, this Honourable Court should exercise its discretion to grant a comparable order under the Court's statutory jurisdiction.

41. The Receiver thus asks this Honourable Court to grant the Approval and Vesting Orders and assign the Leases to the Purchasers notwithstanding any opposition from counter-parties to the Leases given that all conditions set forth under section 84.1 of the BIA have been met.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF JUNE, 2019.

TORYS LLP

Per: Kyle D. Kashuba

Tab 1

Assignment of agreements

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

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only rights and obligations in relation to the business may be assigned.

Exceptions

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

(a) an agreement entered into on or after the date of the bankruptcy;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and

(b) whether it is appropriate to assign the rights and obligations to that person.

Restriction

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(6) The applicant is to send a copy of the order to every party to the agreement.

2005, c. 47, s. 68 2007, c. 29, s. 97 2009, c. 31, s. 64.

Tab 2

Retention of premises by trustee

8(1) This section applies only to premises leased by

(a) a retail merchant, wholesale merchant, commission merchant or manufacturer, or

(b) a person whose ostensible occupation is buying and selling goods, wares or merchandise that are ordinarily the subject of trade and commerce,

and used by the lessee for the purposes of that trade.

(2) Notwithstanding the legal effect of a provision or stipulation in the lease, the trustee

(a) may, at any time while the trustee is in occupation of leased premises for the purposes of the trust estate and before the trustee has given notice of intention to surrender possession, or disclaimed, elect to retain the leased premises for the whole or a portion of the unexpired term, and

(b) may, on payment to the landlord of all overdue rent, assign the lease to a person who

(i) will covenant to observe and perform its terms,

(ii) will agree to conduct on the demised premises a trade or business that is not reasonably of a more objectionable or more hazardous nature than that that was conducted on the premises by the lessee, and

(iii) is on application of the trustee approved by the Court of Queen's Bench as a person fit and proper to be put into possession of the leased premises.

(3) Notwithstanding subsection (2), before the person to whom the lease is assigned may go into occupation, the person shall

(a) deposit with the landlord a sum equal to 6 months' rent, or

(b) supply to the landlord a guarantee bond approved by the Court of Queen's Bench in a penal sum equal to 6 months' rent,

as security to the landlord that the person will observe and perform the terms of the lease and the covenants made by the person with respect to the person's occupation of the premises.

Tab 3

Century Services Inc. *Appellant*

v.

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

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

2010 SCC 60

File No.: 33239.

2010: May 11; 2010: December 16.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

Century Services Inc. *Appelante*

c.

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

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

2010 CSC 60

N° du greffe : 33239.

2010 : 11 mai; 2010 : 16 décembre.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

By Deschamps J.

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

By Fish J.

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

By Abella J. (dissenting)

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

Statutes and Regulations Cited

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

Jurisprudence

Citée par la juge Deschamps

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

Citée par le juge Fish

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

Citée par la juge Abella (dissidente)

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

Lois et règlements cités

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

the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(*f*).

Winding-up Act, R.S.C. 1985, c. W-11.

Loi de l'impôt sur le revenu, L.R.C. 1985, ch. 1 (5e suppl.), art. 227(4), (4.1).

Loi édictant la Loi sur le Programme de protection des salariés et modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et d'autres lois en conséquence, L.C. 2005, ch. 47, art. 69, 128, 131.

Loi sur l'assurance-emploi, L.C. 1996, ch. 23, art. 86(2), (2.1).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3, art. 67, 81.1, 81.2, 86 [mod. 1992, ch. 27, art. 39; 1997, ch. 12, art. 73; 2000, ch. 30, art. 148; 2005, ch. 47, art. 69; 2009, ch. 33, art. 25].

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15, art. 222.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36, art. 11 [mod. 2005, ch. 47, art. 128], 11.02 [aj. *idem*], 11.09 [aj. *idem*], 11.4 [mod. *idem*], 18.3 [aj. 1997, ch. 12, art. 125; abr. 2005, ch. 47, art. 131], 18.4 [*idem*], 20 [mod. 2005, ch. 47, art. 131], 21 [aj. 1997, ch. 12, art. 126; mod. 2005, ch. 47, art. 131], 37 [aj. 2005, ch. 47, art. 131].

Loi sur les arrangements avec les créanciers des compagnies, S.C. 1932-33, ch. 36 [mod. 1952-53, ch. 3].

Loi sur les liquidations, L.R.C. 1985, ch. W-11.

Régime de pensions du Canada, L.R.C. 1985, ch. C-8, art. 23.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Senate. *Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, p. 2147.

Canada. Senate. Standing Committee on Banking, Trade and Commerce. *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of*

Doctrine citée

Canada. Chambre des communes. *Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15.

Canada. Comité consultatif en matière de faillite et d'insolvabilité. *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité*. Ottawa : Ministre des Approvisionnements et Services Canada, 1986.

Canada. Comité d'étude sur la législation en matière de faillite et d'insolvabilité. *Faillite et Insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité*. Ottawa : Information Canada, 1970.

Canada. Industrie Canada. Direction générale des politiques-cadres du marché. *Rapport sur la mise en application de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*. Ottawa : Direction des politiques du droit corporatif et de l'insolvabilité, 2002.

Canada. Sénat. Comité sénatorial permanent des banques et du commerce. *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrange-*

the Study Committee on Bankruptcy and Insolvency Legislation. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

Edwards, Stanley E. "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587.

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto: Thomson Carswell, 2008, 41.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

ments avec les créanciers des compagnies. Ottawa : 2003.

Canada. Sénat. *Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont. : Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal : Thémis, 2009.

Edwards, Stanley E. « Reorganizations Under the Companies' Creditors Arrangement Act » (1947), 25 *R. du B. can.* 587.

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (en ligne : http://www.cairp.ca/publications/submissions-to-government/law-reform/index.php).

Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis Sarra. « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007*. Toronto : Thomson Carswell, 2008, 41.

Jones, Richard B. « The Evolution of Canadian Restructuring : Challenges for the Rule of Law », in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto : Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto : Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. « Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy » (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest : Restructuring Insolvent Corporations*. Toronto : University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto : Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont. : LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto : Irwin Law, 2009.

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

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

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

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

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

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

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

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

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

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

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

1. Facts and Decisions of the Courts Below

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

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

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

1. Faits et décisions des juridictions inférieures

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

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

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

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

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

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

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

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

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

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

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

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

2. Issues

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

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

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

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

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

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

2. Questions en litige

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

(1) Le paragraphe 222(3) de la *LTA* l'emporte-t-il sur le par. 18.3(1) de la *LACC* et donne-t-il priorité à la fiducie réputée qui est établie par la *LTA* en faveur de la Couronne pendant des procédures régies par la *LACC*, comme il a été décidé dans l'arrêt *Ottawa Senators*?

(2) Le tribunal a-t-il outrepassé les pouvoirs qui lui étaient conférés par la *LACC* en levant la suspension des procédures dans le but de permettre au débiteur de faire cession de ses biens?

(3) L'ordonnance du tribunal datée du 29 avril 2008 exigeant que le montant de TPS réclamé par la Couronne soit détenu séparément dans le compte en fiducie du contrôleur a-t-elle créé une fiducie expresse en faveur de la Couronne à l'égard des fonds en question?

3. Analysis

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

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

3.1 *Purpose and Scope of Insolvency Law*

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

3. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[20] Ce ne sont pas seulement les tribunaux qui se sont employés à faire évoluer le droit de l'insolvabilité pendant cette période. En 1970, un comité constitué par le gouvernement a mené une étude approfondie au terme de laquelle il a recommandé une réforme majeure, mais le législateur n'a rien fait (voir *Faillite et insolvabilité : Rapport du comité d'étude sur la législation en matière de faillite et d'insolvabilité* (1970)). En 1986, un autre comité d'experts a formulé des recommandations de portée plus restreinte, qui ont finalement conduit à l'adoption de la *Loi sur la faillite et l'insolvabilité* de 1992 (L.C. 1992, ch. 27) (voir *Propositions d'amendements à la Loi sur la faillite : Rapport du Comité consultatif en matière de faillite et d'insolvabilité* (1986)). Des dispositions à caractère plus général concernant la réorganisation des débiteurs insolvables ont alors été ajoutées à la loi canadienne relative à la faillite. Malgré l'absence de recommandations spécifiques au sujet de la *LACC* dans les rapports de 1970 et 1986, le comité de la Chambre des communes qui s'est penché sur le projet de loi C-22 à l'origine de la *LFI* a semblé accepter le témoignage d'un expert selon lequel le nouveau régime de réorganisation de la *LFI* supplanterait rapidement la *LACC*, laquelle pourrait alors être abrogée et l'insolvabilité commerciale et la faillite seraient ainsi régies par un seul texte législatif (*Procès-verbaux et témoignages du Comité permanent des Consommateurs et Sociétés et Administration gouvernementale*, fascicule nº 15, 3e sess., 34e lég., 3 octobre 1991, 15:15-15:16).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 *GST Deemed Trust Under the CCAA*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

222. . . .

. . .

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

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

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

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

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

222. . . .

. . .

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

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

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

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

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

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

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

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

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

18.3 . . .

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

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

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

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

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

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

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

18.3 . . .

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

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

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

18.4 . . .

. . .

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

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

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

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

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

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

18.4 . . .

. . .

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

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

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

Par conséquent, non seulement la *LACC* précise que les créances de la Couronne ne bénéficient pas d'une priorité par rapport à celles des autres créanciers (par. 18.3(1)), mais les exceptions à cette règle (maintien de la priorité de la Couronne dans le cas des retenues à la source) sont mentionnées à plusieurs reprises dans la Loi.

[40] Le conflit apparent qui existe dans la présente affaire fait qu'on doit se demander si la règle de la *LTA* adoptée en 2000, selon laquelle les fiducies réputées visant la TPS s'appliquent malgré tout autre texte législatif fédéral sauf la *LFI*, l'emporte sur la règle énoncée dans la *LACC* — qui a d'abord été édictée en 1997 à l'art. 18.3 — suivant laquelle, sous réserve de certaines exceptions explicites, les fiducies réputées établies par une disposition législative sont sans effet dans le cadre de la *LACC*. Avec égards pour l'opinion contraire exprimée par mon collègue le juge Fish, je ne crois pas qu'on puisse résoudre ce conflit apparent

conflicts, apparent or real, and resolve them when possible.

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

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

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

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

en niant son existence et en créant une règle qui exige à la fois une disposition législative établissant la fiducie présumée et une autre la confirmant. Une telle règle est inconnue en droit. Les tribunaux doivent reconnaître les conflits, apparents ou réels, et les résoudre lorsque la chose est possible.

[41] Un courant jurisprudentiel pancanadien a résolu le conflit apparent en faveur de la *LTA*, confirmant ainsi la validité des fiducies réputées à l'égard de la TPS dans le cadre de la *LACC*. Dans l'arrêt déterminant à ce sujet, *Ottawa Senators*, la Cour d'appel de l'Ontario a invoqué la doctrine de l'abrogation implicite et conclu que la disposition postérieure de la *LTA* devait avoir préséance sur la *LACC* (voir aussi *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219 (B.R. Alb.); *Gauntlet*).

[42] Dans *Ottawa Senators*, la Cour d'appel de l'Ontario a fondé sa conclusion sur deux considérations. Premièrement, elle était convaincue qu'en mentionnant explicitement la *LFI* — mais pas la *LACC* — au par. 222(3) de la *LTA*, le législateur a fait un choix délibéré. Je cite le juge MacPherson :

> [TRADUCTION] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[43] Deuxièmement, la Cour d'appel de l'Ontario a comparé le conflit entre la *LTA* et la *LACC* à celui dont a été saisie la Cour dans *Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862, et les a jugés [TRADUCTION] « identiques » (par. 46). Elle s'estimait donc tenue de suivre l'arrêt *Doré* (par. 49). Dans cet arrêt, la Cour a conclu qu'une disposition d'une loi de nature plus générale et récemment adoptée établissant un délai de prescription — le *Code civil du Québec*, L.Q. 1991, ch. 64 (« *C.c.Q.* ») — avait eu pour effet d'abroger une disposition plus spécifique

the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

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

d'un texte de loi antérieur, la *Loi sur les cités et villes* du Québec, L.R.Q., ch. C-19, avec laquelle elle entrait en conflit. Par analogie, la Cour d'appel de l'Ontario a conclu que le par. 222(3) de la *LTA*, une disposition plus récente et plus générale, abrogeait implicitement la disposition antérieure plus spécifique, à savoir le par. 18.3(1) de la *LACC* (par. 47-49).

[44] En examinant la question dans tout son contexte, je suis amenée à conclure, pour plusieurs raisons, que ni le raisonnement ni le résultat de l'arrêt *Ottawa Senators* ne peuvent être adoptés. Bien qu'il puisse exister un conflit entre le libellé des textes de loi, une analyse téléologique et contextuelle visant à déterminer la véritable intention du législateur conduit à la conclusion que ce dernier ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la *LACC*, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a apporté à la *LTA*, en 2000, la modification découlant de l'arrêt *Sparrow Electric*.

[45] Je rappelle d'abord que le législateur a manifesté sa volonté de mettre un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité. Selon le par. 18.3(1) de la *LACC* (sous réserve des exceptions prévues au par. 18.3(2)), les fiducies réputées de la Couronne n'ont aucun effet sous le régime de cette loi. Quand le législateur a voulu protéger certaines créances de la Couronne au moyen de fiducies réputées et voulu que celles-ci continuent de s'appliquer en situation d'insolvabilité, il l'a indiqué de manière explicite et minutieuse. Par exemple, le par. 18.3(2) de la *LACC* et le par. 67(3) de la *LFI* énoncent expressément que les fiducies réputées visant les retenues à la source continuent de produire leurs effets en cas d'insolvabilité. Le législateur a donc clairement établi des exceptions à la règle générale selon laquelle les fiducies réputées n'ont plus d'effet dans un contexte d'insolvabilité. La *LACC* et la *LFI* sont en harmonie : elles préservent les fiducies réputées et établissent la priorité de la Couronne seulement à l'égard des retenues à la source. En revanche, il n'existe aucune disposition législative expresse permettant de conclure que les créances relatives à la

in those Acts carving out an exception for GST claims.

[46] The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

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

TPS bénéficient d'un traitement préférentiel sous le régime de la *LACC* ou de la *LFI*. Alors que les retenues à la source font l'objet de dispositions explicites dans ces deux lois concernant l'insolvabilité, celles-ci ne comportent pas de dispositions claires et expresses analogues établissant une exception pour les créances relatives à la TPS.

[46] La logique interne de la *LACC* va également à l'encontre du maintien de la fiducie réputée établie dans la *LTA* à l'égard de la TPS. En effet, la *LACC* impose certaines limites à la suspension par les tribunaux des droits de la Couronne à l'égard des retenues à la source, mais elle ne fait pas mention de la *LTA* (art. 11.4). Comme les fiducies réputées visant les retenues à la source sont explicitement protégées par la *LACC*, il serait incohérent d'accorder une meilleure protection à la fiducie réputée établie par la *LTA* en l'absence de dispositions explicites en ce sens dans la *LACC*. Par conséquent, il semble découler de la logique de la *LACC* que la fiducie réputée établie par la *LTA* est visée par la renonciation du législateur à sa priorité (art. 18.4).

[47] De plus, il y aurait une étrange asymétrie si l'interprétation faisant primer la *LTA* sur la *LACC* préconisée par la Couronne était retenue en l'espèce : les créances de la Couronne relatives à la TPS conserveraient leur priorité de rang pendant les procédures fondées sur la *LACC*, mais pas en cas de faillite. Comme certains tribunaux l'ont bien vu, cela ne pourrait qu'encourager les créanciers à recourir à la loi la plus favorable dans les cas où, comme en l'espèce, l'actif du débiteur n'est pas suffisant pour permettre à la fois le paiement des créanciers garantis et le paiement des créances de la Couronne (*Gauntlet*, par. 21). Or, si les réclamations des créanciers étaient mieux protégées par la liquidation sous le régime de la *LFI*, les créanciers seraient très fortement incités à éviter les procédures prévues par la *LACC* et les risques d'échec d'une réorganisation. Le fait de donner à un acteur clé de telles raisons de s'opposer aux procédures de réorganisation fondées sur la *LACC* dans toute situation d'insolvabilité ne peut que miner les objectifs réparateurs de ce texte législatif et risque au contraire de favoriser les maux sociaux que son édiction visait justement à prévenir.

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

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

[48] Peut-être l'effet de l'arrêt *Ottawa Senators* est-il atténué si la restructuration est tentée en vertu de la *LFI* au lieu de la *LACC*, mais il subsiste néanmoins. Si l'on suivait cet arrêt, la priorité de la créance de la Couronne relative à la TPS différerait selon le régime — *LACC* ou *LFI* — sous lequel la restructuration a lieu. L'anomalie de ce résultat ressort clairement du fait que les compagnies seraient ainsi privées de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la *LACC*, régime privilégié en cas de réorganisations complexes.

[49] Les indications selon lesquelles le législateur voulait que les créances relatives à la TPS soient traitées différemment dans les cas de réorganisations et de faillites sont rares, voire inexistantes. Le paragraphe 222(3) de la *LTA* a été adopté dans le cadre d'un projet de loi d'exécution du budget de nature générale en 2000. Le sommaire accompagnant ce projet de loi n'indique pas que, dans le cadre de la *LACC*, le législateur entendait élever la priorité de la créance de la Couronne à l'égard de la TPS au même rang que les créances relatives aux retenues à la source ou encore à un rang supérieur à celles-ci. En fait, le sommaire mentionne simplement, en ce qui concerne les fiducies réputées, que les modifications apportées aux dispositions existantes visent à « faire en sorte que les cotisations à l'assurance-emploi et au Régime de pensions du Canada qu'un employeur est tenu de verser soient pleinement recouvrables par la Couronne en cas de faillite de l'employeur » (Sommaire de la L.C. 2000, ch. 30, p. 4a). Le libellé de la disposition créant une fiducie réputée à l'égard de la TPS ressemble à celui des dispositions créant de telles fiducies relatives aux retenues à la source et il comporte la même formule dérogatoire et la même mention de la *LFI*. Cependant, comme il a été souligné précédemment, le législateur a expressément précisé que seules les fiducies réputées visant les retenues à la source demeurent en vigueur. Une exception concernant la *LFI* dans la disposition créant les fiducies réputées à l'égard des retenues à la source est sans grande conséquence, car le texte explicite de la *LFI* elle-même (et celui de la *LACC*) établit ces fiducies et maintient leur effet. Il convient toutefois de souligner que ni la *LFI* ni la *LACC* ne comportent de disposition équivalente assurant le maintien en vigueur des fiducies réputées visant la TPS.

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

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

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

[50] Il semble plus probable qu'en adoptant, pour créer dans la *LTA* les fiducies réputées visant la TPS, le même libellé que celui utilisé pour les fiducies réputées visant les retenues à la source, et en omettant d'inclure au par. 222(3) de la *LTA* une exception à l'égard de la *LACC* en plus de celle établie pour la *LFI*, le législateur ait par inadvertance commis une anomalie rédactionnelle. En raison d'une lacune législative dans la *LTA*, il serait possible de considérer que la fiducie réputée visant la TPS continue de produire ses effets dans le cadre de la *LACC*, tout en cessant de le faire dans le cas de la *LFI*, ce qui entraînerait un conflit apparent avec le libellé de la *LACC*. Il faut cependant voir ce conflit comme il est : un conflit apparent seulement, que l'on peut résoudre en considérant l'approche générale adoptée envers les créances prioritaires de la Couronne et en donnant préséance au texte de l'art. 18.3 de la *LACC* d'une manière qui ne produit pas un résultat insolite.

[51] Le paragraphe 222(3) de la *LTA* ne révèle aucune intention explicite du législateur d'abroger l'art. 18.3 de la *LACC*. Il crée simplement un conflit apparent qui doit être résolu par voie d'interprétation législative. L'intention du législateur était donc loin d'être dépourvue d'ambiguïté quand il a adopté le par. 222(3) de la *LTA*. S'il avait voulu donner priorité aux créances de la Couronne relatives à la TPS dans le cadre de la *LACC*, il aurait pu le faire de manière aussi explicite qu'il l'a fait pour les retenues à la source. Or, au lieu de cela, on se trouve réduit à inférer du texte du par. 222(3) de la *LTA* que le législateur entendait que la fiducie réputée visant la TPS produise ses effets dans les procédures fondées sur la *LACC*.

[52] Je ne suis pas convaincue que le raisonnement adopté dans *Doré* exige l'application de la doctrine de l'abrogation implicite dans les circonstances de la présente affaire. La question principale dans *Doré* était celle de l'impact de l'adoption du *C.c.Q.* sur les règles de droit administratif relatives aux municipalités. Bien que le juge Gonthier ait conclu, dans cet arrêt, que le délai de prescription établi à l'art. 2930 du *C.c.Q.* avait eu pour effet d'abroger implicitement une disposition de la *Loi sur les cités et villes* portant sur la prescription, sa conclusion n'était pas

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

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

[54] I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding

fondée seulement sur une analyse textuelle. Il a en effet procédé à une analyse contextuelle approfondie des deux textes, y compris de l'historique législatif pertinent (par. 31-41). Par conséquent, les circonstances du cas dont était saisie la Cour dans *Doré* sont loin d'être « identiques » à celles du présent pourvoi, tant sur le plan du texte que sur celui du contexte et de l'historique législatif. On ne peut donc pas dire que l'arrêt *Doré* commande l'application automatique d'une règle d'abrogation implicite.

[53] Un bon indice de l'intention générale du législateur peut être tiré du fait qu'il n'a pas, dans les modifications subséquentes, écarté la règle énoncée dans la *LACC*. D'ailleurs, par suite des modifications apportées à cette loi en 2005, la règle figurant initialement à l'art. 18.3 a, comme nous l'avons vu plus tôt, été reprise sous une formulation différente à l'art. 37. Par conséquent, dans la mesure où l'interprétation selon laquelle la fiducie réputée visant la TPS demeurerait en vigueur dans le contexte de procédures en vertu de la *LACC* repose sur le fait que le par. 222(3) de la *LTA* constitue la disposition postérieure et a eu pour effet d'abroger implicitement le par. 18.3(1) de la *LACC*, nous revenons au point de départ. Comme le législateur a reformulé et renuméroté la disposition de la *LACC* précisant que, sous réserve des exceptions relatives aux retenues à la source, les fiducies réputées ne survivent pas à l'engagement de procédures fondées sur la *LACC*, c'est cette loi qui se trouve maintenant à être le texte postérieur. Cette constatation confirme que c'est dans la *LACC* qu'est exprimée l'intention du législateur en ce qui a trait aux fiducies réputées visant la TPS.

[54] Je ne suis pas d'accord avec ma collègue la juge Abella pour dire que l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, permet d'interpréter les modifications de 2005 comme n'ayant aucun effet. La nouvelle loi peut difficilement être considérée comme une simple refonte de la loi antérieure. De fait, la *LACC* a fait l'objet d'un examen approfondi en 2005. En particulier, conformément à son objectif qui consiste à faire concorder l'approche de la *LFI* et celle de la *LACC* à l'égard de l'insolvabilité, le législateur a apporté aux deux textes des modifications allant dans le même sens en ce qui concerne les

the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

propositions présentées par les entreprises. De plus, de nouvelles dispositions ont été ajoutées au sujet des contrats, des conventions collectives, du financement temporaire et des accords de gouvernance. Des clarifications ont aussi été apportées quant à la nomination et au rôle du contrôleur. Il convient par ailleurs de souligner les limites imposées par l'art. 11.09 de la *LACC* au pouvoir discrétionnaire du tribunal d'ordonner la suspension de l'effet des fiducies réputées créées en faveur de la Couronne relativement aux retenues à la source, limites qui étaient auparavant énoncées à l'art. 11.4. Il n'est fait aucune mention des fiducies réputées visant la TPS (voir le Sommaire de la L.C. 2005, ch. 47). Dans le cadre de cet examen, le législateur est allé jusqu'à se pencher sur les termes mêmes utilisés dans la loi pour écarter l'application des fiducies réputées. Les commentaires cités par ma collègue ne font que souligner l'intention manifeste du législateur de maintenir sa politique générale suivant laquelle seules les fiducies réputées visant les retenues à la source survivent en cas de procédures fondées sur la *LACC*.

[55] En l'espèce, le contexte législatif aide à déterminer l'intention du législateur et conforte la conclusion selon laquelle le par. 222(3) de la *LTA* ne visait pas à restreindre la portée de la disposition de la *LACC* écartant l'application des fiducies réputées. Eu égard au contexte dans son ensemble, le conflit entre la *LTA* et la *LACC* est plus apparent que réel. Je n'adopterais donc pas le raisonnement de l'arrêt *Ottawa Senators* et je confirmerais que l'art. 18.3 de la *LACC* a continué de produire ses effets.

[56] Ma conclusion est renforcée par l'objectif de la *LACC* en tant que composante du régime réparateur instauré la législation canadienne en matière d'insolvabilité. Comme cet aspect est particulièrement pertinent à propos de la deuxième question, je vais maintenant examiner la façon dont les tribunaux ont interprété l'étendue des pouvoirs discrétionnaires dont ils disposent lorsqu'ils surveillent une réorganisation fondée sur la *LACC*, ainsi que la façon dont le législateur a dans une large mesure entériné cette interprétation. L'interprétation de la *LACC* par les tribunaux aide en fait à comprendre comment celle-ci en est venue à jouer un rôle si important dans le droit canadien de l'insolvabilité.

3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

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

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

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

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

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by

3.3 *Pouvoirs discrétionnaires du tribunal chargé de surveiller une réorganisation fondée sur la LACC*

[57] Les tribunaux font souvent remarquer que [TRADUCTION] « [l]a *LACC* est par nature schématique » et ne « contient pas un code complet énonçant tout ce qui est permis et tout ce qui est interdit » (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, par. 44, le juge Blair). Par conséquent, [TRADUCTION] « [l]'histoire du droit relatif à la LACC correspond à l'évolution de ce droit au fil de son interprétation par les tribunaux » (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (C. Ont. (Div. gén.)), par. 10, le juge Farley).

[58] Les décisions prises en vertu de la *LACC* découlent souvent de l'exercice discrétionnaire de certains pouvoirs. C'est principalement au fil de l'exercice par les juridictions commerciales de leurs pouvoirs discrétionnaires, et ce, dans des conditions décrites avec justesse par un praticien comme constituant [TRADUCTION] « la pépinière du contentieux en temps réel », que la *LACC* a évolué de façon graduelle et s'est adaptée aux besoins commerciaux et sociaux contemporains (voir Jones, p. 484).

[59] L'exercice par les tribunaux de leurs pouvoirs discrétionnaires doit évidemment tendre à la réalisation des objectifs de la *LACC*. Le caractère réparateur dont j'ai fait état dans mon aperçu historique de la Loi a à maintes reprises été reconnu dans la jurisprudence. Voici l'un des premiers exemples :

> [TRADUCTION] La loi est réparatrice au sens le plus pur du terme, en ce qu'elle fournit un moyen d'éviter les effets dévastateurs, — tant sur le plan social qu'économique — de la faillite ou de l'arrêt des activités d'une entreprise, à l'initiation des créanciers, pendant que des efforts sont déployés, sous la surveillance du tribunal, en vue de réorganiser la situation financière de la compagnie débitrice.

(*Elan Corp. c. Comiskey* (1990), 41 O.A.C. 282, par. 57, le juge Doherty, dissident)

[60] Le processus décisionnel des tribunaux sous le régime de la *LACC* comporte plusieurs aspects. Le tribunal doit d'abord créer les conditions propres à permettre au débiteur de tenter une réorganisation.

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

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

Il peut à cette fin suspendre les mesures d'exécution prises par les créanciers afin que le débiteur puisse continuer d'exploiter son entreprise, préserver le statu quo pendant que le débiteur prépare la transaction ou l'arrangement qu'il présentera aux créanciers et surveiller le processus et le mener jusqu'au point où il sera possible de dire s'il aboutira (voir, p. ex., *Chef Ready Foods Ltd. c. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), p. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, par. 27). Ce faisant, le tribunal doit souvent déterminer les divers intérêts en jeu dans la réorganisation, lesquels peuvent fort bien ne pas se limiter aux seuls intérêts du débiteur et des créanciers, mais englober aussi ceux des employés, des administrateurs, des actionnaires et même de tiers qui font affaire avec la compagnie insolvable (voir, p. ex., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, par. 144, la juge Paperny (maintenant juge de la Cour d'appel); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (C.S.J. Ont.), par. 3; *Air Canada, Re*, 2003 CanLII 49366 (C.S.J. Ont.), par. 13, le juge Farley; Sarra, *Creditor Rights*, p. 181-192 et 217-226). En outre, les tribunaux doivent reconnaître que, à l'occasion, certains aspects de la réorganisation concernent l'intérêt public et qu'il pourrait s'agir d'un facteur devant être pris en compte afin de décider s'il y a lieu d'autoriser une mesure donnée (voir, p. ex., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (C.S.J. Ont.), par. 2, le juge Blair (maintenant juge de la Cour d'appel); Sarra, *Creditor Rights*, p. 195-214).

[61] Quand de grandes entreprises éprouvent des difficultés, les réorganisations deviennent très complexes. Les tribunaux chargés d'appliquer la *LACC* ont ainsi été appelés à innover dans l'exercice de leur compétence et ne se sont pas limités à suspendre les procédures engagées contre le débiteur afin de lui permettre de procéder à une réorganisation. On leur a demandé de sanctionner des mesures non expressément prévues par la *LACC*. Sans dresser la liste complète des diverses mesures qui ont été prises par des tribunaux en vertu de la *LACC*, il est néanmoins utile d'en donner brièvement quelques exemples, pour bien illustrer la marge de manœuvre que la loi accorde à ceux-ci.

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

[62] L'utilisation la plus créative des pouvoirs conférés par la *LACC* est sans doute le fait que les tribunaux se montrent de plus en plus disposés à autoriser, après le dépôt des procédures, la constitution de sûretés pour financer le débiteur demeuré en possession des biens ou encore la constitution de charges super-prioritaires grevant l'actif du débiteur lorsque cela est nécessaire pour que ce dernier puisse continuer d'exploiter son entreprise pendant la réorganisation (voir, p. ex., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (C. Ont. (Div. gén.)); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96, conf. (1999), 12 C.B.R. (4th) 144 (C.S.); et, d'une manière générale, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), p. 93-115). La *LACC* a aussi été utilisée pour libérer des tiers des actions susceptibles d'être intentées contre eux, dans le cadre de l'approbation d'un plan global d'arrangement et de transaction, malgré les objections de certains créanciers dissidents (voir *Metcalfe & Mansfield*). Au départ, la nomination d'un contrôleur chargé de surveiller la réorganisation était elle aussi une mesure prise en vertu du pouvoir de surveillance conféré par la *LACC*, mais le législateur est intervenu et a modifié la loi pour rendre cette mesure obligatoire.

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

[63] L'esprit d'innovation dont ont fait montre les tribunaux pendant des procédures fondées sur la *LACC* n'a toutefois pas été sans susciter de controverses. Au moins deux des questions que soulève leur approche sont directement pertinentes en l'espèce : (1) Quelles sont les sources des pouvoirs dont dispose le tribunal pendant les procédures fondées sur la *LACC*? (2) Quelles sont les limites de ces pouvoirs?

[64] The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against

[64] La première question porte sur la frontière entre les pouvoirs d'origine législative dont dispose le tribunal en vertu de la *LACC* et les pouvoirs résiduels dont jouit un tribunal en raison de sa compétence inhérente et de sa compétence en equity, lorsqu'il est question de surveiller une réorganisation. Pour justifier certaines mesures autorisées à l'occasion de procédures engagées sous le régime de la *LACC*, les tribunaux ont parfois prétendu se fonder sur leur compétence en equity dans le but

purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at paras. 31-33, *per* Blair J.A.).

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

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

[67] The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company . . . on the application of any person interested in the

de réaliser les objectifs de la Loi ou sur leur compétence inhérente afin de combler les lacunes de celle-ci. Or, dans de récentes décisions, des cours d'appel ont déconseillé aux tribunaux d'invoquer leur compétence inhérente, concluant qu'il est plus juste de dire que, dans la plupart des cas, les tribunaux ne font simplement qu'interpréter les pouvoirs se trouvant dans la *LACC* elle-même (voir, p. ex., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236, par. 45-47, la juge Newbury; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), par. 31-33, le juge Blair).

[65] Je suis d'accord avec la juge Georgina R. Jackson et la professeure Janis Sarra pour dire que la méthode la plus appropriée est une approche hiérarchisée. Suivant cette approche, les tribunaux procèdèrent d'abord à une interprétation des dispositions de la *LACC* avant d'invoquer leur compétence inhérente ou leur compétence en equity pour justifier des mesures prises dans le cadre d'une procédure fondée sur la *LACC* (voir G. R. Jackson et J. Sarra, « Selecting the Judicial Tool to get the Job Done : An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters », dans J. P. Sarra, dir., *Annual Review of Insolvency Law 2007* (2008), 41, p. 42). Selon ces auteures, pourvu qu'on lui donne l'interprétation téléologique et large qui s'impose, la *LACC* permettra dans la plupart des cas de justifier les mesures nécessaires à la réalisation de ses objectifs (p. 94).

[66] L'examen des parties pertinentes de la *LACC* et de l'évolution récente de la législation me font adhérer à ce point de vue jurisprudentiel et doctrinal : dans la plupart des cas, la décision de rendre une ordonnance durant une procédure fondée sur la *LACC* relève de l'interprétation législative. D'ailleurs, à cet égard, il faut souligner d'une façon particulière que le texte de loi dont il est question en l'espèce peut être interprété très largement.

[67] En vertu du pouvoir conféré initialement par la *LACC*, le tribunal pouvait, « chaque fois qu'une demande [était] faite sous le régime de la présente loi à l'égard d'une compagnie, [. . .] sur demande

matter, . . . subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

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

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

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

d'un intéressé, [. . .] sous réserve des autres dispositions de la présente loi [. . .] rendre l'ordonnance prévue au présent article » (*LACC*, par. 11(1)). Cette formulation claire était très générale.

[68] Bien que ces dispositions ne soient pas strictement applicables en l'espèce, je signale à ce propos que le législateur a, dans des modifications récentes, apporté au texte du par. 11(1) un changement qui rend plus explicite le pouvoir discrétionnaire conféré au tribunal par la *LACC*. Ainsi, aux termes de l'art. 11 actuel de la *LACC*, le tribunal peut « rendre [. . .] sous réserve des restrictions prévues par la présente loi [. . .] toute ordonnance qu'il estime indiquée » (L.C. 2005, ch. 47, art. 128). Le législateur semble ainsi avoir jugé opportun de sanctionner l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence.

[69] De plus, la *LACC* prévoit explicitement certaines ordonnances. Tant à la suite d'une demande initiale que d'une demande subséquente, le tribunal peut, par ordonnance, suspendre ou interdire toute procédure contre le débiteur, ou surseoir à sa continuation. Il incombe à la personne qui demande une telle ordonnance de convaincre le tribunal qu'elle est indiquée et qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue (*LACC*, par. 11(3), (4) et (6)).

[70] La possibilité pour le tribunal de rendre des ordonnances plus spécifiques n'a pas pour effet de restreindre la portée des termes généraux utilisés dans la *LACC*. Toutefois, l'opportunité, la bonne foi et la diligence sont des considérations de base que le tribunal devrait toujours garder à l'esprit lorsqu'il exerce les pouvoirs conférés par la *LACC*. Sous le régime de la *LACC*, le tribunal évalue l'opportunité de l'ordonnance demandée en déterminant si elle favorisera la réalisation des objectifs de politique générale qui sous-tendent la Loi. Il s'agit donc de savoir si cette ordonnance contribuera utilement à la réalisation de l'objectif réparateur de la *LACC* — à savoir éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable. J'ajouterais que le critère de l'opportunité s'applique non seulement à l'objectif de l'ordonnance, mais aussi aux moyens utilisés. Les tribunaux

stakeholders are treated as advantageously and fairly as the circumstances permit.

[71] It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

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

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

doivent se rappeler que les chances de succès d'une réorganisation sont meilleures lorsque les participants arrivent à s'entendre et que tous les intéressés sont traités de la façon la plus avantageuse et juste possible dans les circonstances.

[71] Il est bien établi qu'il est possible de mettre fin aux efforts déployés pour procéder à une réorganisation fondée sur la *LACC* et de lever la suspension des procédures contre le débiteur si la réorganisation est [TRADUCTION] « vouée à l'échec » (voir *Chef Ready*, p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (C.A.C.-B.), par. 6-7). Cependant, quand l'ordonnance demandée contribue vraiment à la réalisation des objectifs de la *LACC*, le pouvoir discrétionnaire dont dispose le tribunal en vertu de cette loi l'habilite à rendre à cette ordonnance.

[72] L'analyse qui précède est utile pour répondre à la question de savoir si le tribunal avait, en vertu de la *LACC*, le pouvoir de maintenir la suspension des procédures à l'encontre de la Couronne, une fois qu'il est devenu évident que la réorganisation échouerait et que la faillite était inévitable.

[73] En Cour d'appel, le juge Tysoe a conclu que la *LACC* n'habilitait pas le tribunal à maintenir la suspension des mesures d'exécution de la Couronne à l'égard de la fiducie réputée visant la TPS après l'arrêt des efforts de réorganisation. Selon l'appelante, en tirant cette conclusion, le juge Tysoe a omis de tenir compte de l'objectif fondamental de la *LACC* et n'a pas donné à ce texte l'interprétation téléologique et large qu'il convient de lui donner et qui autorise le prononcé d'une telle ordonnance. La Couronne soutient que le juge Tysoe a conclu à bon droit que les termes impératifs de la *LTA* ne laissaient au tribunal d'autre choix que d'autoriser les mesures d'exécution à l'endroit de la fiducie réputée visant la TPS lorsqu'il a levé la suspension de procédures qui avait été ordonnée en application de la *LACC* afin de permettre au débiteur de faire cession de ses biens en vertu de la *LFI*. J'ai déjà traité de la question de savoir si la *LTA* a un effet contraignant dans une procédure fondée sur la *LACC*. Je vais maintenant traiter de la question de savoir si l'ordonnance était autorisée par la *LACC*.

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

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

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

[74] Il n'est pas contesté que la *LACC* n'assujettit les procédures engagées sous son régime à aucune limite temporelle explicite qui interdirait au tribunal d'ordonner le maintien de la suspension des procédures engagées par la Couronne pour recouvrer la TPS, tout en levant temporairement la suspension générale des procédures prononcée pour permettre au débiteur de faire cession de ses biens.

[75] Il reste à se demander si l'ordonnance contribuait à la réalisation de l'objectif fondamental de la *LACC*. La Cour d'appel a conclu que non, parce que les efforts de réorganisation avaient pris fin et que, par conséquent, la *LACC* n'était plus d'aucune utilité. Je ne partage pas cette conclusion.

[76] Il ne fait aucun doute que si la réorganisation avait été entreprise sous le régime de la *LFI* plutôt qu'en vertu de la *LACC*, la Couronne aurait perdu la priorité que lui confère la fiducie réputée visant la TPS. De même, la Couronne ne conteste pas que, selon le plan de répartition prévu par la *LFI* en cas de faillite, cette fiducie réputée cesse de produire ses effets. Par conséquent, après l'échec de la réorganisation tentée sous le régime de la *LACC*, les créanciers auraient eu toutes les raisons de solliciter la mise en faillite immédiate du débiteur et la répartition de ses biens en vertu de la *LFI*. Pour pouvoir conclure que le pouvoir discrétionnaire dont dispose le tribunal ne l'autorise pas à lever partiellement la suspension des procédures afin de permettre la cession des biens, il faudrait présumer l'existence d'un hiatus entre la procédure fondée sur la *LACC* et celle fondée sur la *LFI*. L'ordonnance du juge en chef Brenner suspendant l'exécution des mesures de recouvrement de la Couronne à l'égard de la TPS faisait en sorte que les créanciers ne soient pas désavantagés par la tentative de réorganisation fondée sur la *LACC*. Cette ordonnance avait pour effet de dissuader les créanciers d'entraver une liquidation ordonnée et, de ce fait, elle contribuait à la réalisation des objectifs de la *LACC*, dans la mesure où elle établit une passerelle entre les procédures régies par la *LACC* d'une part et celles régies par la *LFI* d'autre part. Cette interprétation du pouvoir discrétionnaire du tribunal se trouve renforcée par

the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

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

[78] Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be

l'art. 20 de la *LACC*, qui précise que les dispositions de la Loi « peuvent être appliquées conjointement avec celles de toute loi fédérale [. . .] autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers », par exemple la *LFI*. L'article 20 indique clairement que le législateur entend voir la *LACC* être appliquée *de concert* avec les autres lois concernant l'insolvabilité, telle la *LFI*.

[77] La *LACC* établit les conditions qui permettent de préserver le statu quo pendant qu'on tente de trouver un terrain d'entente entre les intéressés en vue d'une réorganisation qui soit juste pour tout le monde. Étant donné que, souvent, la seule autre solution est la faillite, les participants évaluent l'impact d'une réorganisation en regard de la situation qui serait la leur en cas de liquidation. En l'espèce, l'ordonnance favorisait une transition harmonieuse entre la réorganisation et la liquidation, tout en répondant à l'objectif — commun aux deux lois — qui consiste à avoir une seule procédure collective.

[78] À mon avis, le juge d'appel Tysoe a donc commis une erreur en considérant la *LACC* et la *LFI* comme des régimes distincts, séparés par un hiatus temporel, plutôt que comme deux lois faisant partie d'un ensemble intégré de règles du droit de l'insolvabilité. La décision du législateur de conserver deux régimes législatifs en matière de réorganisation, la *LFI* et la *LACC*, reflète le fait bien réel que des réorganisations de complexité différente requièrent des mécanismes légaux différents. En revanche, un seul régime législatif est jugé nécessaire pour la liquidation de l'actif d'un débiteur en faillite. Le passage de la *LACC* à la *LFI* peut exiger la levée partielle d'une suspension de procédures ordonnée en vertu de la *LACC*, de façon à permettre l'engagement des procédures fondées sur la *LFI*. Toutefois, comme l'a signalé le juge Laskin de la Cour d'appel de l'Ontario dans un litige semblable opposant des créanciers garantis et le Surintendant des services financiers de l'Ontario qui invoquait le bénéfice d'une fiducie réputée, [TRADUCTION] « [l]es deux lois sont

lost in bankruptcy (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, at paras. 62-63).

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

[80] Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition

liées » et il n'existe entre elles aucun « hiatus » qui permettrait d'obtenir l'exécution, à l'issue de procédures engagées sous le régime de la *LACC*, de droits de propriété qui seraient perdus en cas de faillite (*Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, par. 62-63).

[79] La priorité accordée aux réclamations de la Couronne fondées sur une fiducie réputée visant des retenues à la source n'affaiblit en rien cette conclusion. Comme ces fiducies réputées survivent tant sous le régime de la *LACC* que sous celui de la *LFI*, ce facteur n'a aucune incidence sur l'intérêt que pourraient avoir les créanciers à préférer une loi plutôt que l'autre. S'il est vrai que le tribunal agissant en vertu de la *LACC* dispose d'une grande latitude pour suspendre les réclamations fondée sur des fiducies réputées visant des retenues à la source, cette latitude n'en demeure pas moins soumise à des limitations particulières, applicables uniquement à ces fiducies réputées (*LACC*, art. 11.4). Par conséquent, si la réorganisation tentée sous le régime de la *LACC* échoue (p. ex. parce que le tribunal ou les créanciers refusent une proposition de réorganisation), la Couronne peut immédiatement présenter sa réclamation à l'égard des retenues à la source non versées. Mais il ne faut pas en conclure que cela compromet le passage harmonieux au régime de faillite ou crée le moindre « hiatus » entre la *LACC* et la *LFI*, car le fait est que, peu importe la loi en vertu de laquelle la réorganisation a été amorcée, les réclamations des créanciers auraient dans les deux cas été subordonnées à la priorité de la fiducie réputée de la Couronne à l'égard des retenues à la source.

[80] Abstraction faite des fiducies réputées visant les retenues à la source, c'est le mécanisme complet et exhaustif prévu par la *LFI* qui doit régir la répartition des biens du débiteur une fois que la liquidation est devenue inévitable. De fait, une transition ordonnée aux procédures de liquidation est obligatoire sous le régime de la *LFI* lorsqu'une proposition est rejetée par les créanciers. La *LACC* est muette à l'égard de cette transition, mais l'ampleur du pouvoir discrétionnaire conféré au tribunal par cette loi est suffisante pour établir une passerelle vers une liquidation opérée sous le régime

to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

de la *LFI*. Ce faisant, le tribunal doit veiller à ne pas perturber le plan de répartition établi par la *LFI*. La transition au régime de liquidation nécessite la levée partielle de la suspension des procédures ordonnée en vertu de la *LACC*, afin de permettre l'introduction de procédures en vertu de la *LFI*. Il ne faudrait pas que cette indispensable levée partielle de la suspension des procédures provoque une ruée des créanciers vers le palais de justice pour l'obtention d'une priorité inexistante sous le régime de la *LFI*.

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

[81] Je conclus donc que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir de lever la suspension des procédures afin de permettre la transition au régime de liquidation.

3.4 *Express Trust*

3.4 *Fiducie expresse*

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

[82] La dernière question à trancher en l'espèce est celle de savoir si le juge en chef Brenner a créé une fiducie expresse en faveur de la Couronne quand il a ordonné, le 29 avril 2008, que le produit de la vente des biens de LeRoy Trucking — jusqu'à concurrence des sommes de TPS non remises — soit détenu dans le compte en fiducie du contrôleur jusqu'à ce que l'issue de la réorganisation soit connue. Un autre motif invoqué par le juge Tysoe de la Cour d'appel pour accueillir l'appel interjeté par la Couronne était que, selon lui, celle-ci était effectivement la bénéficiaire d'une fiducie expresse. Je ne peux souscrire à cette conclusion.

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

[83] La création d'une fiducie expresse exige la présence de trois certitudes : certitude d'intention, certitude de matière et certitude d'objet. Les fiducies expresses ou « fiducies au sens strict » découlent des actes et des intentions du constituant et se distinguent des autres fiducies découlant de l'effet de la loi (voir D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., *Waters' Law of Trusts in Canada* (3e éd. 2005), p. 28-29, particulièrement la note en bas de page 42).

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

[84] En l'espèce, il n'existe aucune certitude d'objet (c.-à-d. relative au bénéficiaire) pouvant être inférée de l'ordonnance prononcée le 29 avril 2008 par le tribunal et suffisante pour donner naissance à une fiducie expresse.

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

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

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

[85] Au moment où l'ordonnance a été rendue, il y avait un différend entre Century Services et la Couronne au sujet d'une partie du produit de la vente des biens du débiteur. La solution retenue par le tribunal a consisté à accepter, selon la proposition de LeRoy Trucking, que la somme en question soit détenue séparément jusqu'à ce que le différend puisse être réglé. Par conséquent, il n'existait aucune certitude que la Couronne serait véritablement le bénéficiaire ou l'objet de la fiducie.

[86] Le fait que le compte choisi pour conserver séparément la somme en question était le compte en fiducie du contrôleur n'a pas à lui seul un effet tel qu'il suppléerait à l'absence d'un bénéficiaire certain. De toute façon, suivant l'interprétation du par. 18.3(1) de la *LACC* dégagée précédemment, aucun différend ne saurait même exister quant à la priorité de rang, étant donné que la priorité accordée aux réclamations de la Couronne fondées sur la fiducie réputée visant la TPS ne s'applique pas sous le régime de la *LACC* et que la Couronne est reléguée au rang de créancier non garanti à l'égard des sommes en question. Cependant, il se peut fort bien que le juge en chef Brenner ait estimé que, conformément à l'arrêt *Ottawa Senators*, la créance de la Couronne à l'égard de la TPS demeurerait effective si la réorganisation aboutissait, ce qui ne serait pas le cas si le passage au processus de liquidation régi par la *LFI* était autorisé. Une somme équivalente à cette créance serait ainsi mise de côté jusqu'à ce que le résultat de la réorganisation soit connu.

[87] Par conséquent, l'incertitude entourant l'issue de la restructuration tentée sous le régime de la *LACC* exclut l'existence d'une certitude permettant de conférer de manière permanente à la Couronne un intérêt bénéficiaire sur la somme en question. Cela ressort clairement des motifs exposés de vive voix par le juge en chef Brenner le 29 avril 2008, lorsqu'il a dit : [TRADUCTION] « Comme il est notoire que [des procédures fondées sur la *LACC*] peuvent échouer et que cela entraîne des faillites, le maintien du statu quo en l'espèce me semble militer en faveur de l'acceptation de la proposition d'ordonner au contrôleur de détenir ces fonds en fiducie. » Il y avait donc manifestement un doute quant à la question de savoir qui au juste pourrait toucher l'argent

that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

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

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

The following are the reasons delivered by

FISH J. —

I

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

[91] More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

en fin de compte. L'ordonnance ultérieure du juge en chef Brenner — dans laquelle ce dernier a rejeté, le 3 septembre 2008, la demande de la Couronne sollicitant le bénéfice de la fiducie présumée après qu'il fut devenu évident que la faillite était inévitable — confirme l'absence du bénéficiaire certain sans lequel il ne saurait y avoir de fiducie expresse.

4. Conclusion

[88] Je conclus que le juge en chef Brenner avait, en vertu de la *LACC*, le pouvoir discrétionnaire de maintenir la suspension de la demande de la Couronne sollicitant le bénéfice de la fiducie réputée visant la TPS, tout en levant par ailleurs la suspension des procédures de manière à permettre à LeRoy Trucking de faire cession de ses biens. Ma conclusion selon laquelle le par. 18.3(1) de la *LACC* neutralisait la fiducie réputée visant la TPS pendant la durée des procédures fondées sur cette loi confirme que les pouvoirs discrétionnaires exercés par le tribunal en vertu de l'art. 11 n'étaient pas limités par la priorité invoquée par la Couronne au titre de la TPS, puisqu'il n'existe aucune priorité de la sorte sous le régime de la *LACC*.

[89] Pour ces motifs, je suis d'avis d'accueillir le pourvoi et de déclarer que la somme de 305 202,30 $ perçue par LeRoy Trucking au titre de la TPS mais non encore versée au receveur général du Canada ne fait l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne. Cette somme ne fait pas non plus l'objet d'une fiducie expresse. Les dépens sont accordés à l'égard du présent pourvoi et de l'appel interjeté devant la juridiction inférieure.

Version française des motifs rendus par

LE JUGE FISH —

I

[90] Je souscris dans l'ensemble aux motifs de la juge Deschamps et je disposerais du pourvoi comme elle le propose.

[91] Plus particulièrement, je me rallie à son interprétation de la portée du pouvoir discrétionnaire conféré au juge par l'art. 11 de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C.

And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

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

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

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

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

1985, ch. C-36 (« *LACC* »). Je partage en outre sa conclusion suivant laquelle le juge en chef Brenner n'a pas créé de fiducie expresse en faveur de la Couronne en ordonnant que les sommes recueillies au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur (2008 BCSC 1805, [2008] G.S.T.C. 221).

[92] J'estime néanmoins devoir ajouter de brefs motifs qui me sont propres au sujet de l'interaction entre la *LACC* et la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »).

[93] En maintenant, malgré l'existence des procédures d'insolvabilité, la validité de fiducies réputées créées en vertu de la *LTA*, l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), et les décisions rendues dans sa foulée ont eu pour effet de protéger indûment des droits de la Couronne que le Parlement avait lui-même choisi de subordonner à d'autres créances prioritaires. À mon avis, il convient en l'espèce de rompre nettement avec ce courant jurisprudentiel.

[94] La juge Deschamps expose d'importantes raisons d'ordre historique et d'intérêt général à l'appui de cette position et je n'ai rien à ajouter à cet égard. Je tiens toutefois à expliquer pourquoi une analyse comparative de certaines dispositions législatives connexes vient renforcer la conclusion à laquelle ma collègue et moi-même en arrivons.

[95] Au cours des dernières années, le législateur fédéral a procédé à un examen approfondi du régime canadien d'insolvabilité. Il a refusé de modifier les dispositions qui sont en cause dans la présente affaire. Il ne nous appartient pas de nous interroger sur les raisons de ce choix. Nous devons plutôt considérer la décision du législateur de maintenir en vigueur les dispositions en question comme un exercice délibéré du pouvoir discrétionnaire de légiférer, pouvoir qui est exclusivement le sien. Avec égards, je rejette le point de vue suivant lequel nous devrions plutôt qualifier l'apparente contradiction entre le par. 18.3(1) (maintenant le par. 37(1)) de la *LACC* et l'art. 222 de la *LTA* d'anomalie rédactionnelle ou de lacune législative susceptible d'être corrigée par un tribunal.

II

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

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

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

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

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

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person . . . equal in value to the amount so deemed to be held in trust is deemed

(*a*) to be held, from the time the amount was deducted or withheld by the person, separate and

II

[96] Dans le contexte du régime canadien d'insolvabilité, on conclut à l'existence d'une fiducie réputée uniquement lorsque deux éléments complémentaires sont réunis : en premier lieu, une disposition législative qui *crée* la fiducie et, en second lieu, une disposition de la *LACC* ou de la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* ») qui *confirme* l'existence de la fiducie ou la maintient explicitement en vigueur.

[97] Cette interprétation se retrouve dans trois lois fédérales, qui renferment toutes une disposition relative aux fiducies réputées dont le libellé offre une ressemblance frappante avec celui de l'art. 222 de la *LTA*.

[98] La première est la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) (« *LIR* »), dont le par. 227(4) *crée* une fiducie réputée :

(4) Toute personne qui déduit ou retient un montant en vertu de la présente loi est réputée, malgré toute autre garantie au sens du paragraphe 224(1.3) le concernant, le détenir en fiducie pour Sa Majesté, séparé de ses propres biens et des biens détenus par son créancier garanti au sens de ce paragraphe qui, en l'absence de la garantie, seraient ceux de la personne, et en vue de le verser à Sa Majesté selon les modalités et dans le délai prévus par la présente loi. [Dans la présente citation et dans celles qui suivent, les soulignements sont évidemment de moi.]

[99] Dans le paragraphe suivant, le législateur prend la peine de bien préciser que toute disposition législative fédérale ou provinciale à l'effet contraire n'a aucune incidence sur la fiducie ainsi constituée :

(4.1) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité* (sauf ses articles 81.1 et 81.2), tout autre texte législatif fédéral ou provincial ou toute règle de droit, en cas de non-versement à Sa Majesté, selon les modalités et dans le délai prévus par la présente loi, d'un montant qu'une personne est réputée par le paragraphe (4) détenir en fiducie pour Sa Majesté, les biens de la personne [. . .] d'une valeur égale à ce montant sont réputés :

a) être détenus en fiducie pour Sa Majesté, à compter du moment où le montant est déduit ou retenu,

apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, . . .

. . . .

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

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

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

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

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

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

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

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

séparés des propres biens de la personne, qu'ils soient ou non assujettis à une telle garantie;

. . . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur une telle garantie.

[100] Le maintien en vigueur de cette fiducie réputée est expressément *confirmé* à l'art. 18.3 de la *LACC* :

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

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

[101] L'application de la fiducie réputée prévue par la *LIR* est également confirmée par l'art. 67 de la *LFI* :

(2) Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

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

[102] Par conséquent, le législateur a *créé*, puis *confirmé le maintien en vigueur* de la fiducie réputée établie par la *LIR* en faveur de Sa Majesté *tant* sous le régime de la *LACC* *que* sous celui de la *LFI*.

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

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

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

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

222. (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a

[103] La deuxième loi fédérale où l'on retrouve ce mécanisme est le *Régime de pensions du Canada*, L.R.C. 1985, ch. C-8 (« *RPC* »). À l'article 23, le législateur crée une fiducie réputée en faveur de la Couronne et précise qu'elle existe malgré les dispositions contraires de toute autre loi fédérale. Enfin, la *Loi sur l'assurance-emploi*, L.C. 1996, ch. 23 (« *LAE* »), crée dans des termes quasi identiques, une fiducie réputée en faveur de la Couronne : voir les par. 86(2) et (2.1).

[104] Comme nous l'avons vu, le maintien en vigueur des fiducies réputées créées en vertu de ces dispositions de la *LIR*, du *RPC* et de la *LAE* est confirmé au par. 18.3(2) de la *LACC* et au par. 67(3) de la *LFI*. Dans les trois cas, le législateur a exprimé en termes clairs et explicites sa volonté de voir la fiducie réputée établie en faveur de la Couronne produire ses effets pendant le déroulement de la procédure d'insolvabilité.

[105] La situation est différente dans le cas de la fiducie réputée créée par la *LTA*. Bien que le législateur crée en faveur de la Couronne une fiducie réputée dans laquelle seront conservées les sommes recueillies au titre de la TPS mais non encore versées, et bien qu'il prétende maintenir cette fiducie en vigueur malgré les dispositions à l'effet contraire de toute loi fédérale ou provinciale, il ne *confirme* pas l'existence de la fiducie — ni ne prévoit expressément le maintien en vigueur de celle-ci — dans la *LFI* ou dans la *LACC*. Le second des deux éléments obligatoires que j'ai mentionnés fait donc défaut, ce qui témoigne de l'intention du législateur de laisser la fiducie réputée devenir caduque au moment de l'introduction de la procédure d'insolvabilité.

[106] Le texte des dispositions en cause de la *LTA* est substantiellement identique à celui des dispositions de la *LIR*, du *RPC* et de la *LAE* :

222. (1) La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la personne, jusqu'à ce qu'il soit

security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

. . .

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

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

. . .

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

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

[108] In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

[109] With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, at para. 37). *All* of the deemed trust

versé au receveur général ou retiré en application du paragraphe (2).

. . .

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

. . .

. . . et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[107] Pourtant, aucune disposition de la *LACC* ne prévoit le maintien en vigueur de la fiducie réputée une fois que la *LACC* entre en jeu.

[108] En résumé, le législateur a imposé *deux* conditions explicites — ou « composantes de base » — devant être réunies pour que survivent, sous le régime de la *LACC*, les fiducies réputées qui ont été établies par la *LIR*, le *RPC* et la *LAE*. S'il avait voulu préserver de la même façon, sous le régime de la *LACC*, les fiducies réputées qui sont établies par la *LTA*, il aurait inséré dans la *LACC* le type de disposition confirmatoire qui maintient explicitement en vigueur d'autres fiducies réputées.

[109] Avec égards pour l'opinion contraire exprimée par le juge Tysoe de la Cour d'appel, je ne trouve pas [TRADUCTION] « inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception » (2009 BCCA

provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

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

III

[113] For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada

205, 98 B.C.L.R. (4th) 242, par. 37). *Toutes* les dispositions établissant des fiducies réputées qui sont reproduites ci-dessus font explicitement mention de la *LFI*. L'article 222 de la *LTA* ne rompt pas avec ce modèle. Compte tenu du libellé presque identique des quatre dispositions établissant une fiducie réputée, il aurait d'ailleurs été étonnant que le législateur ne fasse aucune mention de la *LFI* dans la *LTA*.

[110] L'intention du législateur était manifestement de rendre inopérantes les fiducies réputées visant la TPS dès l'introduction d'une procédure d'insolvabilité. Par conséquent, l'art. 222 mentionne la *LFI* de manière à l'*exclure* de son champ d'application — et non de l'y *inclure*, comme le font la *LIR*, le *RPC* et la *LAE*.

[111] En revanche, je constate qu'*aucune* de ces lois ne mentionne expressément la *LACC*. La mention explicite de la *LFI* dans ces textes n'a aucune incidence sur leur interaction avec la *LACC*. Là encore, ce sont les dispositions confirmatoires que l'on trouve *dans les lois sur l'insolvabilité* qui déterminent si une fiducie réputée continuera d'exister durant une procédure d'insolvabilité.

[112] Enfin, j'estime que les juges siégeant en leur cabinet ne devraient pas, comme cela s'est produit en l'espèce, ordonner que les sommes perçues au titre de la TPS soient détenues séparément dans le compte en fiducie du contrôleur pendant le déroulement d'une procédure fondée sur la *LACC*. Il résulte du raisonnement de la juge Deschamps que les réclamations de TPS deviennent des créances non garanties sous le régime de la *LACC*. Le législateur a délibérément décidé de supprimer certaines superpriorités accordées à la Couronne pendant l'insolvabilité; nous sommes en présence de l'un de ces cas.

III

[113] Pour les motifs qui précèdent, je suis d'avis, à l'instar de la juge Deschamps, d'accueillir le pourvoi avec dépens devant notre Cour et devant les juridictions inférieures, et d'ordonner que la somme de 305 202,30 $ — qui a été perçue par LeRoy Trucking

be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

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

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

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

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

au titre de la TPS mais n'a pas encore été versée au receveur général du Canada — ne fasse l'objet d'aucune fiducie réputée ou priorité en faveur de la Couronne.

Version française des motifs rendus par

[114] LA JUGE ABELLA (dissidente) — La question qui est au cœur du présent pourvoi est celle de savoir si l'art. 222 de la *Loi sur la taxe d'accise*, L.R.C. 1985, ch. E-15 (« *LTA* »), et plus particulièrement le par. 222(3), donnent préséance, dans le cadre d'une procédure relevant de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, ch. C-36 (« *LACC* »), à la fiducie réputée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. À l'instar du juge Tysoe de la Cour d'appel, j'estime que tel est le cas. Il s'ensuit, à mon avis, que le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC* est circonscrit en conséquence.

[115] L'article 11[1] de la *LACC* disposait :

11. (1) Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

Pour être en mesure de déterminer la portée du pouvoir discrétionnaire conféré au tribunal par l'art. 11, il est nécessaire de trancher d'abord la question de la priorité. Le paragraphe 222(3), la disposition de la *LTA* en cause en l'espèce, prévoit ce qui suit :

1 Section 11 was amended, effective September 18, 2009, and now states:

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

1 L'article 11 a été modifié et le texte modifié, qui est entré en vigueur le 18 septembre 2009, est rédigé ainsi :

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

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

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

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

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

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

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

[117] As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

[116] Selon Century Services, la disposition dérogatoire générale de la *LACC*, le par. 18.3(1), l'emportait, et les dispositions déterminatives à l'art. 222 de la *LTA* étaient par conséquent inapplicables dans le cadre d'une procédure fondée sur la *LACC*. Le paragraphe 18.3(1) dispose :

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

[117] Ainsi que l'a fait observer le juge d'appel MacPherson, dans l'arrêt *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), le par. 222(3) de la *LTA* [TRADUCTION] « entre nettement en conflit » avec le par. 18.3(1) de la *LACC* (par. 31). Essentiellement, la résolution du conflit entre ces deux dispositions requiert à mon sens une

interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

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

[120] The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from

opération relativement simple d'interprétation des lois : Est-ce que les termes employés révèlent une intention claire du législateur? À mon avis, c'est le cas. Le texte de la disposition créant une fiducie réputée, soit le par. 222(3) de la *LTA*, précise sans ambiguïté que cette disposition s'applique malgré toute autre règle de droit sauf la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, ch. B-3 (« *LFI* »).

[118] En excluant explicitement une seule loi du champ d'application du par. 222(3) et en déclarant de façon non équivoque qu'il s'applique malgré toute autre loi ou règle de droit au Canada *sauf* la *LFI*, le législateur a défini la portée de cette disposition dans des termes on ne peut plus clairs. Je souscris sans réserve aux propos suivants du juge d'appel MacPherson dans l'arrêt *Ottawa Senators* :

> [TRADUCTION] L'intention du législateur au par. 222(3) de la *LTA* est claire. En cas de conflit avec « tout autre texte législatif fédéral (sauf la *Loi sur la faillite et l'insolvabilité*) », c'est le par. 222(3) qui l'emporte. En employant ces mots, le législateur fédéral a fait deux choses : il a décidé que le par. 222(3) devait l'emporter sur tout autre texte législatif fédéral et, fait important, il a abordé la question des exceptions à cette préséance en en mentionnant une seule, la *Loi sur la faillite et l'insolvabilité* [. . .] La *LFI* et la *LACC* sont des lois fédérales étroitement liées entre elles. Je ne puis concevoir que le législateur ait pu mentionner expressément la *LFI* à titre d'exception, mais ait involontairement omis de considérer la *LACC* comme une deuxième exception possible. À mon avis, le fait que la *LACC* ne soit pas mentionnée au par. 222(3) de la *LTA* était presque assurément une omission mûrement réfléchie de la part du législateur. [par. 43]

[119] L'opinion du juge d'appel MacPherson suivant laquelle le fait que la *LACC* n'ait pas été soustraite à l'application de la *LTA* témoigne d'une intention claire du législateur est confortée par la façon dont la *LACC* a par la suite été modifiée après l'édiction du par. 18.3(1) en 1997. En 2000, lorsque le par. 222(3) de la *LTA* est entré en vigueur, des modifications ont également été apportées à la *LACC*, mais le par. 18.3(1) de cette loi n'a pas été modifié.

[120] L'absence de modification du par. 18.3(1) vaut d'être soulignée, car elle a eu pour effet de maintenir le statu quo législatif, malgré les

various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

demandes répétées de divers groupes qui souhaitaient que cette disposition soit modifiée pour aligner l'ordre de priorité établi par la *LACC* sur celui de la *LFI*. En 2002, par exemple, lorsque Industrie Canada a procédé à l'examen de la *LFI* et de la *LACC*, l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation ont recommandé que les règles de la *LFI* en matière de priorité soient étendues à la *LACC* (Joint Task Force on Business Insolvency Law Reform, *Report* (15 mars 2002), ann. B, proposition 71). Ces recommandations ont été reprises en 2003 par le Comité sénatorial permanent des banques et du commerce dans son rapport intitulé *Les débiteurs et les créanciers doivent se partager le fardeau : Examen de la Loi sur la faillite et l'insolvabilité et de la Loi sur les arrangements avec les créanciers des compagnies*, ainsi qu'en 2005 par le Legislative Review Task Force (Commercial) de l'Institut d'insolvabilité du Canada et de l'Association canadienne des professionnels de l'insolvabilité *et de la* réorganisation dans son *Report on the Commercial Provisions of Bill C-55*, et en 2007 par l'Institut d'insolvabilité du Canada dans un mémoire soumis au Comité sénatorial permanent des banques et du commerce au sujet de réformes alors envisagées.

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

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

[121] La *LFI* demeure néanmoins la seule loi soustraite à l'application du par. 222(3) de la *LTA*. Même à la suite de l'arrêt rendu en 2005 dans l'affaire *Ottawa Senators*, qui a confirmé que la *LTA* l'emportait sur la *LACC*, le législateur n'est pas intervenu. Cette absence de réaction de sa part me paraît tout aussi pertinente en l'espèce que dans l'arrêt *Société Télé-Mobile c. Ontario*, 2008 CSC 12, [2008] 1 R.C.S. 305, où la Cour a déclaré ceci :

> Le silence du législateur n'est pas nécessairement déterminant quant à son intention, mais en l'espèce, il répond à la demande pressante de Telus et des autres entreprises et organisations intéressées que la loi prévoie expressément la possibilité d'un remboursement des frais raisonnables engagés pour communiquer des éléments de preuve conformément à une ordonnance. L'historique législatif confirme selon moi que le législateur n'a pas voulu qu'une indemnité soit versée pour l'obtempération à une ordonnance de communication. [par. 42]

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

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

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

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

[122] Tout ce qui précède permet clairement d'inférer que le législateur a délibérément choisi de soustraire la fiducie réputée établie au par. 222(3) à l'application du par. 18.3(1) de la *LACC*.

[123] Je ne vois pas non plus de « considération de politique générale » qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur. Je ne saurais expliquer mieux que ne l'a fait le juge d'appel Tysoe les raisons pour lesquelles l'argument invoquant des considérations de politique générale ne peut, selon moi, être retenu en l'espèce. Je vais donc reprendre à mon compte ses propos à ce sujet :

> [TRADUCTION] Je ne conteste pas qu'il existe des raisons de politique générale valables qui justifient d'inciter les entreprises insolvables à tenter de se restructurer de façon à pouvoir continuer à exercer leurs activités avec le moins de perturbations possibles pour leurs employés et pour les autres intéressés. Les tribunaux peuvent légitimement tenir compte de telles considérations de politique générale, mais seulement si elles ont trait à une question que le législateur n'a pas examinée. Or, dans le cas qui nous occupe, il y a lieu de présumer que le législateur a tenu compte de considérations de politique générale lorsqu'il a adopté les modifications susmentionnées à la *LACC* et à la *LTA*. Comme le juge MacPherson le fait observer au par. 43 de l'arrêt *Ottawa Senators*, il est inconcevable que le législateur, lorsqu'il a adopté la version actuelle du par. 222(3) de la *LTA*, ait désigné expressément la *LFI* comme une exception sans envisager que la *LACC* puisse constituer une deuxième exception. Je signale par ailleurs que les modifications apportées en 1992 à la *LFI* ont permis de rendre les propositions concordataires opposables aux créanciers garantis et que, malgré la plus grande souplesse de la *LACC*, il est possible pour une compagnie insolvable de se restructurer sous le régime de la *LFI*. [par. 37]

[124] Bien que je sois d'avis que la clarté des termes employés au par. 222(3) tranche la question, j'estime également que cette conclusion est même renforcée par l'application d'autres principes d'interprétation. Dans leurs observations, les parties indiquent que les principes suivants étaient, selon elles, particulièrement pertinents : la Couronne a invoqué le principe voulant que la loi « postérieure » l'emporte; Century Services a fondé son argumentation sur le principe de la préséance de la loi spécifique sur la loi générale (*generalia specialibus non derogant*).

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

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

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

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

[125] Le principe de la préséance de la « loi postérieure » accorde la priorité à la loi la plus récente, au motif que le législateur est présumé connaître le contenu des lois alors en vigueur. Si, dans la loi nouvelle, le législateur adopte une règle inconciliable avec une règle préexistante, on conclura qu'il a entendu déroger à celle-ci (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5e éd. 2008), p. 346-347; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3e éd. 2000), p. 358).

[126] L'exception à cette supplantation présumée des dispositions législatives préexistantes incompatibles réside dans le principe exprimé par la maxime *generalia specialibus non derogant* selon laquelle une disposition générale plus récente n'est pas réputée déroger à une loi spéciale antérieure (Côté, p. 359). Comme dans le jeu des poupées russes, cette exception comporte elle-même une exception. En effet, une disposition spécifique antérieure peut dans les faits être « supplantée » par une loi ultérieure de portée générale si le législateur, par les mots qu'il a employés, a exprimé l'intention de faire prévaloir la loi générale (*Doré c. Verdun (Ville)*, [1997] 2 R.C.S. 862).

[127] Ces principes d'interprétation visent principalement à faciliter la détermination de l'intention du législateur, comme l'a confirmé le juge d'appel MacPherson dans l'arrêt *Ottawa Senators*, au par. 42 :

> [TRADUCTION] . . . en matière d'interprétation des lois, la règle cardinale est la suivante : les dispositions législatives doivent être interprétées de manière à donner effet à l'intention du législateur lorsqu'il a adopté la loi. Cette règle fondamentale l'emporte sur toutes les maximes, outils ou canons d'interprétation législative, y compris la maxime suivant laquelle le particulier l'emporte sur le général (*generalia specialibus non derogant*). Comme l'a expliqué le juge Hudson dans l'arrêt *Canada c. Williams*, [1944] R.C.S. 226, [. . .] à la p. 239 . . . :
>
> > On invoque la maxime *generalia specialibus non derogant* comme une règle qui devrait trancher la question. Or cette maxime, qui n'est pas une règle de droit mais un principe d'interprétation, cède le pas

legislature, if such intention can reasonably be gathered from all of the relevant legislation.

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

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

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

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

devant l'intention du législateur, s'il est raisonnablement possible de la dégager de l'ensemble des dispositions législatives pertinentes.

(Voir aussi Côté, p. 358, et Pierre-André Côté, avec la collaboration de S. Beaulac et M. Devinat, *Interprétation des lois* (4e éd. 2009), par. 1335.)

[128] J'accepte l'argument de la Couronne suivant lequel le principe de la loi « postérieure » est déterminant en l'espèce. Comme le par. 222(3) de la *LTA* a été édicté en 2000 et que le par. 18.3(1) de la *LACC* a été adopté en 1997, le par. 222(3) est, de toute évidence, la disposition postérieure. Cette victoire chronologique peut être neutralisée si, comme le soutient Century Services, on démontre que la disposition la plus récente, le par. 222(3) de la *LTA*, est une disposition générale, auquel cas c'est la disposition particulière antérieure, le par. 18.3(1), qui l'emporte (*generalia specialibus non derogant*). Mais, comme nous l'avons vu, la disposition particulière antérieure n'a pas préséance si la disposition générale ultérieure paraît la « supplanter ». C'est précisément, à mon sens, ce qu'accomplit le par. 222(3) de par son libellé, lequel précise que la disposition l'emporte sur tout autre texte législatif fédéral, tout texte législatif provincial ou « toute autre règle de droit » *sauf la LFI*. Le paragraphe 18.3(1) de la *LACC* est par conséquent rendu inopérant aux fins d'application du par. 222(3).

[129] Il est vrai que, lorsque la *LACC* a été modifiée en 2005[2], le par. 18.3(1) a été remplacé par le par. 37(1) (L.C. 2005, ch. 47, art. 131). Selon la juge Deschamps, le par. 37(1) est devenu, de ce fait, la disposition « postérieure ». Avec égards pour l'opinion exprimée par ma collègue, cette observation est réfutée par l'al. 44*f*) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, qui décrit expressément l'effet (inexistant) qu'a le remplacement — sans modifications notables sur le fond — d'un texte antérieur qui a été abrogé (voir *Procureur général du Canada c. Commission des relations de travail dans la Fonction publique*, [1977] 2 C.F. 663, qui portait sur

2 Les modifications ne sont entrées en vigueur que le 18 septembre 2009.

"new law" unless they differ in substance from the repealed provision:

44. Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,

. . .

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

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

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

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

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

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

la disposition qui a précédé l'al. 44*f*)). Cet alinéa précise que le nouveau texte ne doit pas être considéré de « droit nouveau », sauf dans la mesure où il diffère au fond du texte abrogé :

44. En cas d'abrogation et de remplacement, les règles suivantes s'appliquent :

. . .

f) sauf dans la mesure où les deux textes diffèrent au fond, le nouveau texte n'est pas réputé de droit nouveau, sa teneur étant censée constituer une refonte et une clarification des règles de droit du texte antérieur;

Le mot « texte » est défini ainsi à l'art. 2 de la *Loi d'interprétation* : « Tout ou partie d'une loi ou d'un règlement. »

[130] Le paragraphe 37(1) de la *LACC* actuelle est pratiquement identique quant au fond au par. 18.3(1). Pour faciliter la comparaison de ces deux dispositions, je les ai reproduites ci-après :

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

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

[131] L'application de l'al. 44*f*) de la *Loi d'interprétation* vient tout simplement confirmer l'intention clairement exprimée par le législateur, qu'a indiquée Industrie Canada dans l'analyse du Projet de loi C-55, où le par. 37(1) était qualifié de « modification d'ordre technique concernant le réaménagement des dispositions de la présente loi ». Par ailleurs, durant la deuxième lecture du projet de loi

Senate, confirmed that s. 37(1) represented only a technical change:

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

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

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

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

au Sénat, l'honorable Bill Rompkey, qui était alors leader adjoint du gouvernement au Sénat, a confirmé que le par. 37(1) représentait seulement une modification d'ordre technique :

> Sur une note administrative, je signale que, dans le cas du traitement de fiducies présumées aux fins d'impôt, le projet de loi ne modifie aucunement l'intention qui sous-tend la politique, alors que dans le cas d'une restructuration aux termes de la LACC, des articles de la loi ont été abrogés et remplacés par des versions portant de nouveaux numéros lors de la mise à jour exhaustive de la LACC.
>
> (*Débats du Sénat*, vol. 142, 1re sess., 38e lég., 23 novembre 2005, p. 2147)

[132] Si le par. 18.3(1) avait fait l'objet de modifications notables sur le fond lorsqu'il a été remplacé par le par. 37(1), je me rangerais à l'avis de la juge Deschamps qu'il doit être considéré comme un texte de droit nouveau. Mais comme les par. 18.3(1) et 37(1) ne diffèrent pas sur le fond, le fait que le par. 18.3(1) soit devenu le par. 37(1) n'a aucune incidence sur l'ordre chronologique du point de vue de l'interprétation, et le par. 222(3) de la *LTA* demeure la disposition « postérieure » (Sullivan, p. 347).

[133] Il s'ensuit que la disposition créant une fiducie réputée que l'on trouve au par. 222(3) de la *LTA* l'emporte sur le par. 18.3(1) dans le cadre d'une procédure fondée sur la *LACC*. La question qui se pose alors est celle de savoir quelle est l'incidence de cette préséance sur le pouvoir discrétionnaire conféré au tribunal par l'art. 11 de la *LACC*.

[134] Bien que l'art. 11 accorde au tribunal le pouvoir discrétionnaire de rendre des ordonnances malgré les dispositions de la *LFI* et de la *Loi sur les liquidations*, L.R.C. 1985, ch. W-11, ce pouvoir discrétionnaire demeure assujetti à l'application de toute autre loi fédérale. L'exercice de ce pouvoir discrétionnaire est donc circonscrit par les limites imposées par toute loi *autre* que la *LFI* et la *Loi sur les liquidations*, et donc par la *LTA*. En l'espèce, le juge siégeant en son cabinet était donc tenu de respecter le régime de priorités établi au par. 222(3) de la *LTA*. Ni le par. 18.3(1) ni l'art. 11 de la *LACC* ne l'autorisaient à en faire abstraction. Par conséquent,

for payment of the GST funds during the *CCAA* proceedings.

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

[136] I would dismiss the appeal.

APPENDIX

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

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

. . .

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

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

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

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

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

il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la *LACC*.

[135] Vu cette conclusion, il n'est pas nécessaire d'examiner la question de savoir s'il existait une fiducie expresse en l'espèce.

[136] Je rejetterais le présent pourvoi.

ANNEXE

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 13 décembre 2007)

11. (1) [Pouvoir du tribunal] Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations*, chaque fois qu'une demande est faite sous le régime de la présente loi à l'égard d'une compagnie, le tribunal, sur demande d'un intéressé, peut, sous réserve des autres dispositions de la présente loi et avec ou sans avis, rendre l'ordonnance prévue au présent article.

. . .

(3) [Demande initiale — ordonnances] Dans le cas d'une demande initiale visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour une période maximale de trente jours :

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

(4) [Autres demandes — ordonnances] Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime indiquée :

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

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

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

. . .

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

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

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

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

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

(i) the expiration of the order,

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

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

a) suspendre, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, les procédures intentées contre la compagnie au titre des lois mentionnées au paragraphe (1), ou qui pourraient l'être;

b) surseoir, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, au cours de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à ce qu'il rende une nouvelle ordonnance à l'effet contraire, d'intenter ou de continuer toute action, poursuite ou autre procédure contre la compagnie.

. . .

(6) [Preuve] Le tribunal ne rend l'ordonnance visée aux paragraphes (3) ou (4) que si :

a) le demandeur le convainc qu'il serait indiqué de rendre une telle ordonnance;

b) dans le cas de l'ordonnance visée au paragraphe (4), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue.

11.4 (1) [Suspension des procédures] Le tribunal peut ordonner :

a) la suspension de l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents, à l'égard d'une compagnie lorsque celle-ci est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour une période se terminant au plus tard :

(i) à l'expiration de l'ordonnance rendue en application de l'article 11,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

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

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

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

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

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

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

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

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

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

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

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) la suspension de l'exercice par Sa Majesté du chef d'une province, pour une période se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition législative de cette province à l'égard d'une compagnie, lorsque celle-ci est un débiteur visé par la loi provinciale et qu'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(2) [Cessation] L'ordonnance cesse d'être en vigueur dans les cas suivants :

a) la compagnie manque à ses obligations de paiement pour un montant qui devient dû à Sa Majesté après l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

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

as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

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

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

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

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

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

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

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

(A) has been withheld or deducted by a person from a payment to another person

d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne,

and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

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

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

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

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

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

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

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

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same

ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

(3) [Effet] Les ordonnances du tribunal, autres que celles rendues au titre du paragraphe (1), n'ont pas pour effet de porter atteinte à l'application des dispositions suivantes :

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

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou

effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

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

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

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

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

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

provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

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

. . .

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

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

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

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

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

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

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

18.4 (1) [Réclamations de la Couronne] Dans le cadre de procédures intentées sous le régime de la présente loi, toutes les réclamations de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail, y compris les réclamations garanties, prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

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

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii),

in respect of any related interest, penalties or other amounts.

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

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

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

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

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

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

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

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

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

et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

20. [La loi peut être appliquée conjointement avec d'autres lois] Les dispositions de la présente loi peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale, autorisant ou prévoyant l'homologation de transactions ou arrangements entre une compagnie et ses actionnaires ou une catégorie de ces derniers.

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (en date du 18 septembre 2009)

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

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

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

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

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

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

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

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

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

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

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

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

* * *

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

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

(i) the expiry of the order,

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

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

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

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

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income*

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

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

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

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

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

* * *

11.09 (1) [Suspension des procédures : Sa Majesté] L'ordonnance prévue à l'article 11.02 peut avoir pour effet de suspendre :

a) l'exercice par Sa Majesté du chef du Canada des droits que lui confère le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* ou toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie à ce paragraphe et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents, à l'égard d'une compagnie qui est un débiteur fiscal visé à ce paragraphe ou à cette disposition, pour la période se terminant au plus tard :

(i) à l'expiration de l'ordonnance,

(ii) au moment du rejet, par le tribunal ou les créanciers, de la transaction proposée,

(iii) six mois après que le tribunal a homologué la transaction ou l'arrangement,

(iv) au moment de tout défaut d'exécution de la transaction ou de l'arrangement,

(v) au moment de l'exécution intégrale de la transaction ou de l'arrangement;

b) l'exercice par Sa Majesté du chef d'une province, pour la période que le tribunal estime indiquée et se terminant au plus tard au moment visé à celui des sous-alinéas *a*)(i) à (v) qui, le cas échéant, est applicable, des droits que lui confère toute disposition

Tax Act, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the

législative de cette province à l'égard d'une compagnie qui est un débiteur visé par la loi provinciale, s'il s'agit d'une disposition dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(2) [Cessation d'effet] Les passages de l'ordonnance qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*) cessent d'avoir effet dans les cas suivants :

a) la compagnie manque à ses obligations de paiement à l'égard de toute somme qui devient due à Sa Majesté après le prononcé de l'ordonnance et qui pourrait faire l'objet d'une demande aux termes d'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la

collection of a sum, and of any related interest, penalties or other amounts, and the sum

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

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

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

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

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

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

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

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection

perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe;

b) un autre créancier a ou acquiert le droit de réaliser sa garantie sur un bien qui pourrait être réclamé par Sa Majesté dans l'exercice des droits que lui confère l'une des dispositions suivantes :

(i) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*,

(ii) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents,

(iii) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(A) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(B) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens

3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

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

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

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

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

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

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

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

du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

(3) [Effet] L'ordonnance prévue à l'article 11.02, à l'exception des passages de celle-ci qui suspendent l'exercice des droits de Sa Majesté visés aux alinéas (1)*a*) ou *b*), n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

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

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ainsi que des intérêts, pénalités et autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

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

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

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

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

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

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

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured

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

(2) [Exceptions] Le paragraphe (1) ne s'applique pas à l'égard des sommes réputées détenues en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des sommes réputées détenues en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, si, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

b) cette province est une province instituant un régime général de pensions au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un régime provincial de pensions au sens de ce paragraphe, et les sommes déduites ou retenues au titre de cette loi provinciale sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier de la compagnie et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

Loi sur la taxe d'accise, L.R.C. 1985, ch. E-15 (en date du 13 décembre 2007)

222. (1) [Montants perçus détenus en fiducie] La personne qui perçoit un montant au titre de la taxe prévue à la section II est réputée, à toutes fins utiles et malgré tout droit en garantie le concernant, le détenir en fiducie pour Sa Majesté du chef du Canada, séparé de ses propres biens et des biens détenus par ses créanciers garantis qui, en l'absence du droit en garantie, seraient ceux de la

creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

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

. . .

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

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

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

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

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

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

personne, jusqu'à ce qu'il soit versé au receveur général ou retiré en application du paragraphe (2).

(1.1) [Montants perçus avant la faillite] Le paragraphe (1) ne s'applique pas, à compter du moment de la faillite d'un failli, au sens de la *Loi sur la faillite et l'insolvabilité*, aux montants perçus ou devenus percevables par lui avant la faillite au titre de la taxe prévue à la section II.

. . .

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

a) être détenus en fiducie pour Sa Majesté du chef du Canada, à compter du moment où le montant est perçu par la personne, séparés des propres biens de la personne, qu'ils soient ou non assujettis à un droit en garantie;

b) ne pas faire partie du patrimoine ou des biens de la personne à compter du moment où le montant est perçu, que ces biens aient été ou non tenus séparés de ses propres biens ou de son patrimoine et qu'ils soient ou non assujettis à un droit en garantie.

Ces biens sont des biens dans lesquels Sa Majesté du chef du Canada a un droit de bénéficiaire malgré tout autre droit en garantie sur ces biens ou sur le produit en découlant, et le produit découlant de ces biens est payé au receveur général par priorité sur tout droit en garantie.

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, ch. B-3 (en date du 13 décembre 2007)

67. (1) [Biens du failli] Les biens d'un failli, constituant le patrimoine attribué à ses créanciers, ne comprennent pas les biens suivants :

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

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

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

but it shall comprise

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

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

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

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

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

a) les biens détenus par le failli en fiducie pour toute autre personne;

b) les biens qui, à l'encontre du failli, sont exempts d'exécution ou de saisie sous le régime des lois applicables dans la province dans laquelle sont situés ces biens et où réside le failli;

b.1) dans les circonstances prescrites, les paiements au titre de crédits de la taxe sur les produits et services et les paiements prescrits qui sont faits à des personnes physiques relativement à leurs besoins essentiels et qui ne sont pas visés aux alinéas *a*) et *b*),

mais ils comprennent :

c) tous les biens, où qu'ils soient situés, qui appartiennent au failli à la date de la faillite, ou qu'il peut acquérir ou qui peuvent lui être dévolus avant sa libération;

d) les pouvoirs sur des biens ou à leur égard, qui auraient pu être exercés par le failli pour son propre bénéfice.

(2) [Fiducies présumées] Sous réserve du paragraphe (3) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d'assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun des biens du failli ne peut, pour l'application de l'alinéa (1)*a*), être considéré comme détenu en fiducie pour Sa Majesté si, en l'absence de la disposition législative en question, il ne le serait pas.

(3) [Exceptions] Le paragraphe (2) ne s'applique pas à l'égard des montants réputés détenus en fiducie aux termes des paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*, des paragraphes 23(3) ou (4) du *Régime de pensions du Canada* ou des paragraphes 86(2) ou (2.1) de la *Loi sur l'assurance-emploi* (chacun étant appelé « disposition fédérale » au présent paragraphe) ou à l'égard des montants réputés détenus en fiducie aux termes de toute loi d'une province créant une fiducie présumée dans le seul but d'assurer à Sa Majesté du chef de cette province la remise de sommes déduites ou retenues aux termes d'une loi de cette province, dans la mesure où, dans ce dernier cas, se réalise l'une des conditions suivantes :

a) la loi de cette province prévoit un impôt semblable, de par sa nature, à celui prévu par la *Loi de l'impôt sur le revenu*, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 227(4) ou (4.1) de la *Loi de l'impôt sur le revenu*;

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

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

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

. . .

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

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

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

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

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

b) cette province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) du *Régime de pensions du Canada*, la loi de cette province institue un « régime provincial de pensions » au sens de ce paragraphe, et les sommes déduites ou retenues aux termes de la loi de cette province sont de même nature que celles visées aux paragraphes 23(3) ou (4) du *Régime de pensions du Canada*.

Pour l'application du présent paragraphe, toute disposition de la loi provinciale qui crée une fiducie présumée est réputée avoir, à l'encontre de tout créancier du failli et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que la disposition fédérale correspondante, quelle que soit la garantie dont bénéficie le créancier.

86. (1) [Réclamations de la Couronne] Dans le cadre d'une faillite ou d'une proposition, les réclamations prouvables — y compris les réclamations garanties — de Sa Majesté du chef du Canada ou d'une province ou d'un organisme compétent au titre d'une loi sur les accidents du travail prennent rang comme réclamations non garanties.

. . .

(3) [Effet] Le paragraphe (1) n'a pas pour effet de porter atteinte à l'application des dispositions suivantes :

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

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, ou d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, et des intérêts, pénalités ou autres montants y afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

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

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

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Pour l'application de l'alinéa *c*), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa *c*)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa *c*)(ii), et quant aux intérêts, pénalités ou autres montants y afférents, quelle que soit la garantie dont bénéficie le créancier.

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

Tab 4

CITATION: HGC v. IESO 2019 ONSC 259
COURT FILE NO.: CV-15-66152
DATE: 2019/01/10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hutchingame Growth Capital Corporation, Plaintiff

-and-

Independent Electricity System Operator, Defendant

BEFORE: Justice P.E. Roger

COUNSEL: Michael S. Hebert and Cheryl Gerhardt McLuckie, Lawyers for the Plaintiff

Thomas G. Conway and Benjamin Grant, Lawyers for the Defendant

HEARD: September 4 to 7, 10 to 14, 17, and October 5, 2018

REASONS FOR DECISION

P.E. ROGER, J.

Introduction and Factual Overview

[1] The plaintiff (HGC) seeks damages of $4,796,479.41 from the defendant (IESO), claiming breach of contract, negligent misrepresentation, and breach of the duty of good faith.

[2] For reasons that follow, I have decided that this action should be dismissed.

Key Participants

[3] Eric Hutchingame is the principal and directing mind of HGC; he is also the principal and directing mind of Sea to Sky Pollution Solutions Corporation (Sea to Sky), his investment companies. Mr. Hutchingame's experience is primarily in restructuring businesses. He had no experience with biomass electricity generation projects prior to this venture.

[4] William Baker is a longtime acquaintance of Mr. Hutchingame (since the 1980s). Mr. Baker is the president and principal of Truestar Investments Ltd. (Truestar). Truestar is a venture

capital firm incorporated in 2011. Mr. Baker had no prior experience with biomass or energy contracts of any kind.

[5] The amount of damages claimed by HGC represents the amount of consideration (or the price) that is stipulated in an assignment agreement dated May 15, 2014, between HGC and Truestar (Assignment to Truestar).

[6] IESO, previously the Ontario Power Authority (OPA), is a not-for-profit, statutory corporation constituted under the *Electricity Act, 1998*. It operated a Renewable Energy Standard Offer Program (RESOP). Under this program, the OPA entered into contracts to purchase energy from small renewable energy projects over an agreed period of 20 years.

[7] In the course of his dealings with the OPA and the IESO, Mr. Hutchingame dealt primarily with Mr. Devitt, a senior analyst with the OPA/IESO, and with Mr. Fogul, a senior Toronto insolvency lawyer retained by the OPA/IESO.

[8] 951584 Ontario Inc. (Greenview) is not a party to this action. In 2007, Greenview proposed to develop and construct a biomass renewable energy facility on a property it owned at Elephant Lake, near Bancroft, Ontario. Greenview was controlled by Mr. Frank Yantha. Mr. Yantha also controlled another corporation - 2172950 Ontario Inc.

Key Contracts

[9] On November 8, 2007, Greenview entered into a Renewable Energy Standard Offer Program Contract with the OPA (RESOP Contract). Under the RESOP Contract, Greenview was to generate electricity from renewable biomass at an agreed price for a period of 20 years, starting from the Commercial Operation Date (COD - date on which commercial operation is first attained), which in this case was on the third anniversary or on November 8, 2010. Greenview proposed to build this biomass electricity generation plant at its Elephant Lake property from previously used equipment that it had purchased.

[10] Greenview repeatedly failed to meet the Commercial Operation Date (COD of November 8, 2010). Greenview and the OPA eventually agreed to two extensions, extending the COD

deadline to January 15, 2013. Greenview failed again to meet this revised COD deadline. In an effort to obtain an additional extension from the OPA, Greenview submitted a force majeure claim to the OPA, arguing that its failure to meet the COD was beyond its control; this claim was dismissed by the OPA on October 22, 2012. On the same day, the OPA advised Greenview that its failure to meet the COD would constitute an event of default under the RESOP Contract.

[11] In September 2012, as Greenview's renewable biomass electricity generation project was unraveling, Mr. Hutchingame was approached by his longtime friend and trustee in bankruptcy, Kevin McCart.

[12] Mr. Hutchingame testified that the principal of Greenview, Mr. Frank Yantha, had approached Mr. McCart, who in turn approached Mr. Hutchingame. Mr. Hutchingame said that he then understood that "Greenview was a dead duck, a zombie", that they were insolvent, with no possibility of completing the project.

[13] Mr. Hutchingame testified that he conducted a full review of Greenview's documents, saw opportunities, and decided that the risk was worth going ahead. He testified that this project was pure risk. In Mr. Hutchingame's words, he "committed $50,000 to the project to take a flyer."

[14] Mr. Hutchingame then took control of Greenview. During his examination-in-chief, Mr. Hutchingame said that he told Mr. Yantha that he wanted full control and that he would run this through a soft receivership.

[15] On October 26, 2012, Mr. Hutchingame concluded an assignment agreement with 2172950 Ontario Inc. and Greenview, two companies controlled by Mr. Yantha (Assignment to HGC). Under this assignment agreement, 2172950 Ontario Inc. assigned to HGC all of its rights in the security of 2172950 Ontario Inc. in the debts of Greenview, including an August 2010 secured promissory note between 2172950 Ontario Inc. and Greenview in the principal amount of US $3,800,000, and the personal guarantee of Mr. Yantha. No evidence of this loan was presented at trial. As a result of the Assignment to HGC, for an investment of about $50,000, HGC instantaneously became, on paper, the largest secured creditor of Greenview by far.

[16] Although during his cross-examination Mr. Hutchingame initially said that he paid $50,000 for the Assignment to HGC, he later said that he probably paid $10,000 to $15,000, plus some expenses for professional fees. He also said that it was probably worth one dollar, and that Mr. Yantha was prepared to give it to him. No independent proof of this payment was presented at trial.

[17] Shortly thereafter, on November 21, 2012, Greenview – now effectively controlled by Mr. Hutchingame – filed a notice of intention to make a proposal under subsection 50.4(1) of the *Bankruptcy and Insolvency Act*. Mr. McCart was the proposal trustee.

[18] On December 7, 2012, Mr. McCart wrote to the OPA, advising them of this turn of event, and of Greenview's plan to work with creditors to enable Greenview to continue with its business plan.

[19] On January 18, 2013, Mr. Hutchingame, on behalf of HGC, wrote to the OPA. The purpose of this letter was to seek an extension of the now expired COD deadline of January 15, 2013. Mr. Hutchingame indicates in this letter that if an extension is granted, as the largest financial stakeholder, he is willing to provide additional funding for Greenview to successfully complete the project. He indicates that his extensive due diligence convinced HGC that if the OPA consents to an extension, the project could achieve COD before the end of the 2013 construction season, and that the project is a minimum of 80% complete. He attributes much of the blame for Greenview's failing to complete the project on a number of misrepresentations by L & S Engineering (Greenview's occasional project engineer), saying that they failed to meet even the most minimum of professional standards. He concludes by saying that "HGC currently has almost $5,000,000 at risk in this project (based on the initial debt of US $3.8 million converting converted into CDN $ together with interest and expenses) and I believe that HGC and OPA's interests align as although we both want the project to succeed, we are both adverse to any further involvement if it causes a deterioration of our position."

[20] On February 12, 2013, in a further effort to extend the expired COD deadline, Mr. Hutchingame filed an amended force majeure claim with the OPA, which he prepared himself. In

this claim, he again attributes much of the blame to L & S. This amended force majeure claim was rejected by the OPA on March 6, 2013.

[21] At about the same time, on February 14, 2013, Greenview filed an amended proposal under the provisions of the *Bankruptcy and Insolvency Act*, which was approved by the Court on March 1, 2013. Mr. Hutchingame testified that he wrote the proposal, and that it essentially dealt with priority issues between existing creditors.

[22] By letter dated March 8, 2013, Mr. Hutchingame also served a notice of arbitration under section 12.1 of the RESOP Contract on the OPA, proposing the trustee, Kevin McCart, as arbitrator, to resolve the force majeure and extension issue. However, the parties never proceeded to arbitration as the OPA agreed to extend the COD deadline.

[23] Indeed, following negotiations, the OPA, Greenview, and Greenview's secured lenders entered into a Waiver and Amending Agreement which, among other things, extended the COD to November 8, 2015. The Waiver and Amending Agreement resulted following a meeting in Toronto on March 22, 2013. Prior to and following this meeting, the parties exchanged emails relating to outstanding fees and an independent engineering report requested by the OPA. On March 27, 2013, the OPA provided a draft Waiver and Amending Agreement to Mr. Hutchingame. Mr. Hutchingame requested three changes which were largely agreed to by the OPA, and on May 15, 2013, the Waiver and Amending Agreement was signed.

[24] As a result, two documents are key:

a) The RESOP Contract dated November 8, 2007 (attached in part as Schedule I); and

b) The Waiver and Amending Agreement dated May 15, 2013 (attached in part as Schedule II).

[25] Material to the issues in this action, the RESOP Contract provides, in part, that:

- A number of specified events of default. Most of which include a 30-day cure period from written notice of failure. For example, ceasing to satisfy the eligibility requirements in the program rules, or breaching certain representations is subject

to the 30-day cure period. On the other hand, filing a proposal or an assignment in bankruptcy is not.

- Remedies of the OPA include, on written notice to the generator, termination of the agreement and suspension of payment, as provided. However, for acts of default specified at section 7.1 (19) or (20), which relate to various acts of insolvency such as filing a proposal or an assignment in bankruptcy, it provides that the RESOP Contract shall automatically terminate without notice effective immediately before such event of default, and that in such a case secured lenders shall have the rights available under section 9.2 (3).
- The rights and obligations of secured lenders are provided in part at section 9.2 and 13.4. These include the right of a secured lender to acquire or assign the generator's interest (at section 9.2 (2)).
- Alternatively, in the event of termination, a secured lender may, within 90 days after the termination date, require the OPA to enter into a new agreement provided that the secured lender pays outstanding amounts (including reasonable legal fees), and cures any default existing immediately prior to termination that are capable of being cured (at section 9.2 (3)).

(See Schedule I, attached, for extracts of full text)

[26] The Waiver and Amending Agreement provides, in part, that:

- The COD is extended to November 8, 2015 (the 8th anniversary).
- Specified events of default under the RESOP Contract are waived.
- Various specified provisions of the RESOP Contract are amended.
- Greenview has to pay to the OPA certain amounts, which it paid.
- Greenview has to deliver to the OPA: by no later than May 31, 2013, confirmation of each of (i) its engineering team and (ii) the project management team, with their experience and qualifications; the results of an engineering/design review by no later than July 8, 2013; a project development

plan within 15 business days of delivering the above; quarterly progress reports within 20 business days of the end of each fiscal quarter; and a renewable biomass fuel supply plan by May 8, 2015. As indicated below, this information was not delivered to the OPA.

- A breach shall be deemed to be a generator event of default under the RESOP Contract, provided that a 30-day cure period shall be applicable.

  (See Schedule II, attached, for extracts of full text)

Key Transactions & Events

[27] To give some context, after successfully concluding the Waiver and Amending Agreement on May 15, 2013, which extended the time to complete the project to November 8, 2015, one might have expected some activity to meet the May and July 2013 deadlines (outlined above), and one might also have expected, at some point, some boots on the ground or work at the site to ensure that the revised COD was met. Instead, the evidence discloses no immediate real action to meet the May and July 2013 deadlines, and thereafter, the evidence discloses little by way of actual concrete steps. However, the evidence shows that:

- Greenview filed an assignment in bankruptcy (on February 24, 2014 - this bankruptcy was triggered by Mr. Hutchingame);
- HGC and Truestar executed an assignment agreement to convey HGC's rights under the RESOP Contract to Truestar (on May 15, 2014 – this assignment was not disclosed until after this action was started);
- Truestar concluded an agreement of purchase and sale with Sea to Sky to purchase all of the assets of Greenview, including the RESOP Contract (on July 21, 2014); and
- A vesting order confirming the purchase of Greenview's assets by Truestar was obtained without prior notice to the OPA (August 21, 2014).

[28] Mr. Hutchingame testified that after concluding the May 15, 2013 Waiver and Amending Agreement, he started putting the team together but was slowed down by heart issues and heart surgery in December 2013.

[29] During his examination-in-chief, Mr. Hutchingame explained what he did, including that Mr. Harrington, of Harrington Mechanical Ltd., was getting ready to do welding, and how in May 2013, L & S Engineering attended to determine the amount of work and cost remaining. He also mentioned that he was circling back to people and contractors previously involved.

However, despite the tight timelines provided in the Waiver and Amending Agreement (which required some concrete steps by July 2013), Mr. Hutchingame was often vague about who these people and contractors were, what they did, and when. Mr. Baker also described what was done. However, other than hiring a person to watch over the property and a person to assemble all of the equipment and a contractor team (Theo), their descriptions were often vague on specifics.

[30] By letter dated May 31, 2013, Mr. Hutchingame, on behalf of HGC, wrote to the OPA that he will assume the ultimate responsibility for project management and that L & S Engineering will, on an interim basis, continue as the engineering team while HGC continues to review available alternatives. This was HGC's attempt to comply with section 5 (d) of the Waiver and Amending Agreement which, as outlined above, required that by May 31, 2013, the generator deliver confirmation of each of the engineering team and project management team.

[31] Meanwhile, Mr. Devitt was following up with Mr. Hutchingame about the management and engineering team, and the results of the engineering/design review.

[32] In a letter dated July 3, 2013, Mr. Hutchingame implicitly agreed that his letter of May 31, 2013 (described above) was deficient. In the July 3 letter, Mr. Hutchingame indicates that he retained KSH Engineering to provide a detailed review and make recommendations on the project management team, and that he has now been able to transition to KSH Engineering. In fact, he never transitioned to KSH.

[33] KSH's initial letter is dated May 14, 2013, and follows up on HGC's invitation to submit a proposal to provide engineering services for the completion of the biomass project. KSH's study report is dated July 17, 2013. It outlines a number of concerns, and estimates the cost to complete the project at $12,150,000.

[34] At trial, Mr. Hutchingame said that he strongly disagreed with the KSH report, that he thought that it was ridiculous, that KSH were not interested in administering this project, and that they inflated costs because they were nervous about their potential liability. However, Mr. Hutchingame provided no evidence in support of his allegations that this report or its estimates were flawed.

[35] Although at trial Mr. Hutchingame said that KSH told him that they were not interested in being his engineers on this project, he admitted that he never told this to the OPA, and that he continued to allow the OPA to think that KSH might be the engineers on the project. For example, in an email to Mr. Devitt dated September 16, 2013, Mr. Hutchingame indicates that he was extremely disturbed with the content of the KSH report, but that they would need clarification from the proposal trustee and creditors if the prior budget to commercial operation had to be increased above the previously contemplated $1M amount. Similarly, in another follow-up email to Mr. Devitt, dated July 21, 2014, Mr. Hutchingame indicates that he is diligently working on advancing this project, stating: "As you know KSH has budgeted the cost of completion as between $8,000,000 to $10,000,000 but I have not any other estimates from Truestar. In the interim, I have contacted all of the previous contractors and have asked them to be able to hit the ground running if and when Truestar green lights completing the project." Mr. Hutchingame's stated position at trial, namely, that he thought that the KSH report was ridiculous, is also implicitly contradicted by a number of emails and documents exchanged between himself and Mr. Baker (even Mr. Hutchingame's email to Mr. Mark Froud does not go as far as what Mr. Hutchingame stated at trial).

[36] On September 5, 2013, Mr. Devitt wrote to Mr. Hutchingame that "you have also failed to deliver the updated plan", and asked for a specific date for the overdue updated plan. As indicated above, Mr. Hutchingame responded on September 16, 2013, that all parties were still committed, and that he was working with the proposal trustee. He added that "Either way we'll have ample time to complete the project before the November 2015 deadline based on a Spring 2014 start date."

[37] It is apparent from the evidence that starting about September 2013, Mr. Hutchingame was contemplating Greenview filing for bankruptcy. By email dated October 3, 2013, Mr. McCart asked secured creditors what their position would be in the event of the bankruptcy of Greenview. On October 16, 2013, Mr. Hutchingame provided a copy of Mr. McCart's email to Mr. Devitt, indicating that they were revising their plan several times, that he was waiting to hear from secured creditors (about priority), and that he was handcuffed until he heard back from the secured creditors. Mr. Devitt's refusals to admit that he then knew that Greenview might file an

assignment in bankruptcy were simply not convincing. I find that by October 16, 2013, the OPA was aware that the bankruptcy of Greenview was a possibility.

[38] On November 5, 2013, Mr. Hutchingame emailed certain answers to Mr. Devitt, including that he was trying to determine priority issues between secured creditors, that Greenview was considering an assignment (in bankruptcy), that he would like to assign the RESOP Contract but that it would probably require court approval, that he was "totally frustrated" in his ability to proceed, and that he anticipated requiring court approval to proceed as the terms of the proposal did not appear to be adequate.

[39] On November 18, 2013, Mr. Hutchingame advised Mr. Devitt that he had been diagnosed with heart issues that would require surgery in December 2013. He also indicated that he anticipated that Greenview would file an assignment in bankruptcy and that it would take several weeks to convey the Greenview assets to another entity so that it could finance the completion of the project. He concluded by saying that he did not anticipate that any detailed planning document would be available until March or April 2014. In fact, none of the review results, updated plan, or confirmation of the engineering and project management team were produced to the OPA in March or April 2014, or at any time thereafter.

[40] I find that none of the items that were required to be delivered by Greenview to the OPA, under section 5 (c) and (d) of the Waiver and Amending Agreement (described, in part, above at paragraph 26), were delivered.

[41] I also find that following the KSH report, it became apparent to Mr. Hutchingame, or he became concerned, that completing the biomass project would be more difficult and uncertain than anticipated, and likely more expensive. This would also have been apparent to Mr. Hutchingame from the June 10, 2013 Harrington Mechanical Ltd. report, and from the undated L & S Engineering report that he received in June or July 2013. We see that Mr. Hutchingame's next steps are somewhat concerned with resolving priority issues amongst creditors. Indeed, other than obtaining the extension to November 8, 2015, there is no evidence of any real concrete step on the biomass project or of fulfilling Greenview's obligations to the OPA.

[42] On February 7, 2014, Mr. Hutchingame (Sea to Sky) prepared and served a notice of intention to enforce security on Greenview for a stated secured indebtedness of $616,893.

[43] On February 24, 2014, Greenview filed an assignment in bankruptcy (with Mr. McCart as trustee). The statement of affairs indicates that HGC is by far the largest creditor at a stated $4.85M, and Sea to Sky the largest secured creditors at a stated $725,000.

[44] Mr. Baker testified that in 2012, Mr. Hutchingame had raised the possibility of Mr. Baker investing in this project. Additional investment discussions occurred, and in May 2013, Mr. Baker loaned $205,000 to Sea to Sky for this project, as debtor in possession financing.

[45] On May 15, 2014, HGC and Truestar concluded an assignment agreement (the Assignment to Truestar). As indicated at paragraphs 4 and 5 above, Mr. Baker is the president and principal of Truestar. I find that the Assignment to Truestar was prepared by Mr. Baker and Mr. Hutchingame, without legal assistance.

[46] The Assignment to Truestar provides that for $4,769,479.41, and subject to conditions, Truestar purchases from HGC certain assets, including: the RESOP Contract, the Waiver and Amending Agreement, and the US $3.8M security for the debt owing by Greenview to 2172950 Ontario Inc. The conditions include the Government of Ontario assigning various security agreements to HGC, and the trustee in bankruptcy of Greenview obtaining court approval to vest to HGC, free from all liens or encumbrances, all of the assets of Greenview (including all contracts with the OPA).

[47] The amount of consideration agreed to in the Assignment to Truestar is the plaintiff's basis for damages in this action. That amount is premised, in part, on the debt owing by Greenview, which security was purchased by HGC in 2012 for $50,000, or less (see paragraph 16 above). Also potentially impacting the value of these assets, I note the following: Greenview had just filed for bankruptcy on February 24, 2014, there had been little concrete progress on the renewable biomass electricity generation project since May 2013, the project might cost more and be more complicated than initially anticipated, and the extended COD deadline of November 2015 at the very least loomed larger. As well, both Harrington Mechanical Ltd. and KSH had projected higher than anticipated costs; and some uncertainty certainly existed over the

possibility of missing drawings explaining how the equipment should be assembled, over what the TSSA (Technical Standards and Safety Authority) would allow or not allow to be reused, and over what the actual cost and actual time to completion would be.

[48] Despite the above, Mr. Baker agreed that the amount of consideration (or the agreed upon price) provided in the Assignment to Truestar would require Truestar to pay HGC/Mr. Hutchingame almost 100 cents on the dollar; which Mr. Baker admitted was unusual, in such circumstances. All the same, Mr. Baker testified that $4.7M was a fair amount to "my shareholders."

[49] The Assignment to Truestar is also surprising for its minimal content considering the stated amount of consideration. For example, it was prepared without legal advice, and it does not provide how and when the agreed upon amount is to be paid; Mr. Baker and Mr. Hutchingame apparently had a verbal understanding that it included a property transfer. It also does not provide when the conditions are to be met, and what happens if they are not met; Mr. Hutchingame admitted that he has not made a demand for payment from Truestar. Such drafting is surprising when also compared to the more thorough May 2013 letter of intent and loan agreement between Truestar and Sea to Sky, for a much smaller loan ($205,000).

[50] Also confounding is the fact that the Assignment to Truestar was not disclosed to the OPA/IESO, or to the secured creditors until after this action was started. Mr. Hutchingame admitted this, and said that he had no obligation to tell anyone. I note that section 13.4 (1) of the RESOP Contract requires written notice to the OPA, and that section 63 (4) of the *Personal Property Security Act* might possibly have required notice to the Ontario Minister of Finance, a secured lender. Mr. Hutchingame said that only he and Mr. Baker were aware of the Assignment to Truestar.

[51] Following Greenview's assignment in bankruptcy on February 24, 2014, the OPA had prepared a draft letter, dated May 27, 2014, which it never sent. The plaintiff argues that this shows bad-faith. The letter was prepared by the OPA in order for it to be ready to give notice to secured lenders, immediately after the required 90 days, that they no longer had rights exercisable under section 9.2 (3) of the RESOP Contract, and that no new agreement would be

entered into. This letter was not sent because on May 15, 2014, Mr. Hutchingame gave notice to the OPA that he intended to proceed under section 9.2 (2) of the RESOP Contract.

[52] On May 15, 2014, Mr. Hutchingame wrote to the OPA informing them that HGC and Sea to Sky had elected to invoke their rights under section 9.2 (2) of the RESOP Contract. His brief email does not specify precisely how they wished to invoke their rights under this provision, and the email makes no reference to Truestar or to the Assignment to Truestar of the same date. Section 9.2 (2) provides that a secured lender may enforce any secured lender's security agreement and acquire the generator's interest and may sell or assign the generator's interest.

[53] On May 23, 2014, the OPA responded to Mr. Hutchingame's email, including that:

- The original contract terminated on February 24, 2014, as a result of Greenview's default under section 7.1 (20) (Greenview's bankruptcy).
- It assumes that the secured lenders are invoking their rights under section 9.2 (3) of the RESOP Contract.
- HGC and Sea to Sky must decide who will become the new generator.
- The proposed new generator must pay all reasonable costs and expenses including legal fees of the OPA in connection with Greenview's default and preparation of the new agreement and documents. That it incurred to date legal fees of $4,868.71, that the estimated fees of preparing the new agreement and related documents are $15,000 (with no cap on reasonable legal fees), and that it requires a prepayment of $10,000 as security for those future legal fees.
- The proposed new generator must obtain the written consent of the other secured lenders (Ministry of Finance and Ministry of Natural Resources).
- The proposed new generator must cure the default under section 5 (c) (ii) of the Waiver and Amending Agreement (updated plan - the OPA later added that an engineering team and a project management team was also required under section 5 (d)).

- The proposed new generator must provide confirmation that the generator maintains its connection queue with Hydro One (section 7.1 (7) of the RESOP Contract).

[54] Mr. Hutchingame testified that he was gob smacked by the response of the OPA; that he considered it to be a declaration of war. Nonetheless, he did not respond. He did not mention the Assignment to Truestar (and did not proceed to Bankruptcy Court within 30 days to seek relief against the OPA as he claims was available).

[55] Rather, Mr. Hutchingame behaved for quite some time as if he was pursuing efforts to comply with the above noted requests of the OPA. For example:

- May 27, 2014, Mr. Hutchingame wrote an email to Mr. Devitt thanking him for the comprehensive response of the OPA.
- May 27, 2014, Mr. Hutchingame wrote to Mr. Baker that "OPA is stalled at the moment but never say never." He did not even mention the OPA's letter of May 23, 2014. He did not mention to Mr. Baker how frustrated he now says that he was with the OPA's letter of May 23. Instead, he continued to look at fiscally advantageous ways of structuring financing.
- On May 27, 2014, he asked Harrington Mechanical Ltd. whether they are available during the summer 2014, and also asked them for suggestions for project managers, and for an estimate for the timeline to complete work. On May 28, 2014, Mr. Harrington responded: "This is only a guess at this time because we don't have proper engineering drawings. After engineering drawings we would estimate 10 to 12 months to have an operational system. With new equipment the system would probably take 4 to 6 weeks to commission, but with used equipment parts may have to be replaced etc., and they could have long delivery times - therefore to be conservative I would plan for 8 to 12 weeks." Note that no evidence was provided at trial that the plaintiff ever had proper engineering drawings. No evidence was presented on how long these might take to prepare (if they were not otherwise available). No expert evidence, properly admissible, was

presented about whether the project could be completed, about the timeline, or about the cost of completing a workable biomass electricity generation project.

- On June 9, 2014, Mr. Baker told Mr. Hutchingame that he could borrow funds for the project either mid-June or end of June and he asked when the project would need funds. On June 9, Mr. Hutchingame responded "end of June I can stall everything else". This is not at all as if they were at war with the OPA.

- June 12, 2014 letter of his lawyer to the Ministry of Finance budgeted $15,000 for "Future OPA fees likely required to finalize arrangements". This shows an intention to proceed as indicated by the OPA in their May 23 letter.

- June 25, 2014 letter of his lawyer to the Ministry of Finance that "With respect to the OPA fees, OPA has advised that they have already incurred $5,600 which they will want to recover in order to move forward. The balance will be to arrange the closing with any Purchaser and accordingly this should be an expense of the assets." Again, this shows an intention to proceed as indicated by the OPA in their May 23 letter.

- July 21, 2014, Mr. Hutchingame wrote to Mr. Devitt and others, as indicated above, that he was diligently working on advancing this project; however, considering the cost of completion budgeted by KSH of between $8M to $10M he had not received other estimates from Truestar, and had contacted previous contractors asking that they be ready to hit the ground running if and when Truestar green lights completing the project. Mr. Hutchingame does not mention that he disagrees with the OPA's letter of May 23, that he was in shock after receiving their letter, or that he wished to go to court for a ruling. I agree with the evidence of Mr. Hutchingame that he was then waiting for the vesting order, and that this was then the only thing that mattered to him.

- July 23, 2014 emails between Mr. Hutchingame and Mr. Baker relate to financing using flow through shares, and to assembling a management team. Mr. Baker indicated that the biggest challenge would be assembling a management team that can be held up to the brokers and investors as a good, credible team capable of

executing, with a capable operation officer. Mr. Hutchingame responded referring to their obligations under section 5 (d) of the Waiver and Amending Agreement that: "While I am playing around with the financial stuff but we have a year to staff those needs … The key requirement is the project manager … In order to avoid any interruption with the OPA assignment we should minimize any changes … I am currently approved for para 5 of the OPA extension … so it is better to just fade away. I retained L & S engineering for that requirement and assumed as the project manager. Let sleeping dog as the OPA goes but we definitely need someone to drive the bus." It is virtually impossible to reconcile this document with Mr. Hutchingame's stated position at trial that he was at war with the OPA. Rather, like most other documents, this document shows that he was intending on proceeding with the project as outlined by the OPA in their May 23 letter. It also shows that despite some prodding by Mr. Baker, Mr. Hutchingame is not taking concrete proactive steps to hire and put in place a project management team.

- July 25, 2014 email from Mr. Hutchingame to Mr. Baker provided a copy of the L & S Engineering report, and indicated: "Here is the other engineering report which has a very different view. I think we should hope for the best and plan for the worst."

- Mr. Hutchingame and Mr. Baker prepared a prospectus to generate financing for the project, and in an email dated July 25, 2014, Mr. Hutchingame wrote to Mr. Baker that the budget is too low, that "$1.2 is just not enough and should allow at least twice as much." At trial, Mr. Hutchingame claimed that he did not remember when this document was written or what its purpose was; it's obviously the draft of a prospectus seeking financing for the project. This prospectus also mentions a 5% royalty for the assignment which is not mentioned elsewhere; at trial Mr. Hutchingame denied that he would have received this royalty. At trial he said that he was still considering how to make it work, that RESOP project was going to be the anchor tenant, and they were looking at what else they could do with the site. I note that this prospectus misrepresents the situation; it indicates, for example, that: engineering studies provided clear guidance on the steps needed to assemble

the equipment into a working biofuel plant, and that the OPA deadline of November 2015 may be extended.

- August 8, 2014, Mr. Devitt sent an email to Mr. Hutchingame asking him to provide an update regarding his current plans for this contract considering the OPA's response on May 23, 2014. August 11, 2014, Mr. Hutchingame responded that he was working with the secured creditors and could not provide any meaningful responses until priority issues were satisfactorily resolved, indicating: "but (the other secured creditor) hasn't yet confirmed any specific funds, even the payments to your organization, the OPA. This uncertainty makes it impossible to provide any meaningful responses until the issue is satisfactorily concluded." Again, Mr. Hutchingame makes no mention of how insulted he apparently was by the OPA's May 23 letter.

- September 16, 2014 email of Mr. Hutchingame to Mr. Devitt, in which Mr. Hutchingame answered questions of the OPA, indicated that the requested fees would be paid, that they were working on an updated plan, were committed to facilitate the COD by November 2015, that the qualification and expertise of every member of the engineering team and project management team will be provided, and that Mr. Baker was unable to proceed until the secured creditors just recently consented to the Truestar purchase.

[56] Rather than immediately raising with the OPA his stated concerns to their letter of May 23, 2014, insisting to proceed with an assignment under section 9.2 (2) of the RESOP Contract, or giving notice of arbitration as provided in the RESOP Contract, Mr. Hutchingame proceeded, without notice to the OPA, to obtain from this court a vesting order confirming the sale of all assets to Truestar.

[57] Indeed, on July 21, 2014, Truestar and Sea to Sky concluded an agreement of purchase and sale. For $500,000, payable within 30 days of obtaining court approval for the vesting of the assets in the purchaser, and subject to conditions, Truestar purchased from Sea to Sky all of the assets of Greenview, including: all real estate, land, equipment, building, intellectual-property,

and all of the contracts with the OPA, free from all liens, encumbrances or claims affecting any of the assets.

[58] In a letter dated June 12, 2014, HGC's lawyer wrote to the Ontario Ministry of Finance, a secured creditor, in an effort to convince them to step away from their security. The lawyer wrote "You have now received an offer of $500,000 for the purchase of all of the assets of Greenview Power which we believe to be a fair and reasonable offer." The lawyer also outlined amounts paid by Truestar and payable in priority to the Ministry of Finance, and arrived at a balance of $120,235 remaining to be disputed between the secured creditors. The lawyer further stated "As you are aware, Greenview... entered into a management agreement with ... HGC to satisfy 5(d) of the OPA Waiver Amending Agreement Date that HGC become the project management team for the Project; and that Sea to Sky ..., in its capacity as Interim Funder, agreed to warrant and guarantee any and all Greenview's existing and future financial obligations while in the proposal and with the full knowledge and consent of the Trustee. Pursuant to the Contract, fees amount to approximately $450,000." HGC later agreed to forego this amount. The Ontario Ministry of Finance responded with a number of questions. HGC's lawyer replied to those questions, still seeking reimbursement for the amount of costs sought by the OPA in its May 23 letter, that "Truestar is completely arms-length to Sea to Sky or Hutchingame Growth Capital. There are no common shareholders, officers or directors between any of these entities."

[59] Mr. Hutchingame painted an inaccurate picture of the transaction when he instructed his lawyer to respond as he did above - not disclosing that he and Mr. Baker were long-time acquaintances, and not disclosing the $4.7M Assignment to Truestar, both of which were obviously material to the assessment that this secured creditor was trying to make of whether the $500,000 purchase price offered by Truestar for the assets of Greenview was reasonable.

[60] The trustee's motion materials seeking approval of the sale to Truestar were not served on the OPA. Oddly, the motion was brought under section 100 of the *Courts of Justice Act*, rather than under section 84.1 of the *Bankruptcy and Insolvency Act*. Further, it appears from the trustee's affidavit that the trustee (since deceased) was also not aware of the $4.7M Assignment to Truestar because it is not disclosed in his affidavit or motion materials. The trustee's affidavit, sworn July 28, 2014, indicates that the renewable energy project was never completed, that

Greenview is the owner of land, machinery, and that: "A potential asset of the Bankrupt is the RESOP Contract. Based on the estimated costs to complete the RESOP contract and timing issues for compliance, the value of the RESOP Contract is uncertain." It also indicates that there are approximately $8M of secured claims against the property of the bankrupt, and that "The Property is in a state of disrepair." The trustee adds: "There is a deadline date of November 2015… I am advised by … counsel for Sea to Sky that if this deadline is not met, there will be no renewals and any monies spent to that date will be lost… many milestones and events have to occur… the timing is very tight. This is a very risky and speculative investment for any purchaser."

[61] On August 21, 2014, on the trustee's recommendations and effectively unopposed, the court granted an order confirming the sale agreement, and vested all of Greenview's and the trustee's rights in the property and the purchased assets in Truestar, free and clear of any and all security interests, charges etc., for $500,000. Effectively, this order also discharged the claims of all secured creditors, who then had a claim to the $500,000 sale proceeds as per their mutual agreement (reached on the incomplete information disclosed by Mr. Hutchingame).

[62] On August 21, 2014, Mr. Hutchingame provided a copy of the vesting order to Mr. Devitt.

[63] On September 4, 2014, the OPA wrote to Mr. Hutchingame, essentially confirming the terms of their letter dated May 23, 2014. The OPA was clear in its communications with the trustee and Mr. Hutchingame that their position was that the RESOP Contract had not been transferred under the vesting order, that it had been terminated by the bankruptcy of Greenview, and that it could only be assigned by following the process mandated by section 9.2 (3) of the RESOP Contract; the evidence shows that this was understood by Mr. Hutchingame and Mr. Baker.

[64] In October 2014, Mr. Hutchingame reiterated that there was no automatic termination of the RESOP Contract upon the bankruptcy of Greenview. The OPA disagreed. Nonetheless, the parties exchanged emails and seemingly made efforts to resolve issues arising from the vesting order and the RESOP Contract. Mr. Baker hired someone to move the project forward or to

liquidate the assets on the property. In an October 15, 2014 email to Mr. Hutchingame, Mr. Baker wrote that he had been advised by this man, Theo, that: "The turbine looks good but will need outside confirmation … If the turbine doesn't work we are dead in the water … However Theo feels good it's working fine." No evidence was presented at trial addressing whether or not the turbine required for the biomass generation project was in working condition. This was denied by Mr. Hutchingame, but at this point Truestar was considering the value of the scrap metal on its newly acquired property (quoted by Theo at about $4M).

[65] On October 17, 2014, Mr. Hutchingame was asked by the trustee and by Mr. Baker to respond to the OPA's position that the RESOP Contract had not been transferred under the vesting order (let's get this resolved, asked Mr. Baker). Mr. Hutchingame wrote to Mr. Baker that he was preparing a response to the OPA and that "It is clear that they want to "cooperate" but need to jump through the hoops." Mr. Hutchingame then wrote to the trustee making reference to section 9.2 (3) of the RESOP Contract, which again contradicts his stated position at trial.

[66] Despite what Mr. Hutchingame said at trial, it is quite clear from this email that in October 2014, he understood that the OPA was required to enter into a new contract if all of the conditions of sections 9.2 (3) were met. At trial, Mr. Hutchingame said that he was being sarcastic, but clearly the content and the tone of his email to the trustee of October 17, 2014, are more indicative of an intention to proceed under section 9.2 (3) and of efforts to reassure all recipients, including Mr. Baker, that things would work out with the OPA. This interpretation is supported by Mr. Hutchingame's subsequent letter to the OPA dated October 21, 2014.

[67] Consistent with his email dated October 17, 2014, Mr. Hutchingame's letter to the OPA dated October 21, 2014 makes no mention of his alleged shock and dismay at their position. Rather, the content and tone of his letter are indicative of efforts at working towards addressing the stated concerns of the OPA. For example, he indicates that he will immediately retain and proceed with a new independent engineering and cost review to meet the COD of November 2015, but that he requires possession of the project and contract in order to update the project development plan because engineers and financing prospects require an existing RESOP Contract. Other than what he and Mr. Baker said, Mr. Hutchingame provided no independent

evidence that engineers, including the engineers listed in that letter, would otherwise have been retained. Similarly for financing, Mr. Hutchingame provided no independent evidence (admissible for its truth), and was contradicted by Mr. Baker who indicated that Truestar had the financial means to proceed with the project.

[68] On October 24, 2014, the OPA responded that they required the vesting order be corrected, and thereafter would proceed with the process envisioned by section 9.2 (3), clearly outlining how Mr. Hutchingame could successfully obtain a new contract.

[69] On November 3, 2014, the lawyer for the trustee wrote to HGC's lawyer and to Mr. Fogul that he was expecting a response about how they wished to proceed, and indicated that the trustee "is not content to continue with the status quo and will be scheduling a date before a judge to revoke the vesting order and authorize the trustee to sell the property if I do not hear anything from you by the end of today." On November 3, Mr. Fogul responded that he would prepare a list of outstanding issues from the OPA's perspective.

[70] On November 4, 2014, as promised, Mr. Fogul wrote to outline outstanding issues. He repeated that defaults under the agreement would have to be cured prior to a new one being signed, as required by section 9.2 (3), and repeated that the OPA was not prepared to grant extensions or to waive any requirements. Particularly, he outlined that the following was required:

- an updated plan, as per section 5 (c) (ii) of the Waiver and Amending Agreement;
- confirmation of each of the engineering team and project management team, as per section 5 (d) of the Waiver and Amending Agreement; that excuses provided to date were not acceptable;
- that the generator's position in the connection queue needed to be maintained, as per section 7.1 (7) of the RESOP Contract;
- that the updated plan needed to confirm that the generator held a valid generator license, as per section 7.1 (b) of the RESOP Contract;

- that the updated plan needed to address that a renewable biomass fuel supply plan was to be delivered before the anniversary, as per section 5 (c) (iv) of the Waiver and Amending Agreement;
- that arrangements needed to be made for the payment of outstanding and contemplated fees for the new agreement, as per section 9.2 (3) of the RESOP Contract; and
- that the purchaser needed to sign a confidentiality agreement, as per section 12 (b) of the Waiver and Amending Agreement.

[71] During their evidence at trial, both Mr. Hutchingame and Mr. Baker indicated that the connection queue with Hydro One was confirmed, and that Mr. Baker or Truestar could pay the amounts required to accomplish the above.

[72] On November 5, 2014, Mr. Hutchingame's lawyer responded to Mr. Fogul that he had received his November 4 letter stating: "Thanks, Harry. We are looking at it".

[73] On December 15, 2014 (the letter is dated December 14), Mr. Hutchingame wrote to the OPA to provide an update. He did not mention any concern about the OPA's letter of November 4, or raise any issue about their insistence on proceeding under section 9.2 (3). He confirmed their position in the connection queue with Hydro One (their position in the connection queue was indeed confirmed). He indicated that they are engaged in a detailed engineering review (no independent evidence was provided at trial that they were then engaged in a detailed engineering review), and indicated that this review "strongly recommended to use the availability on the grid for solar rather than biomass generation", asking what options are available to amend the contract to utilize solar rather than biomass (no evidence was provided at trial of an engineer strongly recommending to use solar rather than biomass, and this would be in breach of the RESOP Contract). Mr. Hutchingame testified that he was then trying to get the job done and that he was considering solar rather than biomass.

[74] At trial, Mr. Hutchingame frequently said that after the Assignment to Truestar, he took a backseat position to Mr. Baker, letting him drive the process; that he was no longer involved. This is contradicted by most of the correspondence and documents, which show that Mr.

Hutchingame was still involved. It is also contradicted by the evidence of Mr. Baker at trial, who said that Mr. Hutchingame was responsible for ensuring that the RESOP Contract could be transferred to them. What follows is an example of what Mr. Hutchingame said at trial about his involvement, and of how it is contradicting by contemporaneous documents.

[75] It appears quite probable that prior to January 2015, Mr. Hutchingame and Mr. Baker came to the realization that the old equipment could not successfully be reused. I arrive at this conclusion because: they provided no evidence that they ever found the drawings required to reassemble the used equipment (a number of their contractors had informed them that these were missing and required); they provided no evidence that the turbine was in working condition (one of their contractor had informed them that they were dead in the water if it was not in working order); Mr. Hutchingame inquired about solar rather than biomass (saying that this was recommended by his engineers); and in an email of January 13, 2015, Mr. Baker told a potential investor that on the advice of their engineers they had decided to build a new plant rather than using the existing old equipment. As indicated, no engineering evidence was presented by the plaintiff at trial.

[76] During his cross-examination on the topic of this January 13, 2015 email (in which Mr. Baker says that they have decided to build a new plant), Mr. Hutchingame testified that he had no knowledge of this, that he did not know what Mr. Baker was doing, that he did not care, and that he was not involved (despite the fact that he was copied on this email). Mr. Baker on the other hand testified (generally and specifically with regards to this email) that he understood that Mr. Hutchingame was the point person with the OPA and that Mr. Hutchingame was working to resolve issues with the OPA. Moreover, many of the emails exchanged between Mr. Hutchingame and Mr. Baker confirm that Mr. Hutchingame was still very much involved. Oddly, these same emails and the testimony of Mr. Baker, who when he testified did not seem to know all that much about this project, indicate that Mr. Baker was not significantly involved despite having purchased these assets for over $4.7M.

[77] During his cross-examination, Mr. Baker testified that he was then telling the truth in his January 13, 2015 email. Mr. Baker wrote in that email:

> In the update letter, Mr. Hutchingame has confirmed that ELR Energy is the assignee. He also indicates ELR is interviewing engineering firms. This occurred and resulted in a situation whereby the result was a decision to seek a partner to build a new plant as opposed to using the existing old equipment.
>
> OPA charges over $20K to formally transfer the agreement and until such time as we know who will be the go forward entity, we are holding that in abeyance.
>
> I agree that the timeframe is too short and we will need to have an extension but won't approach OPA until we have a credible partner to ensure OPA that an extension is warranted. They've already granted 3 extensions to the contract and we will need significant assurances if we go back for a 4th.

[78] I prefer this contemporaneous document to the evidence of Mr. Hutchingame because the evidence of Mr. Hutchingame is often contradicted by the documents. As well, documents prepared by Mr. Hutchingame often contain exaggerations and misstatements, and they are also often unsupported by the evidence.

[79] I find that this email of January 13, 2015, from Mr. Baker fits well with the bulk of the evidence: the old equipment could not be reused, a new plant would be required, and they understood that they could not meet the COD of November 2015. I make these findings, which are also supported by emails exchanged between Mr. Baker and Theo, including those referring to Wellons.

[80] Also, Mr. Baker testified that, given the timeframe, they decided that they would finance the project themselves. Mr. Baker stated that if financing was not available, Truestar had the means to finance this project. He said that they were pursuing investors, but that he was not counting on it. Mr. Baker agreed that he, and to his knowledge, Mr. Hutchingame, never approached the OPA for an extension.

[81] On January 21, 2015, Mr. Devitt wrote again to Mr. Hutchingame asking once more for a status update. On January 26, 2015, Mr. Hutchingame responded that "I have been actively involved in the process but the reporting goes directly to Truestar but I am awaiting Truestar independent review results." No evidence about this independent review and results was presented at trial.

[82] The OPA responded that they require the review results. On January 27, 2015, Mr. Hutchingame replied:

> My current situation best describes the following quote attributed to Donald Rumsfeld "There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknown. There are things we don't know we don't know."
>
> I received some review results but there are multiples review and are still ongoing and Truestar has not yet received the final reports. The most problematic aspect of one of the unfinished reports is that after review Not-Arc Steel Fabricators found that the existing Wellons boiler plant will not be sufficient to operate the steam turbine at full capacity…Given that potential of litigation any documentation availability for release is subject to the review and approval of Truestar's lawyers. However, the larger issue is that although there are several proposed workarounds and alternatives being examined and that all parties understand the urgency, there is simply nothing conclusive available to forward. [Emphasis added.]
>
> The turbine is not an issue as per the attached report and am forwarding the initial report but it is under review and anticipate revisions. We are anxious as you are to secure reliable data but the limited available documentation is taking longer than anticipated.
>
> (None of these alleged reviews and reports were presented at trial)

[83] Mr. Devitt responded on January 28, 2015, asking for a schedule for the expected delivery of these engineering and design studies. Mr. Hutchingame responded that they were working on several streams in parallel, that the projects situation was somewhat fluid, that the updated plan was not complete, but that they were considering three scenarios:

1) complete and augment the current system to achieve commercial operation;

2) replace the Wellons Boiler rather than repair and supplement the current boiler;

3) use a totally different process to use manure rather than wood for renewable biomass.

He added "I am uncertain when the Dresser rand report was delivered to Truestar because I was not copied on the proposal. I believe Dresser Rand was on-site in December to complete the review and I received a copy of the PDF a few weeks ago. I do not have a report for either

Wellons or Nor-Arc Fabricators and received the update verbally." None of these reports was presented at trial.

[84] Mr. Devitt was trying to be helpful, and in January 2015, he answered questions of Mr. Hutchingame and provided information about the position of the OPA. Mr. Hutchingame agreed that Mr. Devitt was trying to find solutions, and that Mr. Devitt told him very clearly that the final date would not be extended.

[85] At some point, probably in late 2014, Mr. Hutchingame prepared an executive summary showing that they were contemplating multiple usages for the Elephant Lake property, none of which was a biomass project. He testified that this was a draft document, for discussion only, prepared for the audience of Mr. Baker as they were considering everything. Mr. Hutchingame downplayed this document, saying that Mr. Baker was considering the development of his property, and that he could not speak for what Mr. Baker's plans were; however, he had to admit that the document refers to Sea to Sky and that some of the ideas were his. Mr. Hutchingame admitted that in an email sent to Mr. Baker on February 3, 2015, he stated "I think we need to extend the length of the runway. November is just too soon"; that he never sought an extension of the COD from the OPA; that he then considered as a last resort seeking an extension through litigation if required; that he did not start an action to extend the deadline, but instead sued for damages.

[86] Later in February 2015, in answer to repeated requests from Mr. Devitt for updates, Mr. Hutchingame indicated that the yet to be delivered updated plan was dictated by economics not engineering, and that confirming a reliable cost-effective renewable biomass supply plan was a condition precedent to the OPA. On February 23, Mr. Hutchingame also indicated: "I am not in a position to speak on behalf of Truestar or provider a reliable timeline. However, I understand that the greater includes the lesser because if renewable fuel is unavailable the engineering is moot. It is all about economics not engineering and the timeline is being driving by the due diligence by potential financial partners." On March 26, 2015, Mr. Hutchingame wrote to Mr. Devitt that he was waiting for final instructions from Truestar, that he would forward them as soon as he receives them, and that he was essentially just acting as Truestar's agent and doing its bidding.

[87] Mr. Hutchingame and Mr. Baker both confirmed that Mr. Baker had the funds necessary to comply with the OPA's letter of November 4, 2014. Mr. Hutchingame also said that this would have cost about $75,000, but that it would have been a bad business decision because they did not have a contract and the OPA would have "screwed them around". As indicated above, I note however that in a number of emails, dated late 2014 and early 2015, Mr. Hutchingame refers to engineers being on-site and to ongoing reviews, none of which was filed at trial.

[88] Mr. Baker testified that he instructed Mr. Hutchingame to be more aggressive with the OPA, and to send a letter putting their position on the record. On April 1, 2015, Mr. Hutchingame wrote to the OPA that he was considering all of his rights and remedies, and denied the position of the OPA (outlined in their letters dated May 23, 2014, September 4, 2014, November 4, 2014, in emails between Mr. Fogul and the lawyer for the trustee, and later on April 10, 2015). Interestingly, although in the April 1 letter Mr. Hutchingame invokes their rights under section 9.2 (2) of the RESOP Contract, he does not ask for an extension of time to complete the project. Similarly, in his longer letter dated April 15, 2015, he also does not seek an extension of time. Indeed, although both Mr. Hutchingame and Mr. Baker wanted the OPA to adhere to the vesting order, neither ever sought an extension of the RESOP Contract despite the fact that by then it clearly could not be met.

[89] On April 16, 2015, Mr. Hutchingame wrote to Mr. Baker that he was considering suing because "Truestar has screwed me out of the $4,000,000 and blamed it on the OPA claiming the contract had been terminated." However, he never made a demand from Truestar because he said it would have been a losing proposition.

[90] Mr. Baker testified that Truestar still owns the Elephant Lake property; that they are still looking at options to optimize the opportunities and value of this property. He confirmed that Truestar paid $500,000 plus about $60,000 in various expenses (a $205,000 loan was also advanced as DIP financing to Sea to Sky) for this property.

[91] On October 15, 2015, the plaintiff issued the statement of claim in this action.

[92] The plaintiff argues, for a number of reasons that will be addressed in my analysis, that it should have been entitled to proceed with the Assignment to Truestar under section 9.2 (2) of the

RESOP Contract, and that it could then have met the COD. The defendant, since May 23, 2014, has continually taken the position that the assignment in bankruptcy of Greenview was an act of default which automatically terminated the RESOP Contract (by sections 7.1 (20) and 7.2 (2)), and therefore that the secured lender was required to proceed under section 9.2 (3) if it wished to require the OPA to enter into a new agreement.

Issues

[93] In its statement of claim, the plaintiff seeks damages for breach of contract, negligent misrepresentation, and breach of the duty of good faith by the defendant. Key issues resulting from these claims, and from the many arguments raised by the parties include the following:

1) Has the plaintiff proven a breach of contract? The answer to this question includes considering what were the rights of the plaintiff under the RESOP Contract following the bankruptcy of Greenview? It also includes determining whether the RESOP Contract automatically terminated when Greenview made an assignment into bankruptcy? The answers to these questions will answer the plaintiff's arguments relating to negligent misrepresentation and breach of the duty of good faith.

2) Has the plaintiff proven an entitlement to damages? The answer to this question includes considering: Whether the plaintiff has proven an enforceable agreement with Truestar? Whether the plaintiff failed to mitigate its damages? Whether the plaintiff's damages are excluded by section 10.1 of the RESOP Contract?

Analysis and Conclusions

General Principles

[94] The parties agree on the law applicable to contractual interpretation.

[95] Briefly, the primary object of contract interpretation is to give effect to the intention of the parties at the time of contract formation. The court must read a contract as a whole, with the words used given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the contract - the factual matrix. The subjective intentions of the parties are not relevant. However, while the court considers the circumstances

of a written contract, those circumstances cannot overwhelm the words of the agreement. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. If there is doubt or ambiguity about the meaning of a contractual provision, the principle of *contra proferentem* requires that it be interpreted against the party who drafted the agreement. As well, if a contract remains ambiguous after considering its text and its factual matrix, the court may consider the subsequent conduct of the parties. There is also a general organizing principle of good faith underlying many facets of contract law, and a general duty of honesty in contractual performance. And considerations of good faith inform the process of giving effect to the intention of the parties during contractual interpretation. (See: *Sattva Capital v. Creston Moly*, 2014 SCC 53, [2014] 2 S.C.R. 633, at p. 656 – 658; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras, 45, 63 – 65, 73, 93; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512, at paras. 39 – 46; *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648, 73 B.L.R. (5th) 173, at para. 45; *Consolidated Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888, at p. 899 – 900; and *Clarke v. Alaska Canopy Adventures LLC*, 2014 ONSC 6816, at paras. 34 – 37.)

[96] Section 65.1 (1) of the *Bankruptcy and Insolvency Act* provides that if a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person by reason only that the insolvent person is insolvent, or that a notice of intention or a proposal has been filed in respect of the insolvent person. (See for example: *Crystalline Investments Ltd. v. Domgroup Ltd.* (2002), 58 O.R. (3d) 549 (C.A.), at paras. 6 – 10, affirmed by the S.C.C., 2004 SCC 3, [2004] 1 S.C.R. 60)

[97] Section 65.1 (5) of the *Bankruptcy and Insolvency Act* provides that any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to section (1) is of no force or effect.

[98] Section 69 (1) of the *Bankruptcy and Insolvency Act* provides in part and subject to certain exceptions that on the filing of a notice of intention by an insolvent person, no creditor has any remedy against the insolvent person or his/her/its property, or shall commence or continue any action, executed an or other proceedings, for the recovery of a claim provable in bankruptcy.

[99] Section 84.1 (1) of the *Bankruptcy and Insolvency Act* provides that on application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under an agreement to any person who is specified by the court and agrees to the assignment. In deciding whether to make such an order, subsection (4) provides that the court is to consider, among other things, whether the person to whom the rights and obligations are to be assigned is able to perform the obligations, and whether it is appropriate to assign the rights and obligations to that person. Section 84.1 (1) allows the trustee to apply to the court for permission to assign the contract, depending on the circumstances and so long as the provisions of the statute are met, even if a party to the contract had the right to terminate the contract for breach of a condition, or even over the objections of such a party (see: *Ford Motor Company of Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 77 C.B.R. (5th) 278, at paras. 30, 37-41).

[100] Section 84.2 (1) of the *Bankruptcy and Insolvency Act* provides that no person may terminate or amend any agreement with a bankrupt individual by reason only of the individual's bankruptcy or insolvency. That section, on its wording, is applicable to individual bankrupts, as opposed to corporate bankrupts. However, where the bankrupt is a corporation resort may be had to the common law doctrine of fraud upon the bankruptcy law in circumstances that would deprive creditors of value otherwise available (see for example: *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692 (Ct. J. (Gen. Div.); and *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276, at para. 12).

Has the Plaintiff Proven a Breach of Contract?

[101] For reasons that follow, the plaintiff has not proven a breach of contract.

[102] The RESOP Contract terminated on February 24, 2014, when Greenview filed an assignment into bankruptcy. The termination of the RESOP Contract gave the plaintiff the right to obtain a replacement contract under section 9.2 (3) of the RESOP Contract.

[103] The text of the RESOP Contract is unambiguous – an assignment into bankruptcy automatically terminates the RESOP Contract without notice.

[104] Section 7.2 (2) provides that the RESOP Contract terminates automatically, without notice, act, or formality, upon an event of default in section 7.1 (20). Section 7.1 (20) defines bankruptcy as such an event of default.

[105] I do not agree with the plaintiff's arguments that the statutory stay resulting from section 69 of the *Bankruptcy and Insolvency Act* prevented the automatic termination of the RESOP Contract because the effect of such a stay is to prevent creditors of an insolvent person from pursuing claims provable in bankruptcy against the insolvent person. The termination of the RESOP Contract under section 7.2 (2) was not for the recovery of a claim provable in bankruptcy (see sections 69 (1) and 69.3 (1) of the *Bankruptcy and Insolvency Act*).

[106] I do not agree with the plaintiff's arguments that section 65.1 of the *Bankruptcy and Insolvency Act* had the effect of voiding for all purposes section 7.2 (2). The plaintiff seems to argue that because he triggered a proposal before he triggered a bankruptcy, section 7.2 (2) of the RESOP Contract was not only of no force or effect in the event of insolvency or a proposal, but that it was "void by operation of a statute is a nullity and has no force and effect", and relies for this proposition on *Schnarr v. Blue Mountain Resorts Limited* [2018 ONCA 313, 140 O.R. (3d) 241, at para. 79, application for leave to appeal to the S.C.C. filed May 28, 2018]. Firstly, I do not believe that *Schnarr* stands for the proposition argued by the plaintiff, and secondly, the facts and the law in *Schnarr* are very different and not applicable to those in this action.

[107] I agree that as a result of section 65.1 of the *Bankruptcy and Insolvency Act*: (1) the defendant could not terminate the RESOP Contract by reason only that Greenview was insolvent, or had filed a notice of intention or a proposal; and (2) section 7.2 (2) of the RESOP Contract was of no force or effect to terminate the RESOP Contract by reason only that Greenview was insolvent, or had filed a notice of intention or a proposal.

[108] However, section 65.1 of the *Bankruptcy and Insolvency Act* is not relevant to a bankruptcy. The automatic termination of the RESOP Contract on February 24, 2014, resulted from Greenview's bankruptcy, not because of Greenview's status as an insolvent person or because of Greenview's earlier proposal. Section 84.2, not 65.1, is the relevant provision in

connection with bankruptcies, and section 84.2 is applicable only to individual bankrupts, not to corporate bankrupts.

[109] The common law doctrine of fraud upon bankruptcy law has no application to the facts of this case. This doctrine operates where a contractual provision causes an inequity between creditors of the bankrupt. Here, the termination of the RESOP Contract on the bankruptcy of Greenview does not offend the public policy expressed in the cases relied upon by the plaintiff (*Bramalea* and *Aircell*).

[110] The Waiver and Amending Agreement did not replace the RESOP Contract; it specifies that the terms of the RESOP Contract remained in effect and governed the relationship between the parties, except as expressly modified or amended by the Waiver Agreement. Nothing in the Waiver and Amending Agreement modifies or amends the meaning of sections 7.1 (20) and 7.2 (2).

[111] Section 6 of the Waiver and Amending Agreement does not include the subsequent assignment in bankruptcy. The preamble of the Waiver and Amending Agreement refers to the proposal as the BIA Event of Default; it does not refer to or include any future bankruptcy of Greenview. As well, section 10(d) of the Waiver and Amending Agreement provides that the Waiver and Amending Agreement "shall not be deemed to waive or modify in any respect the rights of the OPA under the Contract except as expressly provided for in this Waiver and Amending Agreement." Nothing in the Waiver and Amending Agreement expressly waives the OPA's rights in the event of a bankruptcy.

[112] I also disagree with the plaintiff that section 10(b) of the Waiver and Amending Agreement eliminates any automatic terminations of the RESOP Contract and provides a thirty-day cure period for any breach of both the Waiver and Amending Agreement or the underlying RESOP Contract. This is a misinterpretation of section 10(b). Section 10(b) is directed at new obligations contained in the Waiver and Amending Agreement. The Waiver and Amending Agreement contained new obligations, and without section 10(b), the rights of the OPA in respect of these obligations would be unspecified. Section 10(b) is directed at covenants and provisions of "this Agreement". In fact, the words "this Agreement" are used many times in the

Waiver and Amending Agreement, and in every instance it is apparent that the words refer to the Waiver and Amending Agreement, and not the RESOP Contract. As well, the plaintiff's interpretation of section 10(b) would lead to an absurd result: suggesting that the OPA must give the plaintiff an opportunity to cure any default under the RESOP Contract, even ones which have no cure.

[113] Mr. Hutchingame testified repeatedly that section 2 of the Waiver and Amending Agreement gave the plaintiff the right to have any dispute with the OPA addressed by a bankruptcy court. Section 2 of the Waiver and Amending Agreement is a common contractual provision, also contained in the RESOP Contract, which simply reminds parties that contractual terms may be limited by legislation; it does not provide the parties with additional rights.

[114] The factual matrix of the Waiver and Amending Agreement includes the sophistication of the parties. As a self-described experienced and sophisticated businessperson, Mr. Hutchingame understood the primacy of the text of written agreements and the significance of entire agreement clauses; he testified as such. He said quite clearly that he is not relying on any representation, or anything but the written agreements. Mr. Hutchingame's understanding was highlighted when he answered that he is a bottom line guy, that he understood that until the deal's done, it's not done. In any event, nothing in the circumstances of the Waiver and Amending Agreement demonstrates any common intention of the parties regarding the impact of the future bankruptcy of Greenview.

[115] The discussions of the parties do not show any such common intention. Mr. Devitt and Mr. Fogul testified that neither of them ever discussed what would happen in the event of a bankruptcy of Greenview with Mr. Hutchingame. For his part, Mr. Hutchingame testified that there was "not a single instance" of discussion of the automatic termination provisions of the RESOP Contract prior to the OPA's letter of May 23, 2014, well after the Waiver and Agreement was made.

[116] Contrary to what the plaintiff argues, the content of Greenview's proposal demonstrates that the focus of the secured lenders, of Greenview, and of the OPA was on the success of the proposal, not on its failure.

[117] Mr. Hutchingame testified that he wrote Greenview's proposal, and shared it with the OPA during the negotiation of the Waiver and Amending Agreement. It is apparent that the proposal was written in the context of a priority dispute between the plaintiff and the Ontario government, as secured lenders of Greenview. Mr. Hutchingame testified that the proposal resolved this priority dispute. Mr. Hutchingame testified that the proposal contemplated paying every creditor 100 cents on the dollar, because he didn't want to lose anybody previously involved in the project. Further, the proposal stipulated that Greenview must successfully achieve commercial operation by the deadline contained in the OPA agreement. Clearly, the facts of the proposal demonstrate that a primary purpose of the Waiver and Amending Agreement was for the proposal to succeed.

[118] The priority dispute between the secured lenders also shows that the plaintiff's interpretation is not plausible. Mr. Hutchingame testified that, at the time of the proposal, the amount owing on the loan guaranteed by the government was $2.1M, while the amount owing to the plaintiff was $4,769,479.41. It is not plausible that the secured lenders – both of whom were parties to the Waiver and Amending Agreement – shared a common intention that, in a bankruptcy, the plaintiff could simply sell the RESOP Contract to a third party for the face value of the plaintiff's security ($4.79M), leaving the other secured lender to be paid only with a share of the sale of Greenview's physical assets.

[119] By contrast, an interpretation – that a bankruptcy causes a termination – is more consistent with the context of the priority dispute. Under this interpretation, Greenview's bankruptcy would give both secured lenders the right, under section 9.2 (3), to obtain a new agreement, provided the secured lenders reached agreement among themselves as to how to proceed. This interpretation makes sense.

[120] The plaintiff argues that the waiver of the "BIA Event of Default" must include more than the filing of a proposal, because section 65.1 of the *Bankruptcy and Insolvency Act* already overrode any termination of the RESOP Contract resulting from the filing of a proposal. However, I agree that the impact of section 65.1 following Greenview's proposal is not entirely straightforward. The OPA could have applied to the court under subsection 65.1 (6) of the *Bankruptcy and Insolvency Act* for discretionary relief from the provision's effects. In any event,

at the time, there was at least some uncertainty which explains the need for the parties to expressly waive any default attributable to Greenview's filing of a proposal.

[121] The plaintiff also argues that a bankruptcy was clearly a possibility under the bankruptcy laws that govern the proposal process and that it is unimaginable that the OPA did not consider this possibility when entering the Waiver and Amending Agreement. I find that this argument does not assist in interpreting the Waiver and Amending Agreement because even if both parties knew that Greenview's bankruptcy was a possibility, it does not follow that the parties shared a common intention about what would happen in the event of a bankruptcy. If anything, the knowledge of both parties that bankruptcy was possible makes it particularly significant that the parties omitted any reference to a future bankruptcy in the Waiver and Amending Agreement, and did not delete or amend the provisions of sections 7.1 (19) and (20). If these parties intended to waive the consequences of a future bankruptcy, they would have said so, as they did for many other provisions to the RESOP Contract.

[122] The plaintiff also argues that all parties understood that Mr. Hutchingame would be in control of Greenview after the Waiver and Amending Agreement. It was common knowledge that Mr. Hutchingame would play an important role in the project. However, I agree with the defendant that this does not mean that an assignment in bankruptcy had no significance.

[123] I also agree with the defendant that the automatic termination on Greenview's bankruptcy did not lead to harsh or punitive consequences for the secured lenders of Greenview. Section 9.2 (3) gave secured lenders the right to step in and preserve the value of the RESOP Contract.

[124] In conclusion, the text of the Waiver and Amending Agreement and of the RESOP Contract is clear: the RESOP Contract would automatically terminate in the event of Greenview's bankruptcy. Secured lenders would have the right to obtain a new agreement under section 9.2 (3). Nothing in the factual matrix is inconsistent with the straightforward meaning of the contractual text.

[125] The plaintiff also argues bad faith and negligent misrepresentations.

[126] I disagree with the plaintiff's argument and find that good faith contractual performance and the common law duty to act honestly in the performance of contractual obligations did not impose on the defendant the obligation to tell the plaintiff that the RESOP Contract would terminate in the event that Greenview made an assignment in bankruptcy because this should have been quite obvious to the plaintiff from the clear language of the RESOP Contract. The defendant did not lie or otherwise knowingly mislead the plaintiff. The duty of honesty in contractual performance "does not impose a duty of loyalty or of disclosure or require a party to forgo advantages flowing from the contract". (see *Bhasin*, at para. 73)

[127] The OPA might have acted more transparently upon learning that Greenview had filed for bankruptcy, rather than waiting silently for the 90-day period to expire. However, I do not find that this constituted bad faith or acting in breach of the general duty of honesty in contractual performance because the OPA did not lie or otherwise mislead the plaintiff, and the OPA's understanding of section 9.2 (3) of the RESOP Contract was straightforward and correct. I also find that thereafter the OPA acted honestly and in good faith, and made all reasonable efforts to facilitate the plaintiff's obtaining a new agreement under section 9.2 (3) of the RESOP Contract; this is quite apparent from the evidence and from the many follow-up emails of Mr. Devitt, of Mr. Fogul, and from the timely letters from the OPA explaining clearly to the plaintiff the position of the OPA and what was required from the plaintiff to obtain a new contract.

[128] Considering my earlier findings, the plaintiff's submissions with regards to alleged negligent misrepresentations are without merit. The plaintiff failed to prove that the defendant made any statement that was untrue, inaccurate, or misleading, that the plaintiff relied on such a statement to its detriment, or that such reliance led to the plaintiff's damages.

[129] In addition, the plaintiff presented no independent or expert evidence that it could have met the COD deadline, and the evidence rather demonstrates that its failure to do so resulted from many intrinsic failings, including its lack of experience in such projects and repeated procrastination. Indeed, the evidence indicates and the plaintiff agrees in its submissions that "The evidence of William Baker was clear that Truestar had the funds available to complete the project and was putting the necessary elements in place to move forward, including an engineering team, contractors and a supply of biofuel." Other than blaming the OPA for what

the plaintiff alleges resulted from the OPA's contractual position, no independent evidence was presented by the plaintiff explaining why, considering the above and that Mr. Baker had the necessary resources, it nonetheless did not meet the COD deadline (or seek an additional extension).

Has the Plaintiff Proven an Entitlement to Damages?

[130] For reasons that are outlined above, the plaintiff has not proven an entitlement to damages. In the alternative, for reasons outlined below, the plaintiff has nonetheless also not proven an entitlement to damages.

Firstly

[131] The plaintiff has failed to prove that if the defendant had taken a different position the plaintiff would have successfully assigned the RESOP Contract to Truestar under section 9.2 (2), and would have received $4,769,479.41. Even if the plaintiff's own pleading, submissions, and evidence are accepted, the plaintiff's loss was caused by Greenview's long-standing defaults under the RESOP Contract, not by the defendant insisting on section 9.2 (3).

[132] Indeed, the plaintiff could not have assigned the RESOP Contract without first curing the outstanding defaults. Section 9.2 (2) provides that a secured lender may "enforce any Secured Lender's Security Agreement and acquire the Generator's Interest in any lawful way and, without limitation, may sell or assign the Generator's Interest provided such sale or assignment complies with the requirements of section 13.4."

[133] Section 13.4 provides that "No assignment of this Agreement shall be valid or effective and no change of Control shall be permitted if the assigning Party is in default at the time of the assignment or change of Control."

[134] Greenview's obligations under the Waiver and Amending Agreement were unmet on May 15, 2014, and remained unmet thereafter. It was therefore impossible for the plaintiff to assign the RESOP Contract.

[135] The plaintiff argues that Greenview was not in default because the OPA did not give Greenview formal notice of a default, with a 30-day period for Greenview to cure the default. However, this argument conflates a default by the Generator, and the OPA's decision whether to require a cure. Although the OPA must observe a 30-day cure period before terminating the RESOP Contract for certain defaults, this does not mean that the RESOP Contract is in good standing, without default, unless the OPA has attempted to terminate it. I agree with the defendants that defaults remain outstanding whether or not the OPA has previously insisted on their cure.

[136] The plaintiff suggests that, unlike a generator, secured lenders are not required to correct any outstanding defaults before assigning the RESOP Contract to a third party. I agree with the defendant that this suggestion would provide the secured lenders with greater rights in the RESOP Contract than a generator, and that such an interpretation is inconsistent with the final sentence of section 9.2 (2), which states: "Despite anything else contained in this Agreement, any Person to whom the Generator's Interest is transferred shall take the Generator's Interest subject to the Generator's obligations under this Agreement."

Secondly

[137] The plaintiff failed to mitigate its damages.

[138] A party suing for breach of contract must take reasonable steps to mitigate its damages (*Nashville Contractors Ltd. v. Middleton*, [1984] O.J. No. 99 (C.A.), at para. 5). In its letter of May 23, 2014, and thereafter, the OPA offered to enter into a new agreement with the plaintiff provided that the plaintiff take certain steps. Other than curing the existing defaults, the OPA asked the plaintiff to:

a. Pay the IESO's legal fees for preparing the new agreement (estimated at $14,868.71);

b Obtain the consent of the other secured lender; and

c. Confirm that the generator continued have a place in Hydro One's connection queue.

[139] None of these steps, or the additional steps later requested by the OPA, required an unreasonable effort or expenditure on the part of the plaintiff, and the evidence shows that none would have been an obstacle.

[140] Acting reasonably, the plaintiff should have obtained a new agreement with the OPA, and then assigned that agreement to Truestar.

Thirdly

[141] At law, damages outside the reasonable contemplation of the parties at the time they enter a contract are too remote to be recoverable. I agree with the defendant that at the time of the Waiver and Amending Agreement, the OPA could not have reasonably foreseen the plaintiff's secretive and counterproductive conduct demonstrated by Mr. Hutchingame between May 23, 2014 (when the plaintiff learned of the OPA's position), and April 2015 (when the plaintiff began sending demand letters to the OPA). I agree that it was the plaintiff's conduct, not the OPA's position that ultimately caused the transaction with Truestar to fail.

[142] The plaintiff received the OPA's letter on May 23, 2014, nearly eighteen months before the COD deadline of November 8, 2015. Mr. Hutchingame did not disclose the OPA's position immediately to Truestar. Mr. Hutchingame testified that he told Mr. Baker that they needed a vesting order, but he didn't give him "one of the details". Although Mr. Hutchingame testified that he considered the OPA's letter of May 23, 2014 to be a "declaration of war", he did not object, preferring not to give the OPA "free discovery".

[143] Rather, as explained above, the plaintiff decided to obtain a vesting order in the hope that it would resolve his dispute with the OPA. As well, the vesting order approved the sale of Greenview's physical assets to Truestar for $500,000 free and clear of the claims of any lender, including the other secured lender.

[144] As explained above, the circumstances leading up to the vesting order are unusual. For example:

a) The correspondence between the plaintiff and the other secured lender (in which the parties negotiate the distribution of $500,000 from the sale of Greenview's assets)

does not mention the plaintiff's intention to assign the RESOP Contract to Truestar for $4,769,479.41. Despite the fact that lenders had an unresolved priority dispute, and despite the requirements of the *Personal Property Security Act*, the plaintiff said on cross-examination that he did not think he had to tell the other secured lender.

b) Similarly, the motion record does not disclose the assignment of $4,769,479.41 to the court. Rather, the motion record presents evidence to show that $500,000 is a reasonable offer for all the assets of Greenview. Mr. Hutchingame admitted that he had a chance to see the motion record before it was filed. Mr. Hutchingame likely did not advise the trustee of the true nature of his dealings with Truestar.

c) Despite the plaintiff's intention to use section 84.1 of the *Bankruptcy and Insolvency Act*, neither the motion materials nor the vesting order refer to section 84.1, nor was the motion record served on the OPA (section 84.1 requires notice to every party to an agreement). As well, this section requires the court to consider whether the person to whom the rights and obligations are to be assigned is able to perform the obligations, and whether it is appropriate to assign the rights and obligations to that person – no evidence addressing these factors was presented to the court.

d) The motion was without notice to the OPA. On a motion without notice, a moving party is required to give full and fair disclosure of all material facts, and the failure to do so may be sufficient grounds to set aside the order. However, despite the plaintiff's intention to use the vesting order to resolve its dispute with the OPA, the motion materials do not advise the court of the OPA's position (that the RESOP Contract had terminated).

[145] Mr. Hutchingame's approach during the summer of 2014 stands in contrast to his more assertive behaviour in the winter and spring of 2013. Mr. Hutchingame testified that he had hundreds of phone calls with Mr. Devitt in the spring of 2013 and that he often benefitted from Mr. Devitt's help and input. The plaintiff then also threatened to start an urgent arbitration over the denial of a force majeure claim.

[146] Mr. Baker testified that, after the vesting order, he began to prepare the project for construction in the fall of 2014. Mr. Baker carried out this work from roughly September 2014 to

January 2015, and he spent roughly $60,000. Throughout this time, Mr. Baker testified that he was relying on Mr. Hutchingame to sort out contractual issues with the OPA.

[147] In a letter sent on September 5, 2014, the OPA reiterated that the plaintiff would need to obtain a new contract under section 9.2 (3). In response, Mr. Hutchingame provided various partial updates in an email on September 16, 2014.

[148] In October 2014, Mr. Fogul, raised concerns with the wording of the vesting order, which appeared to include the RESOP Contract. As Mr. Fogul explained, the discussion of these concerns culminated in a conference call on October 24, 2014 between Mr. Fogul, Mr. Ostroff (counsel for the Trustee), Mr. Hebert (counsel for the plaintiff), and Mr. Hutchingame. Mr. Fogul and Mr. Hutchingame's evidence is consistent: the result of the call was that Mr. Fogul would provide a list of requirements from the OPA for a new agreement. Mr. Fogul delivered that list on November 4, 2014. He never heard back from Mr. Ostroff, Mr. Hebert, or Mr. Hutchingame.

[149] There was continued correspondence between the plaintiff and Mr. Devitt from December 2014 to March 2015. When asked about some of this correspondence, which referred to "the potential of litigation", Mr. Hutchingame testified that he was being "deliberately opaque" in his communications with the OPA.

[150] In April 2015, when it was too late to proceed with the project, Mr. Hutchingame sent a letter to the OPA that the plaintiff and Truestar "categorically deny" that the RESOP Contract had terminated the previous year. Mr. Baker testified that he asked Mr. Hutchingame to send this letter, and that he told Mr. Hutchingame that they had to put their position "on the record". Mr. Baker testified that, at this point, he thought that Mr. Hutchingame should have been much more forthright and worked much quicker to get the OPA to the table and get the contract back to where it was supposed to be. He said that he had been "badgering" Mr. Hutchingame to get the OPA to the table so they could get the project built.

[151] I agree with the defendant that the following conclusions can be drawn from events between May 23, 2014 and April 2015, and make these findings:

a) Mr. Hutchingame was seeking to recover the full value of his security ($4.7M) through an assignment to Truestar, without disclosing this fact to another secured lender with whom he was in a priority dispute. Mr. Hutchingame was therefore motivated not to have open communications with other parties about how to move the project forward.

b) Mr. Baker entirely relied on Mr. Hutchingame to ensure the OPA was agreeable to transferring the RESOP Contract to Truestar, but Mr. Hutchingame was being deliberately opaque with the OPA.

c) Rather than working with the OPA to get a new agreement, Mr. Hutchingame attempted to avoid dealing with the OPA's position by obtaining a vesting order, without telling the OPA (or the court) of the intended effect of the vesting order.

d) Compared to Mr. Hutchingame, Mr. Baker was prepared to invest time and money into the project, and Truestar could have financed the project. Mr. Baker also testified that none of the OPA's November 4, 2014 requirements would have been an impediment.

[152] When the evidence is viewed as a whole, I find that the conduct of Mr. Hutchingame is the probable cause of the project's failure and of the failed Assignment to Truestar. Mr. Hutchingame's dealings were secretive, and he delayed directly addressing the OPA's position until April 2015, when it was too late.

[153] When the OPA entered into the RESOP Contract and the Waiver and Amending Agreement, it could not have reasonably contemplated that a secured lender would behave this way. Such damage is too remote to be claimed from the OPA.

[154] As well, the plaintiff argues that the OPA asked them to amend the vesting order obtained without notice to the OPA; however, the plaintiff does not identify any barrier to the trustee, the plaintiff, and Truestar obtaining an amendment to the vesting order on consent. If the evidence of Mr. Hutchingame and Mr. Baker is believed, all of these parties had a common interest in allowing the project to succeed.

[155] The plaintiff also suggests that the OPA's requirements for a new contract under section 9.2 (3) were a moving target, but the plaintiff does not explain why those requirements would have been impossible (considering the evidence).

[156] As well, the plaintiff suggests that a potential financier, Neutopia, required an existing RESOP Contract to move forward, but no one from Neutopia testified at this trial.

Fourthly

[157] Section 10.1 of the RESOP Contract excludes claims for indirect, incidental, or consequential damages, including loss of profits. It provides:

> **10.1 Exclusion of Consequential Damages**
>
> Notwithstanding anything contained herein to the contrary, neither Party will be liable under this Agreement or under any cause of action relating to the subject matter of this Agreement for any special, indirect, incidental, punitive, exemplary or consequential damages, including loss of profits, loss of use of any property or claims of customers or contractors of the Parties for any such damages, but nothing herein shall preclude any claim by the Generator to receive the Contract Payments in respect of Contract Energy that is in fact Delivered under this Agreement during the Payment Period.

[158] I disagree with the arguments of the plaintiff and find that the text of section 10.1 captures the plaintiff's claim. The only damage claimed by the plaintiff are the loss of the assignment of the RESOP Contract to Truestar, and this relates "to the subject matter" of the RESOP Contract.

[159] I agree with the defendant that the purpose of section 10.1 can be inferred from its context. The OPA, when signing hundreds of RESOP contracts, did not want to assume liability for unknown dealings of parties such as Greenview and the plaintiff; as section 10.1 provides, the liability of the OPA would be limited to payments for energy. The plaintiff's opaque dealings with Truestar are a perfect example of the losses intended to be excluded by section 10.1.

[160] The plaintiff's suggestion that section 10.1 does not apply to a secured lender, because a lender is not a "Party" to the RESOP Contract is inapplicable because section 10.1 protects parties, which include the OPA. The plaintiff, who is suing the OPA based on provisions of the

RESOP Contract, cannot argue that only some provisions of the RESOP Contract still have any effect.

[161] I also disagree with the plaintiff's suggestion that section 10.1 should be interpreted against the defendant under the rule of *contra proferentem*. As indicated above, that rule applies where there is an ambiguity; section 10.1 is not ambiguous.

Fifthly

[162] The plaintiff has not proven an enforceable agreement with Truestar.

[163] As indicated above, I have many issues and reservations about the Assignment to Truestar. In addition to what is mentioned above, the Assignment to Truestar lacks features ordinarily seen in commercial agreements of this importance.

[164] As a result, I find more probable that the Assignment to Truestar was not an enforceable obligation, but an aspiration that Truestar would purchase the RESOP Contract from the plaintiff provided that the two partners got all of their "ducks in a row"; they never did.

Conclusion

[165] This action is dismissed.

[166] If the parties are unable to agree on costs within 30 days from the date of these reasons, they shall provide to my assistant written submissions not exceeding five pages, plus relevant documents: by the defendant within 40 days from these reasons, by the plaintiff within 50 days from these reasons, and any reply by the defendant limited to two pages within 55 days from the date of these reasons for decision. If written submissions on costs are not received by the end of February 2019, I will assume that the parties have reached an agreement on costs.

Justice P.E. Roger

Date: 2019/01/10

SCHEDULE 1

Renewable Energy Standard Offer Program Contract (November 8, 2007 – extracts from)

...

Section 7 – TERMINATION AND DEFAULT

7.1 Events of Default by the Generator

Each of the following will constitute an event of default by the Generator (each, a **"Generator Event of Default"**), notwithstanding the occurrence of any event of Force Majeure, unless indicated otherwise:

(1) The Generator or the Contract Facility fails or ceases to satisfy the eligibility requirements set out in the Program Rules and such failure or cessation is not remedied within the Cure Period.

...

(3) The Contract Facility fails to achieve Commercial Operation on or before the eighth anniversary of the Contract Date.

...

(19) By agreement, decree, judgment or order of a Governmental Authority, the Generator agrees to be treated as or is adjudicated bankrupt or insolvent or any substantial part of the Generator's property is sequestered or subject to the appointment of a third party and such agreement, decree, judgment, order or appointment continues in effect unrevoked, undischarged and unstayed for a period of thirty (30) days after the entry or implementation thereof.

(20) The Generator dissolves, winds up or liquidates, or makes an assignment for the benefit of its creditors generally under any Insolvency Legislation, or consents to the appointment of a receiver, manager, receiver-manager, monitor, trustee in bankruptcy, or liquidator for all or part of its property or files a petition or proposal to declare bankruptcy or to reorganize pursuant to the provision of any Insolvency Legislation.

...

7.2 Remedies of the OPA

(1) In addition to all other rights and remedies it may have at law or in equity, and subject to Section 9, if any Generator Event of Default (other than a Generator Event of Default referred to in Section 7.1(19) or 7.1(20) occurs and is continuing, upon written notice to the Generator, the OPA may:

(a) terminate this Agreement; and/or

(b) suspend any or all Contract Payments owing to the Generator until such Generator Event of Default has been remedied to the satisfaction of the OPA, in its sole discretion; and/or

(c) set off any amounts payable by the generator to the OPA against any payments due to the Generator under this Agreement.

(2) Notwithstanding Section 7.2(1), upon the occurrence of a Generator Event of Default referred to in Sections 7.1(19) or 7.1(20) this Agreement shall automatically terminate without notice, act or formality, effective immediately before the occurrence of such Generator Event of Default, in which case, for certainty, the Secured Lender shall have the rights available to it under Section 9.2(3).

...

SECTION 9 – LENDER'S RIGHTS

...

9.2 Rights and Obligations of Secured Lenders

(1) While a Secured Lender's Security Agreement remains outstanding, and provided that the OPA has received from the Generator prior written notice of the name and address for notice of the Secured Lender, no Generator Event of Default (other than those set out in Section 7.1(19) and 7.1(20)) shall be grounds for the termination by the OPA of this Agreement unless any notices required to be given under Sections 7.1 and 7.2(1) have been given on the same day to the Generator and to the Secured Lender and the applicable cure period, if any, set out in Section 7.1 has expired without a cure having been effected either by the Generator or the Secured Lender, who shall have the right (but not the obligation) to cure such default, in which event, the OPA shall accept performance by the Secured Lender as if it had been performed by the Generator.

(2) A Secured Lender may, subject to the provisions of this Agreement, enforce any Secured Lender's Security Agreement and acquire the Generator's interest in any lawful way and, without limitation, may sell or assign the Generator's Interest provided such sale or assignment complies with the requirements of Section 13.4 and provided further that if the Secured Lender is the owner or is in control or possession of the Generator's Interest, then it shall be entitled to and bound by all of the Generator's rights and obligations hereunder so long as it is the owner or is in control or possession of the Generator's Interest. Despite anything else contained in this Agreement, any Person to whom the Generator's Interest is transferred shall take the Generator's Interest subject to the Generator's obligations under this Agreement.

(3) In the event of the termination of this Agreement prior to the end of the Term due to a Generator Event of Default, the OPA shall enter into a New Agreement, which New Agreement shall be effective as of the Termination Date and shall be for the then-remainder of the original Term of this Agreement and otherwise upon the terms contained n this Agreement, provided that the Secured Lender delivers to the OPA a written request thereof within ninety (90) days after the Termination Date; provided further that the OPA's obligation to enter into a New Agreement

is conditional upon the Secured Lender (a) paying all sums that would, at the time of the execution and delivery thereof, be due to the OPA under this Agreement but for such termination, (b) otherwise fully curing any defaults under this Agreement existing immediately prior to termination of this Agreement that are capable of being cured, (c) paying all reasonable costs and expenses, including legal fees, incurred by the OPA in connection with such default and termination, and the preparation, execution and delivery of such New Agreement and related agreements and documents, provided, however, that with respect to any default that could not be cured by the Secured Lender until it obtains possession, such Secured Lender shall have the applicable cure period commencing on the date that it obtains possession to cure such default, and (d) if there is more than one Secured Lender's on the Security Agreement outstanding in respect of which the OPA has received the notice described in Section 9.2(1), delivering to the OPA the written consent of all other Secured Lenders with respect to such New Agreement.

SCHEDULE 2

Waiver and Amending Agreement (May 15, 2013 – extracts from)

...

10. Other

...

(b) In this Agreement:

(i) breach of any covenant or other provision hereof by the Generator; or
(ii) a representation or warranty that is incorrect or untrue in any material respect,

Shall be deemed to be a Generator Event of Default under the RESOP Contract, provided that a thirty (30) calendar day cure period shall be applicable thereto, and pursuant to which the OPA may *inter alia* pursue any remedy available to it under Section 7.2 of the RESOP Contract, including (but not limited to) the termination of the RESOP contract.

...

CITATION: HGC v. IESO 2019 ONSC 259
COURT FILE NO.: 15-66152
DATE: 2019/01/10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Huthingame Growth Capital Corporation, Plaintiff

-and-

Independent Electricity System Operator, Defendant

BEFORE: Mr. Justice P.E. Roger

COUNSEL: Michael S. Hebert and Cheryl Gerhardt McLuckie, Counsel for the Plaintiff

Thomas G. Conway and Benjamin Grant, Counsel for the Defendant

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REASONS FOR DECISION

Justice P.E. Roger

Released: 2019/01/10

Tab 5

Act to apply

66 (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.

Assignments

(1.1) For the purposes of subsection (1), in deciding whether to make an order under subsection 84.1(1), the court is to consider, in addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

Tab 6

In the Court of Appeal of Alberta

Citation: Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd., 2011 ABCA 158

Date: 20110527
Docket: 1003-0089-AC
1003-0362-AC
Registry: Edmonton

Appeal No. 1003-0089-AC

Between:

Ford Motor Company of Canada, Limited

Appellant
(Applicant)

- and -

Welcome Ford Sales Ltd. and Royle Smith

Respondents
(Respondents)

Appeal No. 1003-0362-AC

Between:

Ford Motor Company of Canada, Limited

Appellant
(Applicant)

- and -

Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Myers Norris Penny Ltd. and Bank of Montreal

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 25th day of March, 2010
Filed on the 26th day of March, 2010
(2010 ABQB 199, Docket: 1003 00638)

Memorandum of Judgment

The Court:

INTRODUCTION

[1] This appeal was dismissed from the bench with reasons to follow.

[2] This was an appeal from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the other party to the agreement, an auto manufacturer, pursuant to the provisions of the relatively new s. 84.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

[3] Welcome Ford, owned by Royale Smith ("Smith"), operated a franchise dealership with the Appellant, Ford Motor Company of Canada, Limited ("Ford") in Fort Saskatchewan, Alberta pursuant to the terms of a written dealership agreement. The dealership ceased operations on January 13, 2010 after Ford Credit Canada Ltd. ("Ford Credit"), while conducting a physical audit on its premises, discovered a large defalcation apparently made by a senior employee of the dealership. The following day, the chambers judge, acting as *de facto* case manager, appointed Myers Norris Penny ("MNP") the Receiver of Welcome Ford on the application of Ford Credit.

[4] Ford Credit tendered evidence in support of that application showing that over $3.7 million to which it was entitled had been misappropriated. At that time, Welcome Ford owed Ford Credit approximately $7.7 million and owed the Bank of Montreal ("BMO") approximately $2.7 million. Ford Credit had priority in relation to the vehicle inventory, while BMO had a priority claim to all other assets. As a result, Ford Credit seized and removed all vehicles over which it had security. It is an unsecured creditor for any shortfall on its debt remaining after the sale of those vehicles.

[5] The order appointing the Receiver stayed all rights and remedies against Welcome Ford; in particular, it ordered that no agreements then in place, including the dealership agreement, be terminated without consent of the court. Ford advised as early as January 29, 2010 that it would not consent to the assignment/sale of the dealership agreement to any party. However, on March 23, 2010, the chambers judge granted an order authorizing MNP to market the dealership while adjourning Ford Credit's application to lift the stay so as to be able to terminate the dealership agreement ("the March order").

[6] On May 19, 2010, BMO obtained an order placing Welcome Ford into bankruptcy with MNP as trustee, which had the effect of making the administration subject to the BIA, including s. 84.1 of that statute.

[7] MNP marketed the dealership to existing Ford dealers only, receiving offers to purchase from the ultimate purchaser and two others. Ford maintained its refusal to consent to a sale, even to one of its own dealers, notwithstanding that the offer made by the ultimate purchaser, the highest

bidder, would have produced sufficient funds to retire the debt to BMO in its entirely and produce a further $570,000 (before professional fees) to be distributed among the unsecured creditors. In comparison, liquidation of the assets without sale of the dealership agreement was expected to produce a far smaller sum, one which would leave more than $1 million of the debt to BMO unpaid and produce nothing for any other creditor.

[8] On December 10, 2010, the chambers judge approved MNP's application to assign the rights and obligations of Welcome Ford under the dealership agreement to the ultimate purchaser pursuant to s. 84.1 of the BIA. At the same time, he dismissed Ford's application for a declaration that the dealership agreement could not be assigned without its consent and to lift the stay ("the December orders"). This appeal was then brought against each of the March and December orders.

[9] The BIA was amended on December 15, 2009 by the addition of s. 84.1, which allows a court, upon being satisfied that certain prerequisites are met, to grant an order assigning the rights and obligations of the bankrupt under any agreement to a purchaser, even without the consent of the counter-party to the agreement.

[10] The Respondents argued that the dealership agreement was properly assignable to the ultimate purchaser under this section, even absent Ford's consent. Ford argued that the dealership agreement had been terminated as a result of a fundamental breach occurring before the granting of the receivership order such that there was nothing left to assign to the ultimate purchaser. It, alternatively, argued that the dealership agreement is not assignable by reason of its nature and, as such, the issues of whether the ultimate purchaser is able to perform the obligations under it and whether it is appropriate to assign it are irrelevant.

[11] The issues raised on appeal are:

(A) Has the dealership agreement terminated because of fundamental breach?

(B) How is s. 84.1 of the BIA to be interpreted?

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

(ii) Are the rights and obligations imposed by the dealership agreement not assignable by reason of their nature because:

(a) the estate will not benefit from the assignment?; or

(b) they are personal in nature?

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome

Ford's rights and obligations under s. 84.1(4)?

STANDARD OF REVIEW

[12] The standard of review to be applied to the interpretation of s. 84.1 of the BIA, a question of law, is that of correctness. The chambers judge's findings of fact and application of facts to the law are subject to deference absent palpable and overriding error. The application of deference is amplified when, as here, the decision was not issued by a chambers judge in the normal course but by a case management judge whose decision is part of a series of decisions in relation to the same matter: see ***De Lage Landen Financial Services Canada Inc. v. Royal Bank of Canada***, 2010 ABCA 394 at para. 13.

ANALYSIS

(A) Has the dealership agreement terminated because of fundamental breach?

[13] Ford argued that Welcome Ford "fundamentally breached" the dealership agreement before the appointment of the Receiver, with the result that the agreement came to an end such that nothing remained for the trustee to assign to the ultimate purchaser. It submitted the acts amounting to "fundamental breaches" include the abandonment of the business on January 13, 2010 and Smith's failure to properly supervise employees.

[14] We note the decision of the Supreme Court of Canada in ***Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)***, 2010 SCC 4, [2010] 1 S.C.R. 69 to the effect that the concept of fundamental breach no longer exists, at least in relation to exclusion clauses. The Court stated at 62:

> On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, ..."

and at 82:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. ...

[15] As no party raised this issue, and the breaches in question here were not of exclusion clauses, we will proceed to our analysis on the basis of the case as argued. That said, it may well be that the simple answer to the issue of whether the dealership agreement was terminated as a result of fundamental breach must be "no" because no such breach was possible.

[16] Ford agreed the test for fundamental breach and its application to a franchise agreement is

that relied upon by the chambers judge, established in ***Shelanu Inc. v. Print Three Franchising Corporation*** (2003), 64 O.R. (3d) 533 (C.A.) at paras. 113 and 114 as follows:

> [113] In *Majdpour v. M & B Acquisition Corp.* (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627 (C.A.), the event alleged to have triggered a fundamental breach of the franchise agreement by the franchisor was a bankruptcy. Because the franchisee was able to carry on the commercial purpose of the agreement intact after the bankruptcy, MacPherson J.A. dismissed the franchisee's claim [sic] it was discharged from further performance. That reasoning is equally applicable in this case.
>
> [114] In dismissing the claim for fundamental breach, MacPherson J.A. noted that the test was a restrictive one, namely, whether the conduct of one party deprived the other party of "substantially the whole benefit of the contract" as stated by Wilson J. in *Hunter Engineering, supra*. This is the classic formulation of the test as set out by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474, [1962] 2 Q.B. 26 (C.A.) at p. 66 Q.B.:
>
> > [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing those undertakings?

[17] In application of this test to the facts in this case, the question becomes whether the "abandonment" of the business or Smith's failure to supervise employees, leading to the defalcation, deprived Ford of the ability to carry on the commercial purpose of the dealership agreement.

[18] The chambers judge concluded that the reason Welcome Ford had not operated since mid-January, 2010 was not for lack of trying by the Receiver, but rather because it was met at every step by resistence from Ford. Without receipt of new product and manufacturer's support of that product, the Receiver could not operate the dealership. He found that the proposed sale of the dealership including the dealership agreement would substantially, if not entirely, cure all of the alleged defects under that agreement.

[19] It is not clear from the evidence that the dealership business was "abandoned", as suggested by the Appellant. Rather, Ford Credit arrived unannounced to conduct an audit in early January, 2010. The manager, Greg Duffy, sent the staff home on January 13. He remained on the premises both that day and the next, when the receivership order was obtained. He advised the Receiver that he had been involved in improprieties relating to cars, money or business arrangements on the premises for the past eight years and that the owner of the dealership had for years been residing in the Dominican Republic.

[20] MNP did not reopen the dealership. It pressed Ford for its consent to a sale/assignment of the dealership agreement. On January 29, 2010, Ford advised that it would not consent, a position it consistently maintained thereafter. It advised by letter dated February 12, 2010 that it had no obligation under the dealership agreement to do business with the Receiver or its assignee. Ford Credit removed the vehicles upon which it had security. For the first time on February 24, 2010, Ford took the position that there had been a fundamental breach of the dealership agreement.

[21] Ford argued the dealership agreement provided that a closure of the business for seven days constituted an event allowing for termination of the agreement (see clause 17(b)(3)(ii)). However, clause 17(b) of that agreement also provides that termination is only effective upon such an event occurring where Ford elects to terminate and gives the dealer 15 days written notice of its intention to do so. In this case, the first notice of termination given by Ford was six weeks after the Receiver was appointed, well after Ford had taken the position it would not cooperate with any assignment.

[22] Ford argued this situation is akin to that faced by Yamauchi, J. in ***Canada Western Bank v. 702348 Alberta Ltd.***, 2009 ABQB 271, 472 A.R. 297, commonly known as the ***Guild*** decision, where he found fundamental breach of various leases of a commercial building in relation to a builder who went into receivership prior to the completion of construction. The Receiver did not have sufficient funding to complete construction and did not do so. Justice Yamauchi declared that two of the tenants had properly terminated their leases, finding fundamental breach had occurred because of the indefinite delay in construction. The Receiver had provided no evidence as to when a potential purchaser might recommence construction.

[23] The chambers judge properly distinguished ***Guild*** by noting that there the Receiver decided not to remedy the lease breaches through completion of construction, whereas here Ford advised the Receiver early on that it would not consent to the Receiver's operation of the dealership. Here, in other words, it was the counter-party to the agreement who refused performance rather than the Receiver. He found that it was Ford which was blocking the breach from being remedied by refusing to cooperate with the reopening of the business by the Receiver.

[24] In ***Guild***, it was not clear when, if ever, the buildings which were the subject of the leases in question would be completed (i.e., when the tenants would obtain the commercial benefit they were intended to receive under the leases). Here, Ford would obtain the commercial benefit under the dealership agreement immediately upon its consenting to the Receiver operating it or, alternately, to its sale to a party who could operate it. Ford's refusal to cooperate was the only reason the agreement could not be performed. It, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement; it simply chose not to do so, which falls far short of meeting the test for fundamental breach established in ***Shelanu***.

[25] In relation to the argument that Smith failed to properly supervise his employees with the result that the defalcation occurred, Ford tendered a Statement of Claim which maintained that a Welcome Ford manager misappropriated over $1.2 million by way of fraud. The chambers judge

noted the lack of evidence that Smith was involved in the fraud or any convincing evidence of resulting damage to Ford's reputation. Needless to say, the manager in question was no longer employed by the time the sale was approved. There was no evidence before the chambers judge to support the suggestion that the manager's alleged prior activities would cast a pall over the operation of a Ford dealership in Fort Saskatchewan in the future.

[26] The ultimate purchaser stood ready to reopen the dealership for business upon receiving court approval of the purchase. Any deficiencies in Smith's supervision disappeared with his removal from the business. Upon the reopening of the dealership, there is nothing to suggest that Ford would not be able to carry on the commercial purpose of the dealership agreement. It would not be deprived of the benefits it was intended to receive; indeed, the sooner the sale was effected, the sooner the flow of those benefits would resume.

[27] The chambers judge concluded at para. 95 of the December decision: "I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the [dealership agreement], of which Ford Motor complains". The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The chambers judge also expressly observed that Ford's rights and remedies will continue unchanged, including the right of first refusal and the right to take steps to terminate the dealership agreement if the purchaser defaults in the future.

[28] The standard of review in relation to the chambers judge's findings of fact and application of facts to the law are subject to deference absent clear and palpable error. The application of deference is amplified when, as noted above, the judge is a case management judge whose decision is part of a series of decisions. His decision that no fundamental breach of the dealership agreement had occurred was reasonable and is entitled to our deference. Indeed, had we been required to consider the issue of correctness, we would have concluded his decision to be correct. The ultimate purchaser will be able to perform the dealers obligations under the agreement such that its commercial purpose will be effected. Ford will receive the benefit the parties intended it to receive when that agreement was created.

(B) How is s. 84.1 of the BIA to be interpreted?

[29] The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

[30] The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve

the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

[31] Ford argues that the provisions of s. 84.1 which are prerequisite to granting permission to assign have not been met.

[32] Section 84.1 reads in part:

> (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ...
>
> (3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature ...
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>
> (b) whether it is appropriate to assign the rights and obligations to that person.

[33] The Appellant did not argue, nor did the chambers judge find, that s. 84.1 expressly excludes auto dealership agreements from its operation. Indeed, the word "agreement" found in that section is wide enough to cover this type of agreement. The chambers judge correctly concluded, therefore, that he had jurisdiction under s. 84.1 to order the assignment (sale) in the proper circumstances.

[34] Ford argued, rather, that those proper circumstances did not exist, as discussed below.

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

[35] Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the

ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

[36] This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. The chambers judge concluded that s. 84.1 should be interpreted in light of Parliament's intention that the provision be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreements to third parties for value: see Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed., looseleaf (Toronto: Carswell, 2009) vol. 2 at 3-499. He purported to interpret s. 84.1 in the context of its role as remedial legislation.

[37] Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.

[38] The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.

[39] The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.

[40] A statutory provision analogous to s. 84.1 is that of s. 8(2) of the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5. It provides that, notwithstanding the legal effect of a provision in a lease purporting to terminate the lease upon the tenant becoming bankrupt, the trustee in bankruptcy may elect to retain the leased premises for some or all of the unexpired term of the lease. The trustee may then, upon payment of all overdue rent, assign the lease to a capable third party upon securing an order to that effect from the Court of Queen's Bench. The purpose of the legislation is to enable the trustee to maximize realization without putting the landlord in any worse position that it would have been under the lease before the bankruptcy: see ***Bank of Montreal v. Phoenix Rotary Equipment Ltd.***, 2007 ABQB 86 at para. 51, 72 Alta. L.R. (4th) 321.

[41] Similarly, s. 84.1 of the BIA allows a court to approve the assignment (sale) of any

agreement to obtain maximum benefit for creditors upon payment of any monetary breaches and upon concluding that the rights and remedies of the counter-party will be preserved.

[42] Ford suggested the contrary, offering an extract from the Briefing Book placed before Parliament when it considered this amendment. The Briefing Book gives as a reason for the enactment of the language "not assignable by reason of its nature" (then subsection 3(d)) that it "is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment". It further states, "[s]ubsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations". These stated purposes are not, however, mutually exclusive.

[43] Rather, to the extent that legislative intent is at all relevant, it is as described by the chambers judge as well as Justice Romaine of the Alberta Court of Queen's Bench in ***Alberta Health Services v. Networc Health Inc.***, 2010 ABQB 373 at para. 20, 28 Alta. L.R. (5th) 118:

> The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556, the Supreme Court commented:
>
> > Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

[44] Ford has suggested no business reason to support its interpretation of s. 84.1(3) and (4). There is no apparent reason as to why appropriateness of the assignment or the capability of the proposed assignee would not be relevant to determining whether the rights and obligations are assignable by their nature. Rather, the opposite would appear to be true.

[45] Therefore, I conclude that s. 84.1(3) is to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it is appropriate to assign the rights and obligations as set out in s. 84.1(4).

(ii)(a) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because the estate will not benefit from the assignment?

[46] Ford argued that a court should not exercise its discretion under s. 84.1 to override the

Appellant's clear contractual rights to withhold consent to the sale of the dealership in the absence of very clear evidence that the bankrupt estate will benefit: see ***Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.***, 2005 ABQB 324 at para. 11, 382 A.R. 383; ***Kelly v. Watson*** (1921), 61 S.C.R. 482 at 490, [1921] 1 W.W.R. 958. However, unlike the Courts in these two cases, the chambers judge here was not asked to re-write or make the parties' contract by implying missing terms in the existing contract. All other rights and obligations under the assigned dealership agreement were to remain unchanged but for the change in the identity of the dealer from Welcome Ford to the ultimate purchaser.

[47] Ford suggested that the chambers judge lacked clear evidence that the proposed assignment would benefit the estate. However, he described the supporting evidence at para. 52 of the December decision, which he found in the addendum to MNP's fourth report. Concluding that an assignment of the dealership agreement would benefit the creditors and enhance the value of the estate, the addendum confirmed that an *en bloc* sale of the assets of Welcome Ford which included the dealership agreement would result in full satisfaction of its indebtedness to BMO, would not prejudice Ford Credit's recovery on its secured collateral, and might make funds available for the unsecured creditors. Ford submitted that this evidence is nonetheless inadequate, criticizing MNP's method of marketing the land on which the dealership was located and the fact that the proposed sale would not, as a certainty, assure any recovery for the unsecured creditors.

[48] This criticism falls far short of being persuasive given that the alternative, termination of the dealership agreement, would not generate sufficient funds to satisfy even the secured creditors. The chambers judge's conclusion that the proposed assignment (sale) would benefit the estate is therefore reasonable and deserving of deference.

(ii)(b) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because they are personal?

[49] The dealership agreement expressly provides, among other things, that:

(a) Ford reserves the sole discretion to determine, from time to time, the numbers, locations and sizes of its franchised dealers;

(b) The dealership agreement is personal in nature and Ford expressly reserves the right to execute dealership agreements with individuals and others specifically selected and approved by it;

(c) Ford has the right to approve or decline to approve any transfer or change in voting control of a dealer based on the character, automotive experience, management, capital and other qualifications of the acquirer of the voting control, or the equity or beneficial interest, or the dealership business or its principal assets;

(d) Ford acknowledges a responsibility to ensure that dealers are owned and operated by qualified individuals of good reputation who are able to meet the requirements of the dealership agreement and the challenges of the marketplace;

(e) The dealership agreement may be terminated upon the happening of a number of events, including any transfer or attempted transfer by the dealer of any interest, right, privilege or obligation under the dealership agreement, or transfer by operation of law or otherwise of the principal assets of the dealer without the consent of Ford which "shall not be unreasonably withheld"; and

(f) Where there is a change in voting control of the principal owners of the dealership or a transfer of the dealership business or its principal capital assets, Ford's written approval is required; in declining any such approval (not to be unreasonably withheld), Ford has the right to consider the character, automotive experience, management capital and other qualifications of the proposed acquirer.

[50] Ford argued that these provisions characterize the dealership agreement as "personal" to the parties who executed it, and therefore non-assignable notwithstanding the express provision permitting assignment with Ford's permission. The chambers judge concluded otherwise. The dealership agreement was not a "personal contract" which by its "nature" could not usefully be performed by another. Instead, he described it as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing" (para. 73). As such, it did not fall within the s. 84.1(3) exception.

[51] The dealership agreement is the same type of agreement as that found to be distinguishable from an employment or "personal service arrangement" by the Ontario Superior Court of Justice in ***Struik v. Dixie Lee Food Systems Ltd.***, 2006 CarswellOnt 4932 at para. 69.

[52] Parties to a contract cannot insulate it from the effect of s. 84.1 simply by including a clause describing it as creating "personal" obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties.

[53] Ford correctly pointed out that s. 84.1(3) does not speak of a personal contract as being the only type of contract which contains rights and obligations that are not assignable by their nature. It argued that the above terms of the dealership agreement evidence that it is not assignable by reason of its nature even if it is not a personal contract.

[54] However, those express provisions – including those which describe it as personal in nature as well as Ford's reservation of the right to execute dealership agreements with those specifically selected and approved by it – are not sufficient to attract the application of s. 84.1(3) if other circumstances suggest the contrary. Otherwise, s. 84.1(4) would have no meaning, if a simple contractual provision to the effect that it was not "by reason of its nature" capable of unilateral

assignment would be enough to make that so.

[55] Ford accepted that the test to be applied to determine if the dealership agreement contains rights and obligations which by their nature are not assignable is that set out in ***Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)***, 2002 MBCA 51 at paras. 79, 81- 82, [2002] 7 W.W.R. 104. At para. 82 of ***Black Hawk Mining***, the Manitoba Court of Appeal cited ***Maloney v. Campbell*** (1897), 28 S.C.R. 228 at 233 as follows:

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

[56] Ford argued that it requires its dealers to have special personal characteristics, including specific requirements of knowledge, capital and experience. It led evidence that the value of a dealership is based primarily on the ability of the person operating it. However, the test for "non-assignability" found in ***Black Hawk Mining*** is not that it is important to Ford who would be performing the rights and obligations of Welcome Ford in the future, but rather whether those rights and obligations cannot be performed by the proposed assignee.

[57] In any event, the evidence did not support the argument that it was important to Ford to have Smith and no other act as the Welcome Ford dealer. The chambers judge relied upon the fact that there was no evidence Ford had made any inquiry in respect of Smith, the owner of Welcome Ford, before signing the original dealership agreement or its most recent renewal in 2007, even to the extent of a credit check or confirmation as to his or the dealership's financial status from their bankers. Indeed, Ford did not know that Smith had relocated to the Dominican Republic well before the receivership order was granted; there was no evidence that it monitored him or stayed in regular contact with him throughout the period he controlled Welcome Ford.

[58] Ford responded that it had no ability to review the qualifications of dealers when the 2007 renewal was signed; it was the dealers alone who had the obligation of signing onto the new form or continuing with the extant form of agreement. However, Ford was presumably responsible for the drafting of the original dealership agreement signed by Smith. If it failed to provide for ongoing proof of financial and other stability, that is an indicator that Ford did not consider those factors to be important.

[59] The gist of the dealership agreement is that Ford agreed to provide automobiles to Welcome Ford, who in turn agreed to purchase and pay for them, and thereafter to promote their sale and provide after-market service. The operation of this agreement unfolded in a commercial manner. The evidence did not disclose anything which Smith alone could or did provide. The conclusions of the chambers judge that nothing in the agreement rendered it unassignable, either because it was said to be "personal" or not to be assigned without Ford's consent, are reasonable and should be accorded deference.

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

[60] Section 84.1(4) of the BIA directs a judge, in determining if an order approving an assignment (sale) is to be made, to consider whether the party to whom the rights and obligations are proposed to be assigned can perform those obligations in the same manner as the original dealer. If not, court approval of the assignment should be withheld.

[61] Ford argued the chambers judge did not have sufficient evidence to be able to conclude that the principal of the ultimate purchaser, the proposed assignee, would be able to perform the dealership obligations in the same fashion as had Smith. Notwithstanding the fact that principal was already successfully operating another Ford dealership in the area, Ford argued there was no evidence before the chambers judge as to i) the financial capability of its principal (even though he was proposing to make the purchase without the need of financing), ii) a business plan for operating multiple dealerships, or iii) his ability to satisfy Ford's criteria for owning and operating multiple dealerships.

[62] Presumably some, if not all, of this evidence would have been internally available to Ford, yet it led no evidence to show any disability on the part of the ultimate purchaser. The chambers judge expressly relied on unchallenged affidavit evidence from another local Ford dealer to the effect that the proposed assignee had an excellent track record in terms of operating a profitable Ford dealership and had received many national awards from Ford over the years; the quality of its business premises met Ford's standards, unlike those which Ford had permitted Welcome Ford to operate. From this, the chambers judge inferred that the proposed assignee had both the capital and relevant experience in automotive retailing to enable him to operate the Welcome Ford dealership.

[63] Ford went on to argue that the "good faith" obligation imposed on the parties under the dealership agreement takes into account the particular dealer. It is akin to the duty of good faith found in an employment contract: see ***Transamerica Life Canada Inc. v. ING Canada Inc.*** (2003), 68 O.R. (3d) 457 at para. 46 (C.A.). This means Ford would have a right of action for damages where a dealer breached the duty of fair dealing in the performance or enforcement of the dealership agreement: see Frank Zaid, *Canadian Franchise Guide*, looseleaf (Toronto: Thomson Reuters, 1992) at 2-142Z.36.

[64] An assignment to any third party could conceivably increase the risk of that party not honouring its good faith obligation. However, the dealership agreement will be assigned only upon the court finding the appropriate prerequisite capability, with the resulting reduction in risk that the new dealer will be less honest than the old. Indeed, in this situation where the former dealership encountered a significant problem with employee misappropriation, these risks will likely be well reduced by the proposed assignment to an existing Ford dealer who presumably operates its other dealerships under a similar "good faith" obligation.

[65] Section 84.1(4) of the BIA also directs a judge, in determining if an order approving an assignment (sale) should be made, to consider whether it is appropriate to assign the rights and obligations under the agreement.

[66] The chambers judge assumed, for the purposes of his decision, that "the consent of Ford Motor to the proposed assignee is required", and that the unreasonable failure to provide that consent is a consideration in determining that it is appropriate to nonetheless assign (sell) the agreement. There is nothing in s. 84.1 which expressly requires that the consent of the contracting party be canvassed as a prerequisite to the application for approval of an assignment of an agreement. The chambers judge did not find that such canvassing was required; he simply assumed it was for the purpose of his analysis. There is no reason to interpret the section as containing such an implicit prerequisite. Rather, an unreasonable withholding of consent is simply one factor to consider in determining whether it is otherwise appropriate to assign the agreement pursuant to s. 84.1(4).

[67] The chambers judge found that Ford would never consent to the assignment of this dealership agreement because it would not consent to the assignment of any dealership agreement where a dealership had ceased operation. In withholding consent, Ford had not taken into account the merits of the proposed assignee. The chambers judge therefore concluded that Ford had unreasonably withheld its consent.

[68] Ford argued that a wider investigation needed to be undertaken when determining the appropriateness of assigning the dealership agreement than simply one of its refusal to consent. This investigation would canvass the terms of the agreement, the departing dealer's misconduct, the Receiver's failure to continue to operate the dealership pending approval of the proposed sale, Ford's standard criteria when considering a request to assign a dealership agreement outside of an insolvency context, and the results of an analysis it had done subsequent to the closure of Welcome Ford which concluded that future direct representation of the Ford brand was not warranted in the Fort Saskatchewan area.

[69] While the chambers judge described his investigation into these issues as "limited", he did consider factors in addition to Ford's unreasonable refusal to consent. Those other factors were the uncontradicted evidence that the ultimate purchaser was up to the job, his conclusion that the proposed assignment would substantially cure the breaches which Ford argued were fundamental, and that all of Ford's rights and remedies under the dealership agreement would be preserved against the proposed assignee. There was no obligation upon the chambers judge to expressly address each additional factor which Ford argued should bear on his determination. His approval of the assignment conveys the results of his assessment of those arguments.

[70] Ford argued that the chambers judge should not have considered its failure to consent to any assignment as a factor at all; to do so would amount to a limitation on access to justice in a new area in which it wished to test the effects of s. 84.1 of the BIA. Even if that is so today, it does not counteract the other reasons given by the chambers judge for concluding that it was appropriate to

approve the assignment.

[71] In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights and remedies under the agreement would carry on unchanged. That decision was reasonable; deference should be accorded to it.

CONCLUSION

[72] The appeal is dismissed.

COSTS

[73] The parties advised they had agreed each should bear their own costs of this appeal given that it involved the interpretation of a hitherto uninterpreted statutory provision. For that reason, the normal rule that the victor is entitled to costs will not be followed. Each party is to bear its own costs of this appeal.

Appeal heard on March 4, 2011

Memorandum filed at Edmonton, Alberta
this 27th day of May, 2011

Ritter J.A.

Authorized to sign for: Martin J.A.

Bielby J.A.

Appearances:

K.B. Mills / K.J. Bourassa
for the Appellant

J.H. Hockin / B.P. Maruyama
for the Respondents, Welcome Ford Sales Ltd., Royle Smith and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Meyers Norris Penny Ltd.

R.C. Rutman / A.L. Murray
for the Respondent, Bank of Montreal

Tab 7

CITATION: Dundee Oil and Gas Limited (Re), 2018 ONSC 3678
COURT FILE NO.: CV-18-591908-00CL
DATE: 20180613

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DUNDEE OIL & GAS LIMITED

BEFORE: S.F. Dunphy J.

COUNSEL: *E. Patrick Shea and B. Arnold* for the Applicants

Grant Moffat and Rachel Bengino, for the Monitor FTI Consulting Canada Inc.

J. Wallace for purchaser Lagasco Inc.

S. Kromkamp and B. McPherson for HMQ in right of Ontario

Aubrey E. Kauffman for the National Bank of Canada

M. P. Gottlieb for Canadian Overseas Petroleum Limited

HEARD at Toronto: June 11, 2018

REASONS FOR DECISION

[1] Dundee Oil and Gas Limited brought an application, supported by the Monitor, seeking approval of a sale of substantially all of its assets before me on May 23, 2018. I approved the proposed sale subject to requiring further evidence regarding the requested assignment of executory contracts under s. 11.3 of the *Companies' Creditors Arrangement Act* on June 11, 2018.

[2] The matter came back before me on June 11, 2018 where, based upon the new evidence filed, I approved the transaction including the assignment of the executory contracts with reasons to follow. These are those reasons.

Background facts

[3] Dundee entered into an Asset Purchase Agreement subject to court approval dated April 4, 2018. The sale was the result of a long process that began in August 2017 when Dundee was operating under the protection of the proposal provisions of the *Bankruptcy and Insolvency Act*. Those proceedings were continued under the CCAA on February 13, 2018.

[4] Dundee's assets consist primarily of a large number of petroleum and natural gas leases as well as associated equipment, gathering pipelines, etc. Many of the assets are in fact leased or are otherwise the subject of contractual arrangements between Dundee and the owner of the affected land. Accordingly, a significant aspect of the proposed sale transaction was a requirement that an assignment of the underlying contracts be accomplished by an order pursuant to s. 11.3 of the CCAA.

[5] On May 23, 2018 I indicated to the parties that I was satisfied with the necessity and advisability of ordering the requested relief and the process leading up to it save and except one aspect. In approving an assignment using the authority vested in me by s. 11.3 of the CCAA, I am required to inquire into a number of matters about which I found the record before me that day to be deficient. One landowner, Mr. Whittle, had made a formal objection and availed himself of the opportunity to express his concerns by telephone. He raised a number of objections to what he perceived to be concerns regarding the operational stability of the purchaser and their ability to see to eventual remediation obligations.

[6] During the course of the hearing, the Applicant indicated that the purchaser was prepared to proceed without an order compelling the assignment of agreements between Dundee and Mr. Whittle. The Applicant's position was that the form of agreements used in the case of Mr. Whittle's contracts at least required no consent for a valid assignment. The Purchaser was prepared to run the risk of that assessment proving accurate in Mr. Whittle's case.

[7] In the result, I adjourned the hearing until June 11, 2018 in order to grant the applicant additional time to address the concerns raised by me regarding s. 11.3 of the CCAA. I indicated that there were no other issues.

[8] The specific concerns raised by me were these:

a. The operation of a natural resource extraction business such as an oil and gas business is one that entails a degree of environmental risk that, in the event of insolvency of the lessee/contract holder may visit the remediation or well-capping costs upon the landowner, a factor that makes the capacity and ability of the proposed assignee to manage those

responsibilities a matter of concern when assessing the suitability of the proposed assignee; and

b. The affidavit material at the motion provided no solid evidence of the expected financial stability or durability of the purchaser post-closing, a rather critical factor to assess in considering the suitability of a proposed assignee.

[9] Three things happened during the intervening delay, two planned one unexpected.

[10] Firstly, the Monitor arranged to notify the landowners of the delay. No further objections were received from that front. Mr. Whittle maintained his objection despite the Applicant's concession that it was not seeking to compel assignment of his agreements.

[11] Secondly, the Applicant filed a Supplementary Affidavit of Jane Lowrie, President and Chief Executive Officer of Lagasco Inc, the purchaser sworn June 5, 2018. This affidavit provided further details regarding the financial status of the purchaser.

[12] Lastly, one of the "runner-up" bidders (Canadian Overseas Petroleum Limited) sent a letter to the Monitor on June 7, 2018 which letter COPL decided to send directly to the court on June 8, 2018 when the Monitor did not agree to bring the letter to my attention directly.

[13] This intervention generated a flurry of reaction or overreaction, depending upon your point of view. It was, in the final analysis, a tempest in a teacup.

[14] The Applicant and National Bank (who strongly supports the sale and, despite the sale, will end up with a significant shortfall on its secured claim) were understandably taken aback by a last-second threat to a transaction they have worked very hard to bring to the threshold of completion and that, from their perspective at least, is clearly the best option available. They asked me not to consider the submissions of a mere "bitter bidder".

[15] They needn't have had so little faith in the editorial judgment of the court. COPL had experienced counsel who was well aware of the stiff currents flowing against any attempt of an unsuccessful bidder to gain standing to upset a transaction. There was no request for standing. The principal message of the communication was an opportunistic one perhaps, but not unfair. In light of the issues raised on May 23, 2018, COPL wanted to remind the Monitor and eventually the court that it remains ready willing and able to move forward with a transaction should Lagasco drop the ball. Of course, COPL did not resist ensuring that a few helpful bits of analysis/argument that might serve to persuade the court to think about moving in that direction also managed

to find their way into the communication. It was not an attempt to introduce fresh evidence through the back door.

[16] As I remarked during the hearing, I did not fall off the turnip truck yesterday. The motivation behind the communication was not cloaked nor was its simple object.

[17] A few take-away admonitions from this:

a. Communications directly with the judge are to be discouraged generally;

b. Where necessary, such communications should be copied to the service list generally absent some very compelling reason not to do so; but

[18] I would have preferred that this course of conduct had been followed here. The Monitor was copied and the integrity of the process was in no way compromised.

[19] The substantive question before me was whether I ought to approve the provisions of the requested approval and vesting order that would compel the assignment of certain executory contracts under s. 11.3 of the CCAA.

[20] Section 11.3 of the CCAA authorizes the court to assign "the rights and obligations of the company" to an agreement to any person specified in the court order that is willing to accept the assignment. Post-filing contracts, eligible financial contracts and collective agreements may not be assigned in this fashion.

[21] There was no issue in this case with the technical aspects of the case. Proper notice was given. No prohibited categories of contracts were proposed to be assigned. The terms of the proposed assignment were designed to ensure the payment of cure costs would be made. A procedure for resolving any disputes about cure costs was designed to avoid compromising the rights of affected parties.

[22] The issue to be decided was whether this was an appropriate case for me to exercise my jurisdiction to make the order under s. 11.3. Section 11.3 does not provide an exhaustive code of the factors for me to consider. Rather, s. 11.3(3) lists three factors that, among others, I am to consider:

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

[23] In the present case, the Monitor has approved the proposed assignments and has made detailed and thoughtful submissions to me outlining the basis of that approval. The concerns expressed by me on May 23, 2018 did not fall on deaf ears.

[24] The purchaser Lagasco is largely a shell company for the time being. It will own the business being purchased. The evidence before me indicates that substantially all of the purchase price is to be debt financed – partly through financing secured by the equipment to be purchased and party through a credit facility. On day one there will be little to no equity in the purchaser and the significant leverage will have to be serviced entirely from cash flow.

[25] Taken in isolation, this factor raised grave concerns in my mind as to whether the assignee would be able to perform the obligations or whether, in light of the potential fragility of the assignee, it would be appropriate to compel the contract counterparties to accept the assignee.

[26] I still have those concerns. I think it helpful that I should elaborate somewhat on what the concerns are and how I have resolved them. The Monitor's dispassionate and frank analysis of the issues has been very helpful in this process.

[27] Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

[28] Of course, insolvency is not always a catastrophe for such counterparties. Sometimes it is a godsend. Assets locked into long-term contracts at advantageous prices may be freed up to allow the counterparty to re-price to current market. In such cases, the creditors are at risk of seeing the debtor lose critical assets while the counterparty receives an unexpected windfall. The business and value of the debtor's assets may evaporate in the process – be it from one large contract lost or many smaller ones.

[29] Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.

[30] It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.

[31] A proposed purchaser starting life with close to 100% leverage gives this judge a considerable degree of heartburn when it comes to answering the question of whether the assignee is a person who will be able to perform the obligations. That concern is amplified when one adds the prospect of landowners being made liable for environmental remediation caused by lessees and others on their land.

[32] So, if that is my concern, by what process have I allayed it?

[33] Firstly, the financial information before me is that cash flow from these operations has been quite solid. Dundee's insolvency has not been a result of operating losses.

[34] Secondly, while any projection of future business results will always be subject to a number of contingencies and imponderables outside of the control of the parties, the forecast reserves prepared by Deloitte in this case have been prepared under NI 51.01 which means at the very least that they have been prepared to reviewable standards of reasonableness. The forecasts, such as they are, justify the inference that there is a *reasonable basis* to conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt. It will be a while before an equity cushion will be built though.

[35] Thirdly, the purchaser has a plan to reduce G&A and operating costs to provide a further margin of safety and a level of institutional experience to make such a plan credible.

[36] Fourthly, the environmental risk is mitigated somewhat by the fact that Ontario's regulatory model operates on a "pay as you play" basis requiring the building of reserves to handle capping costs as wells move past their expected lives. Dundee has had no trouble in the past funding capping expenses from operations and these expenses are accounted for in the cash flow forecasts used.

[37] Finally, the MNR has agreed to a voluntary assignment of its leases (off-shore) while no on-shore landowners have seen fit to object to the proposed assignments despite quite adequate notice being given.

[38] I must also be mindful that contract counterparties are not expected to *improve* their situation by reason of an assignment. A counterpart to an executory contract that is subject to involuntary assignment under s. 11.3 of the CCAA has managed to find

itself contractually bound to an insolvent debtor notwithstanding whatever contractual safeguards were negotiated to avoid that outcome. The debtor is now insolvent. The desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required.

[39] In all the circumstances, I was led to the conclusion that it would be appropriate to assign Dundee's rights and obligations to the purchaser and that the purchaser is someone who will be able to perform the obligations assigned. I have carefully reviewed the proposed order and am satisfied that the method of ascertaining cure costs and, if needs be, resolving disputes arising about the quantum satisfies the requirements of s. 11.3(4) and s. 11.3(3)(c). There is a fair process to resolve disputes about quantum should they arise.

[40] In the result, I approved the transaction and the form of Approval and Vesting Order presented to me subject to minor amendments made at the hearing.

S.F. Dunphy J.

Date: June 13, 2018

Tab 8

Assignment of agreements

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

Exceptions

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

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124 2005, c. 47, s. 128 2007, c. 29, s. 107, c. 36, ss. 65, 112.

Tab 9

Ontario Supreme Court
Playdium Entertainment Corp., Re
Date: 2001-11-15

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Ontario Superior Court of Justice [Commercial List] Spence J.

Heard: November 9, 2001

Judgment: November 15, 2001

Docket: 01-CL-4037

Paul G. Macdonald, for Covington Fund I Inc.

Gary C. Grierson, for Famous Players Inc.

Gavin J. Tighe, B. Skolnik, for Toronto-Dominion Bank

David B. Bish, for Playdium Entertainment Corporation

Spence J.:

[1] These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

[2] Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

[3] This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the

assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s.9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effec[???] stayed, which is not an issue.

The Issue

[4] Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

[5] Famous Players submits that a provision to that effect is necessary because otherwise it will suffer the loss of certain of those claims and that it ought not to be deprived of those claims by the order of the court and that the court has [???] jurisdiction to make such an order.

The Terms of the Assignment

[6] Famous Players will continue to have any rights of action it now has [???] which may subsequently arise in its favour against Playdium (subject to any sub sequent court determination to the contrary), because nothing in the proposed transaction purports to alter those rights. It is not indicated whether Playdium is to have liability in respect of events occurring after the transfer. In any event, the continuing liability of Playdium is of no practical consequence to Famous Players' concerns, given Playdium's insolvency.

[7] As against New Playdium, by reason of paragraph 13 of the draft order, Famous Players would be able to exercise a contractual right to terminate as a result of a default that arises or continue to exist after the transfer, except for an insolvency default.

[8] Counsel for Covington said that if there is an existing misrepresentation as to the state of the equipment, that would be brought forward, which I take to mean that the rights of Famous Players in that respect would be preserved for purposes of Famous Players being able to assert those rights against New Playdium.

[9] It was submitted that the proposed terms in the draft order would assign the benefit of the agreement without the burden. However, on the basis of the material and the submissions for Covington and TD Bank, the intention is that New Playdium would assume the burden of the agreement as of and from the transfer date in respect of the obligations of performance then in effect or arising subsequently.

[10] What New Playdium would not assume or be liable for would be any claims that may arise in the future in favour of Famous Players against Playdium in respect of matters which occurred prior to the transfer and do not constitute a continuing default on the part of Playdium at the time of the transfer.

[11] An example of such a contingent claim might be a claim for indemnity by Famous Players against Playdium in respect of damages payable by Famous Players for injury suffered resulting from Playdium's equipment in an occurrence prior to the transfer to New Playdium but not asserted by the claimant until a time subsequent to the transfer. It was submitted that such a claim cannot properly be viewed as part of the continuing burden of the agreement as regards New Playdium because the event giving rise to it antedates New Playdium's involvement. It was also submitted that such a claim is nothing other than a contingent unsecured claim of a person who, in respect of the claim, is a creditor or prospective creditor of Playdium and the claim should not be entitled to any different recognition than other unsecured contingent claims of Playdium. These submissions have merit.

[12] For Famous Players it was submitted that New Playdium is seeking to take an assignment of the agreement without being subject to the equities. However, it appears that Famous Players' rights of termination are preserved (except for the insolvency default), in respect of defaults under the agreement existing at or subsequently arising after the transfer date.

[13] It was not suggested that New Playdium seeks to take an assignment from Playdium of rights against Famous Players in respect of matters that have occurred previously under the agreement and which might be the subject of a claim of set-off or counterclaim. If that were intended, that might well constitute a case of assignment without being subject to the equities. For that reason, it would be appropriate that New Playdium should not be able to assert such rights against Famous Players without being subject to any such claims (i.e. set-offs and counterclaims) of Famous Players relating to such rights. A provision to that effect ought to be

included in the order and it should state that the provision is subject to any further order of the court based on CCAA consideration.

Jurisdiction of the Court Under CCAA

[14] As for the jurisdiction of the court to order the assignment on the terms proposed, Famous Players submits that the authority of the court must derive from the CCAA and there is no provision in the CCAA sufficient for this purpose. This raises an issue of fundamental importance about the scope of the CCAA.

[15] Section 11(4) of CCAA provides as follows:

> Other than initial application court orders—a court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[16] Famous Players now submits that s. 11(4) of the CCAA is not sufficient to give the court authority to make an order which has a permanent effect against a third party and that no other provision of the CCAA assists and neither does the inherent jurisdiction of the court.

[17] As the parties presumably realize, the submission of Famous Players goe not just to the terms proposed but to the jurisdiction of the court to order the assignment itself, a matter that was dealt with in the reasons of November 2, 2001. Since the order has not yet been taken out, the matter is still before me. Because of the importance of the issue, it is appropriate to consider the further submissions made at the present hearing.

The Case Law

[18] The following excerpts from decisions in cases under the CCAA provide assistance in assessing the extent of the jurisdiction of the court.

[19] From *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pages 33 and 34, by Farley J.; with reference to s. 11 of the Act as it was at that time:

> The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 296-298 (B.C.S.C.) and pp. 312-314 (B.C.C.A.) and *Meridan Developments Inc. v. Toronto Dominion Bank,* supra, pp. 219 ff.
>
> The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from
>
> doing so: see *Gaz Metropolitain v. Wynden* and *Qintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 311-312 (B.C.C.A.).

[20] From Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, *Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.,* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

[21] From the endorsement in *American Eco Corp., Re* (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.), unreported Endorsement of Farley J.:

> The only fly in the ointment as I was advised was that BFC was not agreeable to giving its consent, which consent is not to be unreasonably withheld as to the transfer of the j.v. contract participation from Industra to members of the Lockerbie Group…
>
> Thus it appears to me that in relative terms, the financial aspects of this transfer vis a vis the joint venture is covered off by the asset/equity substance of the consolidated Lockerbie group and the provision of the completion bond. As well from a work performance aspect, one should note that if Lockerbie was not allowed the transfer, then BFC would be looking at an insolvent j.v. venturer Industra—with the result that as opposed to the Industra team being kept together (as assumed by Lockerbie

purchasers), the team would be "let go" and BFC would not have this likely package but would have to go after the disintegrated team on a one by one basis.

But perhaps more telling is the BFC October 12/2000 letter that "Therefore, we would only be prepared to seventy five (75) percent". Thus it appears that there is no financial or operational reason to refuse the assignment—but merely, a bonus which in my view is not related to any true risk—but merely a "bare consideration" bonus. See paragraph 194 of *Welch Foods v. Cadbury Beverages Canada Inc.* I find that BFC would be unreasonable to withhold its consent if the Lockerbie group provided the aforesaid guarantees and bond.

While it is true that the assignment provision is there irrespective of it being in an insolvency setting or not, it would seem to me that in the fact circumstances prevailing of the insolvency that BFC is attempting to confiscate value which should otherwise be attributable to the creditors.

[22] Famous Players is not seeking a bonus for its consent. But its only apparent remaining reason for withholding consent, vis a vis the prospect now afforded of a solvent Playdium business under the new owners, is that it has a better prospective deal with Starburst, which is not dissimilar to the Industra situation.

[23] From *Smoky River Coal Ltd, Re,* [1999] A.J. No. 676 (Alta. C.A.) at pages 10 and 13 by Hunt J.A.

47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as Norcen, supra, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the CCAA…

49 …Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empowers the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceedings" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

72 …I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings. I assume that, in setting the details of the CCAA procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

[24] Paragraph 72 of the *Luscar* decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

[25] It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

[26] Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only f[???] orders of a negative injunctive effect until otherwise ordered by the court, respect of proceedings against the company, i.e. in this case, Playdium. H[???] ever, the order sought is in effect to require Famous Players to be bound by assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

[27] Section 11(4)(c) warrants further consideration in this regard. Section 11(4) (c) does not require that an order be made only for a limited period, as s. 11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4)(c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

[28] Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order *on such terms as it may impose* (emphasis added).

[29] It is instructive to compare s. 11(4) of the CCAA with s. 11 (3). Section 11 (3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification "effective for such period as the court deems necessary not exceeding thirty days".

[39] Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J in *Canada (Minister of Indian Affairs & Northern Development)* v. *Curragh Inc* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List])at pp 184 and 185 is instructive:

> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon,* order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd.,* order of Blair J. dated September 22, 1993. As MacDonald J. said in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
> > I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co.* v. *Genevieve Mortgage Corp.,* [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
> >
> > The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
> >
> > > ...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...
> >
> > Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.
>
> In commenting on this decision and discussing the stay provisions of the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 ("CCAA") and the *U.S. Bankruptcy* Code, Tysoe J. observed in *Re Woodward's Ltd.* (1993), 17 C.B.R. at pp. 247-8, [1993] B.C.J. No. 42:
>
> > Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisitive to the Court exer-
> >
> > rising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
> >
> > In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to

> persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[40] It should be noted that orders made under s. 11(4)(*c*) are to be made "until otherwise ordered by the court". A proviso to this effect (e.g. "subject to an further order of the court pursuant to s. 11(4)(c) of the CCAA") should be included in any vesting order to be made in favour of New Playdium with respect to the assignment of the Techtown Agreement.

Whether the Order is Appropriate

[41] The circumstances that are relevant in the present case are dealt with in the earlier reasons at paragraphs 24 through 33 and in the preceding paragraphs of the present reasons.

Conclusion

[42] Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

[43] Provided that terms are added to the assignment and to the vesting order to the effect directed above, Famous Players will not be subjected to an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by CCAA and my reasons for decision of November 2, 2001.

[44] Accordingly, it is appropriate for the assignment to be approved and it is not necessary to add the clause requested by Famous Players to the form of order now before the court.

[45] Counsel may consult me about costs.

Order accordingly.

Tab 10

Ontario Supreme Court
Playdium Entertainment Corp., Re
Date: 2001-11-02

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Ontario Superior Court of Justice [Commercial List] Spence J.

Heard: October 29 and 30, 2001

Judgment: November 2, 2001[1]

Docket: 01-CL-4037

Paul G Macdonald, Alexander L. MacFarlane, for Covington Fund I Inc.

Gary C. Grierson, J. Anthony Caldwell, for Famous Players Inc.

Craig J. Hill, for Pricewaterhouse Coopers Inc.

Roger Jaipargas, for Monitor

Gavin J. Tighe, for Toronto-Dominion Bank

Michael B. Rosztain, for Canadian Imperial Bank of Commerce

Geoff R. Hall, for Ontario Municipal Employees Retirement Board

David B. Bish, for Playdium Entertainment Corporation

Julian Binavince, for Cambridge Shopping Centres Limited

***Spence J.*:**

[1] These reasons are provided in brief form to accommodate the exigencies of this matter.

[2] The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement* Act (the "*CCAA*"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets

[1] Additional reasons at 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

[3] The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

[4] This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

[5] The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

[6] Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

[7] Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

[8] Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

[9] Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous

Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

[10] The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

[11] Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society/Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what "justice dictates" and "practicality demands".

[12] Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

[13] The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

[14] Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their

notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

[15] Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

[16] Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

[17] The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit, Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

[18] Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business

carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

[19] On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

[20] The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

[21] This is the pivotal issue in respect of the motion.

[22] Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

[23] If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

[24] The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under *CCAA* and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

[25] Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a *CCAA* situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross,* and those circumstances do not exist here.

[26] In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

[27] The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

[28] The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

[29] Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the *CCAA* stay will be lifted—which would happen at the end of November, on the present proposal—and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

[30] If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

[31] The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

[32] Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

[33] If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

[34] For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

Tab 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Hayes Forest Services Limited (Re),***
2009 BCSC 1169

Date: 20090827
Docket: S085453
Registry: Vancouver

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

and

In the Matter of the *Business Corporations Act*, S.B.C. *2002*, c. 57

and

In the Matter of Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd.

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment
(from Chambers)

Counsel for Teal Cedar Products Ltd.:	S.C. Fitzpatrick
Counsel for Hayes Forest Services Limited Hayes Holding Services Limited and Hayes Helicopter Services Ltd.:	J.I. McLean
Counsel for Western Forest Products Inc.:	E.J. Milton, Q.C.
Counsel for G.E. Canada Corporation	J. Cytrynbaum
Counsel for Steelworkers Locals 1-80 and 1-85	J. Mistry
Counsel for Canadian Imperial Bank of Commerce	F.R. Dearlove
Place and Date of Hearing:	Vancouver, B.C. July 8, 10, 24 & August 14, 2009
Place and Date of Judgment:	Vancouver, B.C. August 27. 2009

[1] Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("TRL46"). A $50,000.00 deposit has been paid by North View, and a further $277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of $1,614,266.00 is to be paid at the rate of $3.00 per cubic metre of the timber harvested under the Contract.

[2] In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of $1,400,000.00, with a down payment of $400,000.00, and with the balance of the purchase price to be paid at the rate of $2.00 per cubic metre of timber harvested under the Contract.

[3] As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

> In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.
>
> The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a

> sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of $327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

BACKGROUND

[4] A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

[5] These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

> The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

[6] Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

[7] In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the

Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

> Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

[8] The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

[9] An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

[10] In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

[11] Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of $2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

[12] In November 2008, Teal made an offer to Hayes to purchase the Contract for $764,112 with $191,028 on closing and the remainder at the rate of $2.00 per cubic

meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

[13] Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

POSSIBLE TRANSFER OF THE CONTRACT TO NORTH VIEW

[14] The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

> 18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.
>
> 18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

[15] In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

[16] The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

[17] In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

[18] The matters which remained of concern to Teal were set out in that letter, being that North View:

1. is not a going concern;
2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;
3. has no experience performing a Coastal stump to dump contract;
4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;
5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and
6. has no executed assignment of the Contract conditional on our consent being provided.

[19] The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further

information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

> In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.
>
> In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.
>
> However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

SHOULD THE DISPUTE GO TO ARBITRATION?

[20] The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and

discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

[21] Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

[22] But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that *Act*: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.* (2008), 82 B.C.L.R.(4th) 110 (C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Luscar Ltd. v. Smoky River Coal Ltd.* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

[23] In *Luscar*, *supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

[24] In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

> The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. Arbitration Act. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated bys. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of CCAA proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration. For these reasons, having taken into account the nature and purpose of the CCAA, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the CCAA.
>
> (at para. 33)
>
> The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
>
> (at para. 50)

[25] I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centers Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. G.D.) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

[26] Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *Re T. Eaton Co.* (1997), 46 C.B.R. (3d) 293 (Ont. G.D.); *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. G.D.); *Re Philip's Manufacturing Ltd.* (1991), 9 C.B.R. (3d) 1 (B.C.S.C.); *Re Playdium Entertainment Corp.* (2001) 31 C.B.R. (4th) 32 (Ont. S.C.J.) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J.); *Armbro*

Enterprises Inc. (1993), 22 C.B.R. (3d) 80 (Ont. G.D.); and *Skeena Cellulose Inc v. Clear Creek Contracting Ltd.* (2003), 13 B.C.L.R. (4th) 236 (C.A.).

[27] *Skeena*, *supra*, dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

> In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal*; *supra*, and *Re Armbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Ltd* [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

[28] In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that

they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium*, *supra*, Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

[29] Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corporation (Re)* (2003), 336 A.R. 302: "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd. (Re)* (2003), 14 B.C.L.R. (4th) 153 and *T. Eaton Co. (Re)*, [1997] O.J. No. 6388 (QL) (Ont. Ct. J. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

[30] I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach $250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the

type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute between the parties should be dealt with by this Court in the *CCAA* proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

CAN THE COURT APPROVE THE ASSIGNMENT OF THE CONTRACT, EVEN THOUGH IT IS NOT UNREASONABLE FOR TEAL TO WITHHOLD ITS CONSENT?

[31] I am satisfied that the *CCAA* Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium*, *supra*, Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the *CCAA* Order in place, Spence J. concluded that there could be no assignment but that the *CCAA* Order affords "... a context in which the court has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium*, *supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

HAS THE CONSENT OF TEAL BEEN UNREASONABLY WITHHELD?

[32] The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

> The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)
>
> On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.
>
> However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.
>
> Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.
>
> (at paras. 58-60)

[33] The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

> In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:
>
> 1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.), at pages 149-50; *Sundance Investment Corporation Ltd. v. Richfield Properties Limited et al*, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500; cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. Hedges Menswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages 715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.
> 2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley Park Garden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.
> 3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-Emma Restaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) - but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.), at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden Estates Ltd. v. Moss*, above, at page 901 per Dunn L.J.)

> 4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd., v. Gloucester City Council*, [2001] H.L.J. 57.
> 5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.* [1985] O.J. No. 1874 (Dist. Ct.)
> 6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or unreasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke of Westminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5; *Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67; *Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.
>
> (at para. 9)

[34] Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

[35] Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

> At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.
>
> There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty

> acquiring the necessary equipment at some of the lowest historic prices for that equipment.
>
> There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

[36] I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

> I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.
>
> Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.
>
> Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.
>
> Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that requirement.

[37] Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

[38] I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

The contract will be operated as follows:

(a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");

(b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;

(c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;

(d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

[39] I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

[40] Regarding the concern of Teal that North View is not financially capable, I note that a $50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for $400,000.00 so that the further $277,000.00 required at the date of closing will be available, that $100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

[41] Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

> I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all purchases to control the cash flow.
>
> I have had Mr. Donald P. Hayes assist me with the preparation of the
>
> Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the $3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.
>
> This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

[42] As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

[43] In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lendorf Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987) 13 B.C.L.R. (2d) 387 (S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes

has met the burden of showing that a reasonable person would not have withheld consent.

[44] In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for $764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for $1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

WHAT SHOULD BE MADE OF THE OFFER OF 858?

[45] The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is $1,400,000, with $400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for $1,000,000.

[46] In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:

(a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:

(i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and

(ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;

(b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;

(c) if:

(i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or

(ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation,

either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;

(d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and

(e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

[47] Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

> As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.
>
> Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:
>
> 1. The proposed purchase price is substantially less than the North View offer, some $250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of $50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;
> 2. The rate of payment on the Promissory Note is only $2 per M3 as opposed to the $3 per M3 to be paid by North View;
> 3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the $2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;
> 4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;
> 5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;

6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;
7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

[48] Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of 858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives $400,000.00 remains an unfulfilled condition.

[49] There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is $214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment

will be based on $3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of $2.00 per cubic metre. Third, if there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a $50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

[50] It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the $400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the $2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

[51] I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

[52] The parties will be at liberty to speak to the question of costs.

"Burnyeat J."

The Honourable Mr. Justice Burnyeat

APPENDIX "A"

SCHEDULE "D"

DISPUTE RESOLUTION CAUSE

Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the. matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of

procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only. ....

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

(a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;

(b) discovery of one officer or representative of the other party;

(c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each $50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

(a) Where one party is found, on a balance of probabilities

  (i) not to have pursued its various rights and responsibilities under this agreement in good faith,

  (ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or

  (iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

  then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be re-submitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

Tab 12

In the Court of Appeal of Alberta

Citation: Robinson, Little & Company Limited v. Block Bros. Contractors Ltd., 1987 ABCA 241

Date: 19871223
Docket: 18491
Registry: Calgary

Between:

The Clarkson Company Limited, Trustee in Bankruptcy of Robinson, Little & Company Limited, a Bankrupt

Applicant
(Appellant)

- and -

Block Bros. Contractors Ltd.

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Belzil
The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Virtue

Reasons for Judgment of The Honourable Mr. Justice Belzil
Concurred in by The Honourable Madam Justice Hetherington
Concurred in by The Honourable Mr. Justice Virtue

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE R.A. DIXON DATED the 28th day of MAY, A.D. 1986 FILED the 29th day of MAY, A.D. 1986

COUNSEL:

E.D.D. Tavender, Q.C. and J.S. Shortt, Esq., for the Appellant

S.L. Shavers, Esq., for the Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE BELZIL

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[1] This appeal, concerns the power conferred upon a trustee in bankruptcy by s.8 of the *Landlord's Rights on Bankruptcy Act,* R.S.A. 1980, c. L-7, to assign the unexpired term of a lease held by the bankrupt. The section reads as follows:

"8(1) This section applies only to premises leased by

(a) a retail merchant, wholesale merchant, commission merchant or manufacturer, or

(b) a person who as his ostensible occupation buys and sells goods, wares or merchandise that are ordinarily the subject of trade and commerce,

and used by him for the purposes of his trade.

(2) Notwithstanding the legal effect of a provision or stipulation in the lease, the trustee

(a) may, at any time while he is in occupation of leased premises for the purposes of the trust estate and before he has given notice of intention to surrender possession, or disclaimed, elect to retain the leased premises for the whole or a portion of the unexpired term, and

(b) may, on payment to the landlord of all overdue rent, assign the lease to a portion who

(i) will covenant to observe and perform its terms,

(ii) will agree to conduct on the demised premises a trade or business that is not reasonably of a more objectionable or more hazardous nature than that that was conducted thereon by the lessee, and

(iii) is on application of the trustee approved by the Court of Queen's Bench as a person fit and proper to be put into possession of the leased premises.

(3) Notwithstanding subsection (2), before the person to whom the lease is assigned may go into occupation, he shall

(a) deposit with the landlord a sum equal to 6 months' rent, or

(b) supply to the landlord a guarantee bond approved by the Court of Queen's Bench in a penal sum equal to 6 months' rent.

as security to the landlord that he will observe and perform the terms of the lease and the covenants made by him with respect to his occupation of the premises."

[2] The facts relevant to the grounds raised are as set out in the written reasons of the learned chambers judge as follows:

"The applicant is the Trustee in Bankruptcy of Robinson. Little and Company Limited ('Robinson Little') and seeks the attainment of court approval to the assignment to F.W. Woolworth Company Limited ('Woolworth') of leasehold rights held by Robinson

Little in the Grande Prairie Shopping Centre premises occupied by Robinson Little as at, and prior to, the date of bankruptcy, January 5, 1985. The respondent is the present registered owner of the shopping centre, hereinafter called 'Prairie Mall', it having purchased same from National Land Consultants Ltd. in 1977. Robinson Little took possession of the subject premises when the Prairie Mall opened in late 1974 or early 1975 as a tenant of National Land Consultants Ltd.

Under sale and purchase agreement dated March 26, 1985, and subject to the conditions stipulated therein, the applicant, in its capacity as Trustee in Bankruptcy of Robinson Little, agreed to sell to Woolworth the interests of Robinson Little, as tenant, in seventy-three locations throughout the four western provinces of Canada and western Ontario. Prairie Mall was one such location and the Robinson Little premises therein was given an allocable percentage rating of 4.37% under the agreement. The gross leasable square footage of Prairie Mall is approximately 250,000 square feet and the leasable area of the premises formerly occupied by Robinson Little is 17,115 square feet.

Under communication dated March 29, 1985, the applicant informed the respondent of the sale of assets as between the applicant and Woolworth and requested that the respondent consent to an enclosed form of Assignment of Lease dated March 29, 1985 and executed by the applicant and Woolworth. The form of the Assignment of Lease contains the following clause:

> '3. Notwithstanding anything herein contained, it is agreed between the parties hereto that this Assignment of Lease is subject to the written consent of the landlord being obtained or, alternatively, the approval of the Assignee as a fit and proper tenant by court of competent jurisdiction, and it is further subject to the compliance by the Assignee with the provisions of the Landlord's Rights on Bankruptcy Act.'

The respondent refused to give its consent to the Assignment of Lease thus precipitating the trustee's application to this court under the Landlord's Rights on Bankruptcy Act. Notwithstanding such refusal, Woolworth took possession of the subject premises as of April 5, 1985 and has been carrying on business in such premises to and including present date."

* * * *

"The respondent refused to give its consent to the assignment to Woolworth on two principal grounds, the first being that no lease existed between the respondent and Robinson Little, their relationship being that of a tenancy at will only, and secondly, that a consent to assignment would place the respondent in breach of covenant with its anchor tenant, Zellers Inc. ('Zellers'). The Zellers store in Prairie Mall comprises 80,664.16 square feet and represents 31.51% of the gross leasable area of Prairie Mall."

[3] On an application by the trustee for court approval of a prospective assignee pursuant to s.8(2)(b)(iii), the court held that the right to assign under s.8(2)(b) could not be exercised unless the trustee first elected to retain the leased premises under s.8(2)(a). The learned judge further held that the letter of March 19, 1985 from the trustee to the landlord

requesting the latter's consent to assignment was not a proper election within s.8(2)(a). He refused approval.

[4] In holding that "election to retain" under s.8(2)(a) was a mandatory pre-condition to assignment under s.8(2)(b), the learned chambers judge followed the interpretation by successive Ontario courts of similar legislation in that province. Chronologically, the first of the Ontario decisions is *In re Bowman* (1927) 8 C.B.R. 562, a decision of Meredith, C.J.C.P., who held that the power to assign could be exercised only after notice to retain the lease had been given. This was followed by Urquhart, J. in *Re Surplus Merchandisers Limited* [1950] 31 C.B.R. 26. On application for leave to appeal the decision in *Re Surplus Merchandisers Limited and Howard* [1950] 31 C.B.R. 30 Ferguson, J. expressed doubt about the correctness of the interpretation in *Re Bowman* and granted leave. He said:

> "The interpretation placed on sec.37(2) of *The Landlord and Tenant Act* by *In re Bowman* is that the right to assign cannot be exercised unless the trustee has elected to retain the lease. I am doubtful that that is the correct interpretation of the section because if that were so the trustee would become personally liable on the lease for the rent and he would be unable to wind up the estate until the lease had terminated."

Unfortunately the appeal was abandoned.

[5] In the subsequent case of *Re Limestone Electrical & Supply Co. Ltd.* [1955] 3 D.L.R. 104, before the Ontario Court of Appeal, Laidlaw, J.A. again expressed the view in *obiter* and without referring to any of the preceding decisions that a notice of intention to retain was a prerequisite to assignment by the trustee. In that case, notice had in fact been given and the issue was whether the assignee was fit and proper.

[6] I do not agree with the Ontario decisions and endorse the doubt expressed thereon by Ferguson, J. in *Re Surplus Merchandisers.*

[7] In a more recent decision of the High Court of Ontario *Re Darrigo Consolidated Holdings Inc. et al*, [1987] 63 C.B.R. 216, which was brought to our attention by counsel after the hearing of this appeal, Eberle, J. expressed concern about the procedure laid out in *Re Limestone Electrical.* Noting that the rule expressed in *Re Limestone Electrical* was not necessary to that decision, he granted the trustee's application which had been brought before the giving of notice of election on the condition that notice be thereafter given.

[8] I agree with counsel for the appellant that the powers conferred upon the trustee by s.8(2)(a) and s.8(2)(b) of the Act are alternate, and that the exercise of the power under ss.(b)

is not dependent upon prior notice under ss.(a). The two subsections have different purposes. In my opinion, the purpose of ss.(b) is to permit the trustee to put his assignee in the same legal position vis-a-vis the landlord under the lease as that held by the bankrupt lessee immediately before bankruptcy. The intent is to enable the trustee, in cases limited by s.8(1), to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease than it would have been in vis-a-vis its lessee before bankruptcy. The landlord's protection is in the requirement of s.8(2)(b)(iii) that the assignee be a person found by the court to be fit and proper to take the position of the former lessee. The trustee is but a conduit in effecting this substitution.

[9] To hold otherwise is to place the trustee in the precarious position contemplated by Ferguson, J. in *Re Surplus Merchandisers Limited.* The value of merchandise of a bankrupt merchant as in the present case is at its highest if sold as a going concern with the lease. If the trustee were required to elect to keep the lease before assignment, in order to achieve maximum realization as he is duty bound to do, its election would render the estate, and perhaps itself, liable for the rents for the balance of the term in the event that court approval of the assignee could not be obtained. This might result in waste of the estate and postponement of final distribution until expiry of the lease, to the detriment of the creditors.

[10] Having reached this conclusion, it is unnecessary to decide whether the letter from the trustee to the landlord requesting consent to the assignment was sufficient notice for the purpose of s.8(2)(a).

[11] The learned chambers judge also found an implied term in the lease that it would not be assigned without consent of the lessor, such consent not to be unreasonably withheld. He held that the landlord's right to refuse consent in this case, based on the landlord's fear of financial risk, was a valid ground for the court refusing its approval of the proposed assignee as a fit and proper person within the meaning of s.8(2)(b) of the Act. The appellant submits that a covenant not to assign without consent cannot be implied; and, alternatively, that, even if properly implied, the covenant is overridden by s.8 of the Act.

[12] It is again unnecessary to decide whether a clause prohibiting assignment without consent was properly implied. The opening words of s.8(2) makes it clear that the power to assign conferred upon the trustee by the section overrides any restriction on assignment which may be contained in the lease. Such a restriction on assignment is not binding on the trustee. The respondent argued before us as he had before the learned chambers judge that

to approve the assignee as a fit and proper person in this case might place the landlord in a position of having breached a covenant in its lease with Zellers, the major anchor tenant in the shopping centre, Such a breach, it is argued, might entitle the anchor tenant to cancel its lease, which in turn might entitle other minor tenants to cancel because of covenants in their respective leases regarding the presence of Zellers as major anchor tenant. The covenant in question in the Zellers lease is in Article 22, s.1 which is as follows:

"ARTICLE 22

> SECTION 1. The landlord agrees that it will not occupy or use, or permit to be occupied or used, any store premises in the shopping centre for any department store, junior department store or change variety store in excess of 15,000 square feet, without the tenants written consent in each instance, except for the following:
>
> > A second department store in the calibre of Eaton's, Simpsons, Hudson's Bay or Woodwards, if such is constructed in the future.
> >
> > A Robinson Little of approximately 16,000 square feet.
>
> The landlord further agrees that it will not occupy or use, or permit to be occupied or used, any store premises in the Shopping Centre for a discount store (whatever the size)."

[13] When requested by the landlord to approve the proposed assignment from the trustee to F.W. Woolworth Company Limited, Zellers raised the clause to support its refusal of approval.

[14] The learned chambers judge upheld the respondent's argument, holding that the financial risk to the landlord was a factor to be considered in determining the fitness of a proposed assignee in an application under s.8(2)(b)(iii), and that it was determinative against approval in this case. In doing so, he adopted what was said by this court in *Sundance Investment Corporation Ltd. v. Richfield Properties Limited and Beaver Lumber Company Limited.* [1983] 2 W.W.R. 493 and other decisions therein considered.

[15] With all due respect the learned chambers judge erred in applying the law on unreasonable withholding of consent by a landlord to the application before him. The tests are not the same.

[16] That is the effect of the decision of Wilson, J.A. (as she then was) in *Re Somerset Management Services and Yolles Furniture Co. (Ontario) Ltd.* (1978) 26 C.B.R. (N.S.) 205. She stated at p.221:

"Having concluded that the judge under s. 38(2) is not bound by the case law on unreasonable withholding. I must consider on what basis he should make his decision on the fitness of a proposed tenant. I would respectfully adopt the test applied by Houlden, J. in the *Sunnybrook* case. I think the judge must be satisfied that the proposed tenant is one who will be both motivated to and able to honour the covenants in the lease and the covenants he is required to give under the section, and that he will make a fit and proper use of the premises. In order to satisfy himself of this the judge will require evidence of the proposed tenant's reputation in the community, both as a tenant and as a businessman, and he will also require evidence of the proposed tenant's credit-worthiness. But in addition to these factors, the judge will consider the status of the bankrupt estate, the availability of assets to meet the claims of creditors and the sum, in this case $151,000, subject to adjustments, which will be realized for their benefit if the assignment is effected. Weighing all these things, he will grant or withhold his approval."

[17] The learned chambers judge distinguished *Re Somerset Management Services* on the basis that it did not involve considerations in a shopping centre situation as in the present case.

[18] The simple answer to the respondent's argument is that an assignment under power of law, approved by the court, to which the landlord does not consent, cannot be construed in law as a breach of the lease by the landlord. The assignment under statutory authority approved by order of the court could not result in a financial risk to the landlord.

[19] The principle that the powers conferred upon a trustee in bankruptcy by the *Landlord's Rights on Bankruptcy Act* supercede any restriction on assignment contained in a lease was accepted in this province in *Re Cafe La Ronde Ltd.* (1984) 50 C.B.R. 283, unanimously affirmed by this court without written reasons (1984) 54 C.B.R. (N.S. 320. In that case, the trustee in bankruptcy gave notice of exercise of an option to renew contained in the lease. The landlord refused to consent to renewal on the grounds that the lease had terminated upon bankruptcy under another clause in the lease. The application came up on agreed facts before MacDonald, J. of the Court of Queen's Bench and it was agreed that he should also deal with the trustee's request for approval of a proposed assignment of the lease to a proposed purchaser. MacDonald. J. followed the Ontario decision in *Re Karelia Ltd.* (1980), 36 C.B.R. (N.S. 58 at 61. He said in granting the application of the trustee:

"In *Karelia Ltd.,* supra, p.64. Henry J. dealt with the right conferred on the trustee by statute saying:

That right is conferred on the trustee by statute, notwithstanding the provisions of the lease, which in my opinion cannot defeat the statutory right so conferred.

> I concur with the decision of Henry J. and find that the provisions of the Landlord's Rights on Bankruptcy Act of Alberta supersede anything to the contrary contained in the sublease. The undisputed facts before me show that the trustee has observed the requisites of s. 8(2)(b) of the provincial Act and is in a position to satisfy the requirements of s. 8(3) of that Act."

[20] Apart from s.8 of the Act under consideration, recognized principle of the general law that a restrict assignment contained in a lease does not affect assign operation of law or pursuant to statutory authority granted to a trustee.

[21] The effect of a restriction on assignment upon a Trustee appointed for the benefit of creditors was considered in several English cases. In *Doe on the Demise of Goodbehere v. Bevan* (1815) 3 M.N.S. 353, 105 E.R. 644, the lease provided that the lessee, his executors, administrators, or assigns, would "not during the terms assign the lease or any interest therein, without the consent in writing of the lessor, executors, administrators or assigns". The lessee deposited the lease with a creditor as security for the repayment of money. The lessee became bankrupt, and his estate and effects were assigned to trustees. The court directed that the lease be sold to discharge the debt. The landlord then argued that the assignment for the benefit of creditors was a breach of the covenant not to assign without consent, and the landlord was entitled to re-enter.

[22] At page 646 E.R., Lord Ellenborough, C.J. rejected the landlord's argument, holding that the clause prohibited voluntary assignments by the tenant and not assignments arising by operation of law, including assignments to and by a Trustee in bankruptcy:

> "Here the question is upon the meaning of the term of assigns, whether by that term the proviso was meant to have effect against assigns in law, as it would have against assigns by act of the party. Now the Courts have construed it to mean voluntary assigns as contradistinguished from assigns by operation of law, and further than that, that the immediate vendee from the assignee in law is not within the proviso; the reason of which is, that the assignee in law cannot be encumbered with the engagement belonging to the property which he takes, such as in this case the carrying on the bankrupt's trade in the public house, which is a strong instance. In such cases, therefore, the law must allow the assignee to divest himself of the property, and convert it into a fund for the benefit of the creditors. That 'assigns' does not relate to assignees in law, I consider as determined in *Doe d. Mitchinson v. Carter* and *Coring v. Warner,* but more distinctly in *Doe v. Carter.* Nor do I find that *Roe v. Harrison* impugns these authorities, because that passed entirely on the ground of the executors and administrators being specially named. But an executor is a volunteer, he is at liberty to renounce, and an administrator is wholly voluntary; therefore it does not follow from that decision, that 'assigns' must necessarily comprehend such as are involuntary and do not come in by the act of the party, as the assignees under a commission of bankruptcy do not."

At page 647, Dampier, J. affirmed this principle:

> "... the assignees of a bankrupt lessee, whose assignment is not voluntary, but passes in invitum, and by operation of law, are not within the general word 'assigns' in this proviso. It is not pretended that the assignment by the commissioners to the assignees is a breach of the proviso, but it is said the assignment by the assignees afterwards is their own voluntary act. But what is the duty of the assignees? They would incur a great risk if they did not so manage the estate of the bankrupt so as to fulfil their trust..."

[23] In support of this reasoning the court relied upon the earlier decision of *Doe on the Demise of Mitchinson v. Carter* (1798) B T.R. 56 101 E.R. 1264. In that case, the court considered whether a confession of judgment by a debtor which resulted in execution and sale of the debtor's leasehold by his judgment creditor was a breach of a covenant not "to let, assign, transfer, make over, barter, exchange or otherwise part with the indenture". At page 1267, Lord Kenyon, Ch.J. stated that the confession of judgment and the taking of the lease in execution was not a breach of the covenant against assignment:

> "Now, what are the words used in this lease; that the lessee shall not let, set, assign, transfer, make over, barter, exchange, or otherwise part, with the indenture or the premisses demised: but these are all acts to be done by the tenant himself; and I adopt the distinction relied upon by the defendant's counsel between those acts, that the party does voluntarily; and those that pass, in invitum: judgments in contemplation of law always pass in invitum: and I see no difference between a judgment that is obtained in consequence of an action resisted, and a judgment that is signed under a warrant of attorney, since the latter is merely to shorten the process, and to lessen the expence of the proceedings."

[24] The test outlined by Wilson, J.A. in *Somerset (supra)* had been satisfied in the present case. The appeal is allowed and an order made approving the proposed assignment of the balance of the term of the lease by the trustee to F.W. Woolworth Company Limited. The trustee will have its costs of this appeal and the costs of the application below.

DATED at CALGARY, Alberta
this 23rd day of December, 1987.

Tab 13

Court of Queen's Bench of Alberta

Citation: Bank of Montreal v. Phoenix Rotary Equipment Ltd., 2007 ABQB 86

Date: 20070212
Docket: 0603 13965
Registry: Edmonton

Between:

Bank of Montreal

Plaintiff

- and -

Phoenix Rotary Equipment Ltd., Phoenixbilt Industries Ltd., Brian Read, Bismarck Phoenix Equipment Inc., and Echidna Investments Ltd.

Defendants

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision:

[1] Section 8(2)(b) of the ***Landlord's Rights on Bankruptcy Act,*** R.S.A. 2000, c. L-5 ("the LRB Act") permits a Bankruptcy Trustee to assign a leasehold interest in realty to a successful tenderer notwithstanding the absence of consent from the landlord even where the lease contains an express requirement for such consent and even where only one of the three holders of the lease was in bankruptcy.

[2] A lease was held by three tenants-in-common, one of which was in bankruptcy and receivership and one of which was in receivership. The third lessee was not insolvent but had provided its written consent to the assignment. An early attempt by the landlord to terminate the interest of the third tenant on the basis that the other tenants had become insolvent and the

Receiver/Trustee had gone into possession of the leased premises was declared to be an ineffective attempt to circumvent the provisions of the LRB Act.

[3] Even had that attempt at termination been effective, relief from forfeiture would have been available to the solvent tenant given that the landlord would suffer no loss under the assigned lease from what it would have received had the receivership and bankruptcy not occurred. The fact that the assignment deprived the landlord of windfall profits of $2 million available to it if it had been able to enter into a fresh lease of the property at current market rates was no reason to refuse to approve the assignment which would maximize recovery for the creditors of the insolvent tenants.

Facts:

[4] PricewaterhouseCoopers Inc. ("the Receiver/Trustee") was appointed receiver of Phoenix Rotary Equipment Ltd. ("Rotary") and Phoenixbilt Industries Ltd. ("Industries") pursuant to a court order granted November 7, 2006 ("the Receivership Order"). The Receiver/Trustee was also appointed trustee in bankruptcy of Rotary pursuant to a court order granted the same day. As of that date both companies owed in excess of $1 million to various creditors including the Canada Revenue Agency, the Bank of Montreal and Workers' Compensation.

[5] One of the assets of the receivership/bankruptcy is a lease ("the Lease") entered into September 1, 2005 between York Realty Inc. ("York") as landlord and Rotary, Industries and Banksia Investments Ltd. ("Banksia") as tenants. The term of that lease was for 10 years, from September 1, 2005 to August 31, 2015. It relates to an industrial building located in Nisku, Alberta.

[6] York owned the building as a result of a financing arrangement with Banksia, the original owner. It sold the building to York, then leased it back along with its related companies, Rotary and Industries. Banksia did not actually occupy the leased premises; Rotary and Industries did. There is some dispute between the parties about whether Banksia was to have been the original tenant, with Rotary and Industries then being added at the landlord's request to offer additional security or whether the reverse occurred. In any event, all three are described as lessees on the Lease.

[7] At the time the Lease was created York also granted Banksia an option to purchase the leased premises ("the Option") for $2.5 million exercisable between January 4, 2010 and July 31, 2010.

[8] On November 17, 2006 York purported to terminate the Lease and Option on the basis that a Receiver and Trustee had been appointed and that a creditor had taken control of the leased premises, i.e. the Receiver/Trustee.

[9] On December 13, 2006 York entered into a new lease ("the new lease") for the premises with Reliance Industrial Products Ltd. ("Reliance") as a result of the efforts of a leasing agent to

whom it is contractually obliged to pay a commission of $95,463 as a result. Under the terms of the new lease it expects to receive $2 million more in rentals over the next 10 years over and above what it would have received under the Lease. Further, if York's termination of the Lease is effective, the Option would thus also have been terminated at a time when the market value of the property it covers has risen from $2 million to $3.7 million. Such is the reality of a vibrant economy with a resulting shortage of rental space in this oilfield industrial park.

[10] Meanwhile the Receiver was soliciting interest in acquiring the Lease and for the purchase of the assets of Rotary and Industries. On January 12, 2007 Reliance offered it $650,000 of which $460,000 related to acquiring the Lease and $190,000 to the acquisition of equipment and other assets of Industries and Rotary. The remaining assets of the insolvent companies are of negligible value. Reliance's offer was subject to a court order being granted approving the assignment of the Lease and relieving Banksia of forfeiture of its interest in the Lease, or otherwise declaring that the Lease continues in good standing and that the Receiver/Trustee is authorized and directed to transfer the entirety of it to Reliance.

[11] The Receiver has been unable to obtain better offers for the assets. It has applied for authorization to accept Reliance's offer. The Receivership Order requires it to seek approval for any such sale.

[12] Banksia has executed an irrevocable consent, authorization, waiver and release under which it has authorized the Receiver to act as its agent with respect to executing the assignment of its interest in the Lease and Option to Reliance. It also releases any interest in the sale proceeds so generated in exchange for the release of certain personal guarantees. Banksia has a common ownership with Rotary and Industries.

[13] Banksia has also applied for relief from forfeiture of its interest in the Lease and Option should I conclude its interest in the Lease was validly terminated.

[14] York has withdrawn its purported termination of the Lease as against Industries and Rotary in light of the provisions of s. 8(2) of the LRB Act but maintains that it has validly terminated the Lease as against Banksia.

[15] The Receiver now applies for authorization to accept Reliance's offer to purchase the assets in Receivership including the Lease for $650,000. It undertakes to pay York all monies due and owing under the Lease from November 7, 2006 to February 2, 2007 when it was in possession of the leased premises so that York will be made whole in relation to the benefits it was entitled to receive under the Lease had the bankruptcy and receivership never occurred. It has not done so as yet because it maintains that it would be proper to pay those costs to preserve the Lease from the funds otherwise available to creditors only if the Court finds that it has the right to sell the Lease.

[16] Clause 19 of the Lease provides that York's consent must be obtained prior to the Lease being assigned, consent which "shall not be unreasonably withheld". York has refused to consent

to the assignment on the basis that it will earn significantly more rental income under the new lease.

[17] Reliance simply wants the building on any terms, and has covered off all possibilities by entering into two lease agreements, one with the owner and one by accepting an assignment of the Lease from the Receiver/Trustee subject to court approval. It now supports the Receiver/Trustee's request for court approval of that assignment of the Lease.

[18] To permit time to review the authorities and arrive at a reasoned decision, at the conclusion of oral argument on January 29 I granted an order allowing Reliance to take possession of the premises on February 1, 2006 upon payment of the rent at the rate prescribed in the new lease, subject to any further orders made in this written decision. Reliance subsequently confirmed in writing that it would extend the date for satisfaction of the conditions in its offer to purchase from the Receiver for the five business days next following the rendering of this decision.

[19] Reliance will thus acquire the property in any event. The issues relate to the rate of rental it will pay and, ultimately, whether it will be in a position to claim the right to exercise the Option. From the Receiver's perspective, the result effects the size of the recovery for the creditors of Rotary and Industries. From York's perspective the result affects whether it receives rent at the lower or higher rate and whether it is exposed to the 2010 exercise of the Option for far less than the current market value.

Issues:

1. Was York entitled to terminate the Lease as against Banksia ?
2. Does the Option remain in good standing?
3. Is Banksia entitled to relief from forfeiture?
4. Is the Receiver nonetheless precluded from assigning the Lease to Reliance because of York's failure to consent to the assignment?

Analysis:

1. Was York entitled to terminate the Lease as against Banksia?

[20] The statutory powers conferred upon a trustee in bankruptcy pursuant to the LRB Act supercede any restriction on assignment contained in a lease. Section 8(2) of that Act provides:

> (2) Notwithstanding the legal effect of a provision or stipulation in the lease, the trustee...
>
> (b) may, on payment to the landlord of all overdue rent, assign the lease to a person who

(i) will covenant to observe and perform its terms,

(ii) will agree to conduct on the demised premises a trade or business that is not reasonably of a more objectionable or more hazardous nature than that that was conducted on the premises by the lessee, and

(iii) is on application of the trustee approved by the Court of Queen's Bench as a person fit and proper to be put into possession of the leased premises.

[21] Compliance with the requirements of s.8(2)(b) (i)-(iii) by Reliance is not in issue. York would have difficulty arguing that these requirements are not met because it entered into the new lease itself with Reliance.

[22] Justice Belzil of the Court of Appeal of Alberta stated in ***Re Robinson, Little & Company*** 67 C.B.R. (N.S.) 23 at paragraph 8:

> ... the purpose of subs. (2)(b) is to permit the trustee to put his assignee in the same legal position vis-à-vis the landlord under the lease as that held by the bankrupt lessee immediately before bankruptcy. The intent is to enable the trustee...to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease than it would have been in vis-à-vis its lessee before bankruptcy. The landlord's protection is in the requirement of s. 8(2)(b)(iii) that the assignee be a person found by the court to be fit and proper to take the position of the former lessee. The trustee is but a conduit in effecting this substitution.

[23] York has acknowledged that it cannot terminate the Lease as against Rotary and Industries in the result. It nonetheless maintains that it has terminated the Lease as against Banksia and that alone means it may re-let the entire premises as if the Receiver had no claim to them.

[24] The Lease itself is silent in terms of how the rights and obligations of the tenant are to be shared among the three parties named as tenant, being Banksia, Rotary and Industries. It does not, for example, state that a default by one of the tenants is sufficient to allow York to terminate the Lease. The reference throughout the Lease is simply to "tenant" in its singular form.

[25] All parties agree that the Lease should be construed to provide that the three tenants hold their interests as tenants-in-common.

[26] Clause 10 of the Lease provides:

> 10. DEFAULT AND REMEDIES
>
> In the event that:
>
> a) the Tenant defaults under any provision of this Lease for a period of twenty five days; or
>
> b) the Tenant makes a general assignment for the benefit of creditors, becomes bankrupt or insolvent, or takes the benefit of or becomes subject to any statute that may be in force relating to bankrupt or insolvent debtors; or
>
> c) any creditor seizes or takes control of the Tenant's property...
>
> the Landlord may, immediately and without prior notice being required, and without in any way restricting any of its other rights or remedies, elect to do any or all of the following: ...
>
> (b) terminate this Lease and re-enter into possession of the Leased Premises...

[27] York argues that clause 10(c) should be construed to mean that if any creditor of any of the three tenants is allowed to take control of the property the landlord's right to terminate is triggered. Clause 10(c) does not state that expressly; it is, at best, ambiguous. York nonetheless submits that the intention of the parties was to the effect that Banksia was the primary tenant because it was initially to have been the sole tenant. Rotary and Industries were eventually added to the Lease at York's insistence because of concerns about the financial condition of the group of companies to which Banksia belonged. These facts are disputed.

[28] In any event, York argues that the intention of the parties was that Banksia's situation should govern and the fact that Banksia is not insolvent should allow the landlord its full rights including termination upon Banksia being in breach of any term of the Lease. Such breach has occurred because no rent has been paid since the appointment of the Receiver/Trustee.

[29] The Receiver notes, however, that default in rent payments was not the reason given for the termination of Banksia's interest in the Lease. The notice of termination rather refers to the Receiver/Trustee having taken possession of the leased premises as the reason for termination. That notice was dated November 17, 2006; it may be that there were no enforceable rental arrears owing as of that date.

[30] Further, the Receiver argues that clause 10 of the Lease be interpreted to mean that a creditor of Banksia would have had to go into possession for there to have been a reason to

terminate, rather than a creditor of its co-tenants. The Lease does not define creditor or otherwise expressly deal with this issue.

[31] I conclude that York has not validly terminated Banksia's interest in the Lease because it could not do so for the reasons set out in the notice of termination, i.e. because the Receiver/Trustee of Industries and Rotary had gone into possession of the leased premises. The fact that it might have subsequently validly terminated Banksia's interest in the Lease for other reasons is irrelevant as it did not attempt to do so.

[32] I arrive at this interpretation and conclusion based on the assumption that the parties to the Lease must have intended that it comply with the law, including the LRB Act. The legislative intent in enacting s. 8(2)(b) of that legislation would be defeated if a lease could be terminated where there was more than one lessee but not all lessees were bankrupt. There is no reason why the Legislature would have adopted the goal of maximizing recovery for creditors at the cost of potential windfalls to landlords only where every joint lessee becomes bankrupt or only where there is a sole bankrupt tenant.

[33] As such, Banksia retains its interest in the Lease and the assignment of that interest to the Receiver is effective. This conclusion avoids the need to determine how, if Banksia's lease interest had been terminated, the resulting deadlock could be resolved with the Receiver wishing to assign the two interests in the Lease in his control to Reliance and York declining such an assignment in relation to the third interest in the Lease.

2. Does the Option remain in good standing?

[34] The agreement creating the Option provides that "provided that [the] Lease...is in good standing in all material respects...and the Lease has not been terminated...Banksia shall have a one-time option to purchase...the lands and buildings thereon".

[35] The Option remains in good standing at this time and may be assigned along with the Lease because none of the conditions to its termination have arisen. The relevant conditions contained in paragraph 1 of the Option agreement are:

a. the Lease is in good standing in all material respects,
b. the Lessee has paid all minimum rent and additional rent due thereunder, and
c. the Lease has not been terminated.

[36] The conclusion that Banksia's interest in the Lease was not terminated means these conditions will be met when the Receiver tenders all rental due under the Lease from November 7, 2006 to February 1, 2007 as it has undertaken to do. I reject the suggestion that the fact two of the lessees went into receivership (one of them also becoming bankrupt) means the Lease has become not "in good standing" for all time. Nothing has occurred which puts the landlord into a worse or more vulnerable position that it was before the appointment of the Receiver/Trustee.

Indeed, in Reliance it likely has a more solvent and suitable tenant than it did when the Lease was originally signed.

3. Is Banksia entitled to relief from forfeiture?

[37] Had I not concluded that the attempt by York to terminate Banksia's interest in the Lease was ineffective and the Option remains operative I would nonetheless have granted Banksia relief from forfeiture so that it would have been restored to the position where it could validly assign its interests in same to the Receiver/Trustee. The Receiver/Trustee would thereby control all three interests in the Lease and its assignment to Reliance would be effective.

[38] The *Judicature Act*, R.S.A. 2000, c. J-2 gives the Court the power to grant relief from all forfeitures. It provides:

> 10. Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

[39] As stated, the Receiver/Trustee has offered to pay the rental arrears which have accrued since it went into possession of the leased premises as a condition of obtaining relief from forfeiture.

[40] Relief from forfeiture is a discretionary remedy. The Supreme Court of Canada set out the factors a court should consider in determining whether to exercise this discretion in ***Saskatchewan River Bungalows v. Maritime Life Assurance Co.*** (1994) 20 Alta. L.R. (3d) 296 at 306:

> (a) the conduct of the applicant
> (b) the gravity of the breaches
> (c) the disparity between the value of the property forfeited and the damage caused by the breach

[41] York argues that Banksia's claim fails on all three of these considerations. In relation to its conduct York notes that there were several occasions on which the rent was paid late during the 14 months between the commencement of the Lease and the date of the appointment of the Receiver/Trustee although it was apparently always eventually paid. It also argues that Banksia failed to disclose in its affidavit filed in support of this application that it was more than a mere accommodation tenant on the Lease and had been the party which in fact had originally owned the building. There is a difference in the evidence between the two affidavits as to whether Banksia was intended to be the original tenant with the other two then added as accommodation tenants or vice versa. The Court was not misled by this dispute or lack of certainty on this point as both York and Banksia's affidavits were contemporaneously before it and the issue is of indirect relevance in any event.

[42] York also argues that the breaches of the Lease by Banksia were grave in that four months have now passed without the payment of rent, a breach which the Receiver has offered to remedy in its entirety. York also complains that if Banksia's rights are restored under the Lease it will be the sole party against whom the landlord could exercise its rights as the other two tenants are insolvent. This ignores the fact that the security for performance of the Lease will lie with Reliance, not Banksia which has already assigned its interest in the Lease to the Receiver and the Receiver to Reliance. York is obviously prepared to accept Reliance as a tenant, evidenced by its own lease made with that firm. Finally, in this fast rising real estate market the value of the land and building itself forms good security for the performance of the Lease obligations.

[43] Finally, York argues that the disparity between the value of the property forfeited and the damage caused by the breach should resound in its favour, pointing out that it will lose $2 million in additional rental and the increase in market value of the building should the Option be exercised by Reliance, losses which it says make the $460,000 recovery which the creditors will lose if the assignment of the Lease to Reliance is inoperable pale by comparison. This argument rather brazenly confuses the test. It is not the loss of a windfall to a landlord which a Court should strive to avoid in considering relief from forfeiture but rather the loss of rent and other benefits to the landlord under the original lease. That loss in this case is nil, given that the Receiver/Trustee has committed to payment of all rental arrears owing under the Lease forthwith upon this decision being rendered.

[44] Ample case authority supports the proposition that loss of a windfall is no reason to deny relief from forfeiture. In ***S.M.L. Industries Ltd. v. Highlander Cleaners Ltd.*** [1987] 78 A.R. 110 a receiver was granted relief from forfeiture of a 30 year lease which the landlord purported to terminate simply because a receiver had been appointed, under lease terms similar to the ones in question here. One of the factors considered in granting relief was that the forfeiture would have resulted in a substantial windfall to the landlord because it would result in significant realty improvements vesting in it 20 years earlier than what had been provided for in the lease; see also ***Gentra Canada Investments Inc. v. 724270 Ontario Ltd.*** 1994 CarswellOnt 3852, aff'd 1995 CarswellOnt 3912.

[45] York complains that not only would it lose the benefit of increased rent and the appreciation in the value of the building upon the granting of relief from forfeiture but that it is exposed to paying the Lease commission of $95,463 to the leasing agent which it hired to lease the building after the Receiver/Trustee had been appointed. While Reliance indicated some willingness to indemnify York for at least a portion of that expense in exchange for future business goodwill I conclude that York is the author of its own misfortune in relation to this obligation. It knew that it had the right at best to only one of three interests in the Lease in question yet immediately contracted to release the building to Reliance without first contacting the Receiver/Trustee to enquire whether the Receiver was willing to forfeit the interests of Rotary and Industries so as to allow an effective new lease to be created. Given the current rental market at Nisku, and the existence of the Option, York should have realized that it was taking a

significant risk in hiring a leasing agent to find a tenant to whom it would unilaterally release the property a few weeks after the receiver had been appointed.

[46] Similarly, I am not influenced by the fact that York has entered into a new, apparently unconditional lease with Reliance which it will have to breach as a result of my decision which confirms that the Receiver's assignment of the Lease to Reliance is effective. It would be difficult for Reliance to prove damages in any claim against York for breach of the new lease given that it was obtaining the same benefit at lower cost through accepting the Lease assignment from the Receiver/Trustee. More importantly, unilateral entry into a new lease in uncertain circumstances brought with it risks that York could have avoided but chose not to for reasons upon which one can only speculate.

[47] For these reasons I would have granted Banksia relief from forfeiture of its interest under the Lease and Option had it been necessary.

4. Is the Receiver precluded from assigning the Lease to Reliance because of York's failure to consent?

[48] York argues that the Receiver's assignment of the Lease is ineffective in any event absent its consent. It maintains that it has not unreasonably withheld that consent because the grant of it would result in the loss, to it, of $2 million in additional rent and the potential loss of almost half the current market value of the property should Reliance later exercise the Option.

[49] Further, York argues that to allow the assignment would have the effect of granting the guarantors release from personal liability for the shortfall on recovery which is proportionally of less significance than its loss of the potential for windfall profits of this size.

[50] In ***Re Café La Ronde Ltd.*** (1984) 50 C.B.R. (N.S.) 283 Justice D. C. McDonald of this court held in similar circumstances that the exercise of a right of renewal of a sublease, presumably so that it could be assigned to an eventual purchaser, did not fall within the ambit of a clause in the lease which required the consent of the landlord. He concluded, in effect, that the landlord's right to withhold consent to the assignment of a lease was superceded by the provisions of the *Landlord's Rights on Bankruptcy Act* which allowed the trustee to assign the lease without the landlord's consent.

[51] This case is somewhat different because, again, the Receiver did not acquire the entirety of the lease as a result of receivership/bankruptcy but rather the third portion was acquired by a straight assignment from Banksia. However, to allow that factor to prevent the Receiver/Trustee from realizing upon the most valuable asset of the companies in receivership would be to defeat the Legislature's intent in passing the LRB Act. That intent was described by Belzil, J.A. in ***Re Robinson***, *supra*, where he stated in paragraph 8: "The intent is to enable the trustee...to obtain maximum realization of the bankrupt estate for the benefit of creditors without putting the landlord in a worse position under the lease as it would have been in a vis-a-vis its lessee before bankruptcy."

[52] In this case as well, the assignment of the Lease to Reliance will afford the Receiver the maximum recovery on behalf of the creditors of the insolvent companies, will not put the landlord into any worse position than it would have been had the insolvency not occurred and has received the consent of the solvent holder of the third interest in the Lease.

[53] I therefore conclude that the absence of York's consent to the assignment of the Lease to Reliance does not preclude the Receiver/Trustee from making that assignment.

Conclusion:

[54] The Lease is declared to be in good standing. The Option is declared to remain in good standing and be capable of assignment by the Receiver to Reliance. The Receiver is hereby authorized to accept Reliance's tender of $650,000 for the assets of Rotary and Industries including the Lease and the Option and to assign the Lease and the Option in their entirety to Reliance who will take possession of the leased premises under the terms and obligations of that Lease.

[55] The monies paid by Reliance to York in relation to the new lease will therefore be considered as a credit toward their obligations to York as the assignee of the Lease.

Costs:

[56] Costs may be spoken to, if necessary.

Heard on the 29th day of January 2007.
Dated at the City of Edmonton, Alberta this 12th day of February 2007.

M.B. Bielby
J.C.Q.B.A.

Appearances:

Ray C. Rutman
for the Receiver, PricewaterhouseCoopers Inc.

Charles P. Russell, Q.C.
for Reliance Industrial Products Ltd.

Frank R. Dearlove
for Banksia Investments Ltd. & Brian Read

Howard J. Sniderman
for York Realty Inc.

Tab 14

DEBTORS AND CREDITORS SHARING THE BURDEN:

A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Report of the Standing Senate Committee on Banking, Trade and Commerce

Chair
The Honourable Richard H. Kroft

Deputy Chair
The Honourable David Tkachuk

November 2003

J. Executory Contracts

Executory contracts are contracts under which something remains to be done by one or more of the parties to the contract. In essence, it is a contract where there are obligations yet to be completed. Examples include leases, intellectual property rights and employment contracts, among others. Neither the BIA nor the CCAA uses the expression "executory contract."

Nevertheless, the existence of these contracts in a situation of insolvency raises the question of the extent to which these private contracts – negotiated in good faith and with due consideration of risk – should be altered or terminated, under what circumstances and by whom. Alteration or termination of contractual rights change expectations, reduce predictability in contracting and increase risks, which will have negative implications. As well, both contracting parties may experience harm, since the continuation of a contract may be in the best interest of both parties.

... the existence of [executory] these contracts in a situation of insolvency raises the question of the extent to which these private contracts – negotiated in good faith and with due consideration of risk – should be altered or terminated, under what circumstances and by whom.

Canadian legislation in this area has existed for some time. The *Bankruptcy Act* passed in 1949 contained few restraints on completed contracts; as well, it explicitly recognized the applicability of provincial/territorial law to real estate leases. Various omnibus bills in the 1970s and 1980s, all of which died on the Order Paper, proposed that an insolvent person who wished to make a proposal could disclaim any executory contract, and the co-contracting party would have the right to file a claim in the proposal for damages; the insolvent company could continue as a going concern, while the co-contracting party to the disclaimed contract would be no worse off than if a bankruptcy had occurred.

Amendments to the BIA in 1992 provide that, after a reorganization begins, secured creditors cannot exercise their security; the termination of a lease, licensing agreement or public utility because of default was also prevented. Debtors, however, were given the ability to disclaim leases on real property.

Witnesses presented the Committee with divergent opinions on whether disclaimer of executory contracts should be allowed, with the Court's permission, by insolvency practitioners or by co-contracting parties. Some witnesses told us that a company involved in a reorganization should be permitted to renounce such contracts. This view was held, for example, by Mr. Mendelsohn, who told the Committee – in reference to the CCAA – that "reorganizing entities [do and should] have the ability to renounce executory contracts, … with appropriate judicial supervision." After noting that, under the BIA, only commercial leases of real estate where the reorganizing entity is the lessee can be renounced, he argued that a coherent system of restructuring must permit the entity to renounce other executory contracts as well. He informed us that "[i]f executory contracts have to be renounced, they have to be renounced whether … [the] company [is big or small]."

Mr. Mendelsohn also shared the view that a bankruptcy trustee should be able to assign and transfer executory contracts to third parties, including licensing arrangements and leases of premises. He believed that "a trustee in bankruptcy should be given the right to realize, for the benefit of creditors, whatever economic value resides in the assets, including executory contract assets."

The Joint Task Force on Business Insolvency Law Reform also spoke about the ability to disclaim executory contracts and assignment to third parties. In the Joint Task Force's opinion, "[t]here should be a general right to disclaim (reject) executory contracts (including real property leases) in all bankruptcy and reorganization proceedings." Although it does not believe that insolvent organizations or the trustee in bankruptcy should require Court approval in order to disclaim these contracts existing at the date of commencement of proceedings, the Joint Task Force argued that "the legislation could impose some pre-conditions to the exercise of the disclaimer power either generally, or with respect to certain types of contracts."

Regarding the ability to assign executory contracts, the Joint Task Force informed the Committee that "trustees in

bankruptcy and court-appointed receivers should have the power to assign executory contacts (not including eligible financial contracts) both in connection with going concern transactions and on a liquidation basis," subject to a number of limitations. It went on to note, however, that "[t]here should be provision for the court to prohibit an assignment if [the non-bankrupt party to the contract] establishes that the proposed assignee does not meet, in a material way, criteria reasonably applied by [it] before entering into similar agreements ... or the proposed assignee is less creditworthy than [the bankrupt] was when the executory contract was entered into and reasonable assurances of payment have not been provided with respect to any credit required to be extended to the assignee by [the non-bankrupt party] under the executory contract after the assignment."

The Canadian Bankers Association, however, told the Committee that "[i]nsolvency law constraints on contracts can affect pre-insolvency contracting behaviour and may reduce credit availability. The new economy dictates that companies must be innovative and dynamic. In order to finance such new enterprises, financiers must be able to rely on the negotiated terms of their contracts."

A particular executory contract – a collective agreement – was discussed by several witnesses, including representatives of organized labour. In general, their view is that the Court should not be able to terminate a collective agreement, in whole or in part. The CAW-Canada told the Committee that "the CCAA offers no authority to a Court to abrogate a collective agreement. Nor should it do so. Still, some counsel and commentators believe that Superior Courts in Canada have an 'inherent jurisdiction' to issue an order pursuant to the CCAA which suspends or temporarily cancels one or more terms of a collective agreement. We fundamentally disagree."

A particular executory contract – a collective agreement – was discussed by several witnesses, including representatives of organized labour.

In the union's opinion, "[t]here can be no dispute that if the preservation of the status quo is a key objective of the CCAA, then the terms and conditions of employment defined in a collective agreement at the time of the issuance of a CCAA order must be maintained subject to the parties' mutual authority to negotiate changes." From this perspective, the

CAW-Canada told the Committee that "[t]he CCAA should ... make clear that it is not open to a Court, in exercising its 'inherent jurisdiction' to alter, waive, or override the provisions of a collective agreement without the consent of the employer and the relevant trade union."

A similar view was presented to the Committee by the United Steelworkers of America, which told us that "the Courts should not be entitled, under the guise of a CCAA proceeding, to interfere with the operation of freely negotiated collective agreements which affect the rights of many workers. ... [U]nions have demonstrated, in times of legitimate economic crisis, that they are capable of acting responsibly and in the best interests of their membership to agree to amendments to a collective agreement which may be necessary to enable the employer to survive. This cooperative approach is to be preferred to an approach which would eliminate workers (sic) rights with the stroke of a pen and subvert the primacy of collective bargaining."

Moreover, the Canadian Labour Congress differentiated collective agreements from other executory contracts, and indicated to the Committee that "[j]ust as employees are not like other creditors, collective agreements are not like other contracts. ... [T]he bankruptcy and CCAA courts should not be accorded any jurisdiction over collective bargaining agreements. ... Unlike other creditors, workers are not in a position to negotiate the terms upon which they may become creditors of their employer. Unlike other creditors, they are not in a position to assess the risks that they are required to bear. Unlike other creditors, they are not able to guarantee their employer's obligation by way of a secured charge. And unlike senior executives, they are not in a position to have their termination entitlements, including golden parachutes, set aside in trust accounts and thereby protected from bankruptcy proceedings."

The labour federation also informed the Committee that it does not support disclaimer of collective agreements. In its view, "[t]he debtor company and the union are in the best

position to evaluate the needs of the company and are also the parties with the greatest interest in preserving the company as a going concern; they are, therefore, the appropriate parties to determine any changes to the collective agreement. The key incentive for the parties to reach an agreement is the threat that a failure to do so will lead to the bankruptcy of the debtor. … Neither the courts nor the monitor or receiver should have the power to vacate or amend a collective bargaining agreement that was arrived at within the provincial or federal statutory framework." The Canadian Labour Congress, however, went farther, and argued that "the value of each concession should be assigned unsecured creditor status with no less priority of valuation than any other unsecured creditor."

In support of the views of organized labour, Professor Sara commented that "treating collective agreements as commercial executory contracts that can be unilaterally set aside … is highly problematic."

From the perspective of intellectual property rights, the Intellectual Property Institute of Canada indicated its preference for an approach that would limit the right of disclaimer to "unprofitable," rather than "executory," contracts, since there is "too much uncertainty as to what types of agreements would be found to be 'executory'." The Institute also made other suggestions for change.

For example, the Institute recommended that: the time limit for the exercise of the right of disclaimer be three months; the Court have the discretion to maintain the contract if the disclaimer would cause undue hardship not compensable in damages; the Court be permitted to make an order discharging the agreement and ordering payment for damages for non-performance by the trustee; aggrieved persons be given the status of a creditor of the bankrupt, to the extent of any loss suffered by reason of the disclaimer; and, where the bankrupt is a licensor of intellectual property rights, the licensee have the right to elect – within one month after receipt of the notice of disclaimer – to retain the licence. Recommendations were also made by it with respect to patents, trademarks and trade secrets.

[The Committee received testimony] with respect to patents, trademarks and trade secrets.

Similarly, Mr. Baird, Q.C., spoke to the Committee about intellectual property issues and noted the debate that has existed for some years about "whether a trustee in bankruptcy or a bankrupt licensor or a debtor under the protection of the CCAA has the right to repudiate licences issued by the bankrupt or the insolvent debtor." In supporting a recommendation made by the Insolvency Institute of Canada, he said that "the BIA and the CCAA [should] be amended to provide protection for a licensee of a right to intellectual property similar to that provided in the United States."

The Writers' Union of Canada also commented on copyright, noting the absence of copyright issues in the CCAA and the extent to which "the *Bankruptcy and Insolvency Act* less frequently applies – or doesn't apply initially. … When [it] does apply, it provides writers with very limited protection and often too late. A receiver or trustee in bankruptcy may already have assigned his or her rights and sold the inventory, short circuiting a possible statutory reversion of rights, depriving the author of possible revenues from sales by the trustee, and interfering with the author's future opportunities for republication." It also recommended that a trustee not be permitted to transfer or assign the copyright, or any interest in it, since the relationship between a writer and his or her publisher is personal; the writer should be permitted to make any alternative arrangements in the event of his or her publisher's insolvency. Finally, the Union commented that there is a lack of clarity about whether a publishing agreement is a partial assignment of copyright or a licensing agreement under which the author retains the copyright.

… we urge relevant parties to engage in the discussion needed to ensure a satisfactory resolution to the full range of issues identified to us by the Intellectual Property Institute of Canada.

While we believe that there are a variety of unresolved issues related to the insolvency of a licensor or a licensee in the context of an intellectual property licence, intellectual property law is a highly specialized area and we feel that the limited examination given by the Committee to this particular aspect of insolvency does not enable us to make any meaningful recommendations for change. Nevertheless, we urge relevant parties to engage in the discussion needed to ensure a satisfactory resolution to the full range of issues identified to us by the Intellectual Property Institute of Canada.

More generally, the Committee supports the concept of permitting disclaimer of all executory contracts, since we believe that the flexibility to take this action increases the probability of successful reorganization and thereby – in some sense – a fresher, if not fresh, start for the business. We also feel, however, that the parties to executory contracts should meet in good faith with a view to negotiating mutually acceptable changes to their contract that would enable them to meet their goals and permit the contract to continue, albeit in a changed form. We strongly believe that, in most cases, the parties will be able to come to a successful resolution; however, it is likely that situations will arise in which the parties cannot reach agreement, and in these cases we believe that disclaimer should be permitted by the Court. Nevertheless, disclaimer should only be allowed where certain conditions are met, including good faith attempts to negotiate mutually acceptable changes to the contract and serious hardship in restructuring without the disclaimer. Believing that this approach would enhance fairness, predictability and effectiveness, the Committee recommends that:

... the Committee supports the concept of permitting disclaimer of all executory contracts, since we believe that the flexibility to take this action increases the probability of successful reorganization and thereby – in some sense – a fresh, if not fresher, start for the business.

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit disclaimer of executory contracts in existence on the date of commencement of proceedings under the Acts. This disclaimer should apply to all executory contracts, provided a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring; and, where a collective agreement is being disclaimed, the debtor should also have the burden of establishing that post-filing negotiations have been carried on, in good faith, for relief of too onerous aspects of the collective agreement and should establish in Court that the disclaimer is necessary in order to allow for a viable restructuring.

Moreover, the Committee is of the view that trustees, Court-appointed receivers and monitors should be able to assign executory contracts where doing so would enhance the value of the assets and, thereby, moneys available for

distribution to creditors. We recognize that while this circumstance would not permit the co-contracting party to choose its commercial partner, we feel that if the co-contracting party is no worse off financially, it would suffer no prejudice. As well, efficiency and effectiveness – two principles that we believe should characterize our insolvency system – would be enhanced. From this perspective, the Committee recommends that:

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit trustees, Court-appointed receivers and monitors, if authorized by judgment, to assign executory contracts when appropriate, in connection with going concern transactions and on a liquidation basis, provided that two conditions are met: the proposed assignee is at least as credit worthy as the debtor was at the time the contract was entered into; and the proposed assignee agrees to compensate the other party for pecuniary loss resulting from the default by the debtor or give adequate assurance of prompt compensation.