Court of Appeal File No.: COA-24-OM-0248
Court File No.: CV-2300696017-00CL

COURT OF APPEAL FOR ONTARIO

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 LOYALTYONE, CO.

Applicant

BOOK OF AUTHORITIES OF THE MOVING PARTIES LOYALTYONE, CO. AND THE MONITOR (MOTION FOR LEAVE TO APPEAL)

September 9, 2024

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Court of Appeal File No.: COA-24-OM-0248
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INDEX

9354-9186 Québec inc. and 9354-9178 Québec inc. *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals *Interveners*

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited) *Appellants*

v.

Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier *Respondents*

and

9354-9186 Québec inc. et 9354-9178 Québec inc. *Appelantes*

c.

Callidus Capital Corporation, International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier *Intimés*

et

Ernst & Young Inc., IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited), Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)), Institut d'insolvabilité du Canada et Association canadienne des professionnels de l'insolvabilité et de la réorganisation *Intervenants*

- et -

IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) *Appelantes*

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INDEXED AS: 9354-9186 QUÉBEC INC. *v.* CALLIDUS CAPITAL CORP.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

RÉPERTORIÉ : 9354-9186 QUÉBEC INC. *c.* CALLIDUS CAPITAL CORP.

2020 CSC 10

N° du greffe : 38594.

Audition et jugement : 23 janvier 2020.

Motifs déposés : 8 mai 2020.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Rowe et Kasirer.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Bankruptcy and insolvency — Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act — Appellate review of decisions of supervising judge — Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose — Whether supervising judge can approve third party litigation funding as interim financing — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Faillite et insolvabilité — Pouvoir discrétionnaire du juge surveillant dans une instance introduite sous le régime de la Loi sur les arrangements avec les créanciers des compagnies — Contrôle en appel des décisions du juge surveillant — Le juge surveillant a-t-il le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement si ce créancier agit dans un but illégitime? — Le juge surveillant peut-il approuver le financement de litige par un tiers à titre de financement temporaire? — Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11, 11.2.

En novembre 2015, les compagnies débitrices déposent une requête en délivrance d'une ordonnance initiale sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* (« *LACC* »). La requête est accueillie, et l'ordonnance initiale est rendue par un juge surveillant, qui est chargé de surveiller le déroulement de l'instance. Depuis, la quasi-totalité des éléments d'actif de la compagnie débitrice ont été liquidés, à l'exception notable des réclamations réservées en dommages-intérêts contre le seul créancier garanti des compagnies. En septembre 2017, le créancier garanti propose un plan d'arrangement, qui n'obtient pas subséquemment l'appui nécessaire des créanciers. En février 2018, le créancier garanti propose un autre plan d'arrangement, presque identique au premier. Il demande aussi au juge surveillant la permission de voter sur ce nouveau plan dans la même catégorie que

same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

les créanciers non garantis des compagnies débitrices, au motif que sa sûreté ne vaut rien. À peu près au même moment, les compagnies débitrices demandent un financement temporaire sous forme d'un accord de financement de litige par un tiers qui leur permettrait de poursuivre l'instruction des réclamations réservées. Elles sollicitent également l'approbation d'une charge super-prioritaire pour financer le litige.

Le juge surveillant décide que le créancier garanti ne peut voter sur le nouveau plan parce qu'il agit dans un but illégitime. En conséquence, le nouveau plan n'a aucune possibilité raisonnable d'être avalisé et il n'est pas soumis au vote des créanciers. Le juge surveillant accueille la demande des compagnies débitrices et les autorise à conclure un accord de financement de litige par un tiers. À l'issue d'un appel formé par le créancier garanti et certains des créanciers non garantis, la Cour d'appel annule l'ordonnance du juge surveillant, estimant qu'il est parvenu à tort aux conclusions qui précèdent.

Arrêt : Le pourvoi est accueilli et l'ordonnance du juge surveillant est rétablie.

Le juge surveillant n'a commis aucune erreur en empêchant le créancier garanti de voter ou en approuvant l'accord de financement de litige par un tiers. Un juge surveillant a le pouvoir discrétionnaire d'empêcher un créancier de voter sur un plan d'arrangement s'il décide que le créancier agit dans un but illégitime. Un juge surveillant peut aussi approuver le financement de litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*. La Cour d'appel n'était pas justifiée de modifier les décisions discrétionnaires du juge surveillant à cet égard et n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport à ces décisions.

La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Elle poursuit un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement catastrophiques qui peuvent découler de l'insolvabilité. Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie. La structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* — that is, acting for an improper purpose — s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately

Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant, qui a le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas. Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11 de la *LACC*, lequel confère au juge le pouvoir de rendre toute ordonnance qu'il estime indiquée. Quoique vaste, ce pouvoir discrétionnaire n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC* et tenir compte de trois considérations de base : (1) que l'ordonnance demandée est indiquée, et (2) que le demandeur a agi de bonne foi et (3) avec la diligence voulue. La considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage. Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. En conséquence, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable.

En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter, ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Étant donné que le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer ou à miner les objectifs réparateurs de la *LACC* ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un but illégitime — l'art. 11 de la *LACC* confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter. Ce pouvoir discrétionnaire s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *Loi sur la faillite et l'insolvabilité* et favorise l'équité fondamentale qui imprègne le droit et la pratique en matière d'insolvabilité au Canada. La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation que le juge surveillant est le mieux placé pour effectuer.

En l'espèce, la décision du juge surveillant d'empêcher le créancier garanti de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Lorsqu'il a rendu sa décision, le juge surveillant

familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive.

connaissait très bien les procédures en cause, car il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances. Il a tenu compte de l'ensemble des circonstances et a conclu que le vote du créancier garanti viserait un but illégitime. Il savait qu'avant le vote sur le premier plan, le créancier garanti avait choisi de n'évaluer aucune partie de sa réclamation à titre de créancier non garanti et n'avait pas tenté de voter sur ce plan, qui n'a finalement pas reçu l'aval des autres créanciers. Entre l'insuccès du premier plan et la proposition du nouveau plan (identique pour l'essentiel au premier plan), les circonstances factuelles se rapportant aux affaires financières ou commerciales des compagnies débitrices n'avaient pas réellement changé. Pourtant, le créancier garanti a tenté d'évaluer la totalité de sa sûreté à zéro et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si le créancier garanti avait été autorisé à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation à double majorité prévu par le par. 6(1) de la *LACC*. La seule conclusion possible était que le créancier garanti tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. La façon d'agir du créancier garanti était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans une procédure d'insolvabilité, ce qui comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Le créancier garanti a donc été empêché à bon droit de voter sur le nouveau plan.

La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 de la *LACC* et des objectifs réparateurs de la *LACC* de façon plus générale. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Cela ressort du libellé du par. 11.2(1), qui est large et ne prescrit aucune forme ou condition type. Le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur. Dans certaines circonstances, comme en l'espèce, le financement de litige favorise la réalisation de cet objectif fondamental. Les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Ces facteurs

Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund*

ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant, car ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. En outre, pour qu'un accord de financement de litige par un tiers soit approuvé à titre de financement temporaire, il ne doit pas comporter des conditions qui le convertissent effectivement en plan d'arrangement.

En l'espèce, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'accord de financement de litige à titre de financement temporaire. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par les compagnies débitrices sous le régime de la *LACC*, mène à la conclusion que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'accord de financement de litige à titre de financement temporaire. De plus, l'accord de financement de litige ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou l'existence de leurs droits d'avoir accès aux fonds provenant des actifs des compagnies débitrices, pas plus qu'on ne saurait dire qu'il s'agit d'une transaction à l'égard de leurs droits. Enfin, la charge relative au financement de litige ne convertit pas l'accord de financement de litige en plan d'arrangement. Une conclusion contraire aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers, un résultat qui est expressément prévu par l'art. 11.2 de la *LACC*.

Jurisprudence

Citée par le juge en chef Wagner et le juge Moldaver

Arrêt appliqué : *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; **arrêts examinés :** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **arrêts mentionnés :** *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes c. The City of Saint John*, 2016 NBQB 125; *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271; *Ernst*

Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

& Young Inc. c. Essar Global Fund Ltd., 2017 ONCA 1014, 139 O.R. (3d) 1; *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299; *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323; *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701; *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338; *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *Re 1078385 Ontario Ltd.* (2004), 206 O.A.C. 17; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955; *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; *Langtry c. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915; *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577.

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Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* and *Hannah Toledano*, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

Neil A. Peden, for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited).

Geneviève Cloutier and *Clifton P. Prophet*, for the respondent Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* and *François Alexandre Toupin*, for the respondents International

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POURVOIS contre un arrêt de la Cour d'appel du Québec (les juges Dutil, Schrager et Dumas), 2019 QCCA 171, [2019] AZ-51566416, [2019] Q.J. No. 670 (QL), 2019 CarswellQue 94 (WL Can.), qui a infirmé une décision du juge Michaud, 2018 QCCS 1040, [2018] AZ-51477967, [2018] Q.J. No. 1986 (QL), 2018 CarswellQue 1923 (WL Can.). Pourvois accueillis.

Jean-Philippe Groleau, *Christian Lachance*, *Gabriel Lavery Lepage* et *Hannah Toledano*, pour les appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc.

Neil A. Peden, pour les appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)).

Geneviève Cloutier et *Clifton P. Prophet*, pour l'intimée Callidus Capital Corporation.

Jocelyn Perreault, *Noah Zucker* et *François Alexandre Toupin*, pour les intimés International

Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier.

Joseph Reynaud and *Nathalie Nouvet*, for the intervener Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

THE CHIEF JUSTICE AND MOLDAVER J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed

Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier.

Joseph Reynaud et *Nathalie Nouvet*, pour l'intervenante Ernst & Young Inc.

Sylvain Rigaud, *Arad Mojtahedi* et *Saam Pousht-Mashhad*, pour les intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Version française des motifs de jugement de la Cour rendus par

LE JUGE EN CHEF ET LE JUGE MOLDAVER —

I. Aperçu

[1] Ces pourvois s'inscrivent dans le contexte d'une instance toujours en cours introduite sous le régime de la *Loi sur les arrangements avec les créanciers de compagnies*, L.R.C. 1985, c. C-36 (« *LACC* »), dans le cadre de laquelle la quasi-totalité des éléments d'actif des compagnies débitrices ont été liquidés. L'instance a été introduite il y a plus de quatre ans. Depuis, un seul juge surveillant a été chargé de sa supervision. À ce titre, il a rendu de nombreuses décisions discrétionnaires.

[2] Deux de ces décisions du juge surveillant font l'objet du présent pourvoi. Chacune d'elles soulève une question exigeant de notre Cour qu'elle précise la nature et la portée du pouvoir discrétionnaire exercé par les tribunaux dans les instances relevant de la *LACC*. La première est de savoir si le juge surveillant dispose du pouvoir discrétionnaire d'interdire à un créancier de voter sur un plan d'arrangement s'il estime que ce créancier agit dans un but illégitime. La deuxième porte sur le pouvoir du juge surveillant d'approuver le financement du litige par un tiers à titre de financement temporaire, en vertu de l'art. 11.2 de la *LACC*.

[3] Pour les motifs qui suivent, nous sommes d'avis de répondre à ces deux questions par l'affirmative, à l'instar du juge surveillant. Dans la mesure où la

and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues

Cour d'appel s'est dite d'avis contraire et a modifié les décisions discrétionnaires du juge surveillant, nous concluons qu'elle n'était pas justifiée de le faire. Avec égards, la Cour d'appel n'a pas fait preuve de la déférence à laquelle elle était tenue par rapport aux décisions du juge surveillant. C'est pourquoi, comme nous l'avons ordonné à l'issue de l'audience, les pourvois sont accueillis et l'ordonnance du juge surveillant est rétablie.

II. Les faits

[4] En 1994, M. Gérald Duhamel fonde Bluberi Gaming Technologies Inc., qui est devenue l'une des appelantes, 9354-9186 Québec inc. L'entreprise fabriquait, distribuait, installait et entretenait des appareils de jeux électroniques pour casino. Elle offrait aussi des systèmes de gestion dans le domaine des jeux d'argent. Pendant toute la période pertinente, son unique actionnaire était Bluberi Group Inc., qui est devenue une autre des appelantes, 9354-9178 Québec inc. Par l'entremise d'une fiducie familiale, M. Duhamel contrôlait Bluberi Group inc. et, de ce fait, Bluberi Gaming (collectivement, « Bluberi »).

[5] En 2012, Bluberi demande du financement à l'intimée Callidus Capital Corporation (« Callidus »), qui se décrit comme un [TRADUCTION] « prêteur offrant du financement garanti par des actifs ou du financement à des entreprises en difficulté financière » (m.i., par. 26). Callidus lui consent une facilité de crédit d'environ 24 millions de dollars, que Bluberi garantit partiellement en signant une entente par laquelle elle met en gage ses actions.

[6] Au cours des trois années suivantes, Bluberi perd d'importantes sommes d'argent et Callidus continue de lui consentir du crédit. En 2015, Bluberi doit environ 86 millions de dollars à Callidus — Bluberi affirme que près de la moitié de cette somme est composée d'intérêts et de frais.

A. *L'introduction des procédures sous le régime de la LACC par Bluberi et la vente initiale d'actifs*

[7] Le 11 novembre 2015, Bluberi dépose une requête en délivrance d'une ordonnance initiale sous le régime de la *LACC*. Dans sa requête, Bluberi allègue

were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[1] Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

que ses problèmes de liquidité découlent du fait que Callidus exerce un contrôle de facto à l'égard de son entreprise et lui dicte un certain nombre de décisions d'affaires dans l'intention de lui nuire. Bluberi prétend que Callidus agit ainsi afin de réduire la valeur des actions dans le but de devenir propriétaire de Bluberi et ultimement de la vendre.

[8] Malgré l'objection de Callidus, la requête de Bluberi est accueillie. Le juge surveillant, le juge Michaud, rend une ordonnance initiale sous le régime de la *LACC*. Celle-ci confirme entre autres que Bluberi est une « compagnie débitrice » au sens du par. 2(1) de la Loi, suspend toute procédure introduite à l'encontre de Bluberi, de ses administrateurs ou dirigeants, et désigne Ernst & Young Inc. pour agir à titre de contrôleur (« contrôleur »).

[9] Travaillant en collaboration avec le contrôleur, Bluberi décide que la vente de ses actifs est nécessaire. Le 28 janvier 2016, elle propose un processus de mise en vente que le juge surveillant approuve. Ce processus débouche sur la conclusion d'une convention d'achat d'actifs entre Bluberi et Callidus. Cette convention prévoit que Callidus obtient l'ensemble des actifs de Bluberi en échange de l'extinction de la presque totalité de la créance garantie qu'elle détient à l'encontre de Bluberi, qui s'élevait à environ 135,7 millions de dollars. Callidus conserve une créance garantie non libérée de 3 millions de dollars contre Bluberi. La convention prévoit aussi que Bluberi se réserve le droit de réclamer des dommages-intérêts à Callidus en raison de l'implication alléguée de celle-ci dans ses difficultés financières (les « réclamations réservées »)[1]. Tout au long de ces procédures, Bluberi affirme que la valeur des réclamations ainsi réservées représente plus de 200 millions de dollars en dommages-intérêts.

[10] Le juge surveillant approuve la convention d'achat d'actifs, et la vente des actifs de Bluberi à Callidus est conclue en février 2017. En conséquence, Callidus acquiert l'entreprise de Bluberi et en poursuit l'exploitation.

[1] Bluberi semble ne pas avoir encore déposé cette action (voir 2018 QCCS 1040, par. 10 (CanLII)).

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the

[11] Depuis la vente, les réclamations réservées sont le seul élément d'actif de Bluberi et représentent donc la seule garantie que possède Callidus pour sa créance de 3 millions de dollars.

B. *Les premiers plans d'arrangement concurrents*

[12] Le 11 septembre 2017, Bluberi dépose une demande par laquelle elle sollicite l'approbation d'un financement provisoire de 2 millions de dollars sous forme de facilité de crédit afin de financer le coût des procédures liées aux réclamations réservées ainsi que d'autres mesures de réparation accessoires. Le prêteur est une coentreprise constituée sous le numéro 9364-9739 Québec inc. Cette demande de financement provisoire devait être instruite le 19 septembre 2017.

[13] Toutefois, la veille de l'audience, Callidus propose un plan d'arrangement (« premier plan ») et demande une ordonnance pour convoquer les créanciers à une assemblée afin qu'ils votent sur ce plan. Le premier plan proposait que Callidus avance la somme de 2,5 millions de dollars (puis plus tard 2,63 millions de dollars) aux fins de distribution aux créanciers de Bluberi, sauf elle-même, en échange de quoi elle serait libérée des réclamations réservées. Cette somme aurait permis d'acquitter entièrement les créances des anciens employés de Bluberi et toutes celles de moins de 3 000 $; les créanciers dont la créance était plus élevée devaient recevoir chacun en moyenne 31 pour 100 du montant de leur réclamation.

[14] Le juge surveillant ajourne donc l'audition des deux demandes au 5 octobre 2017. Entre-temps, Bluberi dépose son propre plan d'arrangement dans lequel elle propose notamment que la moitié de toute somme provenant des réclamations réservées, après paiement des dépenses et acquittement des réclamations des créanciers de Bluberi, soit distribuée aux créanciers non garantis, pourvu que la somme nette ainsi obtenue soit supérieure à 20 millions de dollars.

[15] Le 5 octobre 2017, le juge surveillant ordonne que les plans d'arrangement des parties soient soumis au vote des créanciers. Il ordonne que les honoraires et dépenses découlant de la présentation des

presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded

plans d'arrangement à l'assemblée des créanciers soient partagés entre les parties et qu'il soit interdit à toute partie qui ne dépose pas les fonds nécessaires auprès du contrôleur de présenter son plan d'arrangement. Bluberi choisit de ne pas déposer les fonds nécessaires et, en conséquence, seul le premier plan de Callidus est présenté aux créanciers.

C. *Le vote des créanciers sur le premier plan de Callidus*

[16] Le 15 décembre 2017, Callidus soumet son premier plan au vote des créanciers. Le plan n'obtient pas l'appui nécessaire. Le paragraphe 6(1) de la *LACC* prévoit que, pour être approuvé, le plan doit obtenir la « double majorité » de chaque catégorie de créanciers — c'est-à-dire, la majorité en *nombre* d'une catégorie de créanciers, qui représente aussi les deux tiers en *valeur* des réclamations de cette catégorie de créanciers. Tous les créanciers de Bluberi, hormis Callidus, forment une seule catégorie de créanciers non garantis ayant droit de vote. Des 100 créanciers non garantis, 92 (qui ont ensemble une créance de 3 450 882 $) votent en faveur du plan, et 8 votent contre (qui ont ensemble une créance de 2 375 913 $). Le premier plan échoue parce que les réclamations des créanciers ayant voté en sa faveur ne détiennent que 59,22 p. 100 en valeur des réclamations de ceux ayant voté, ce qui ne respectait pas le seuil établi au par. 6(1). Plus particulièrement, SMT Hautes Technologies (« SMT »), qui détient 36,7 p. 100 de la dette de Bluberi, vote contre le plan.

[17] Callidus ne vote pas sur le premier plan — malgré les propos explicites du contrôleur, selon qui Callidus pouvait [TRADUCTION] « voter [. . .] selon le pourcentage de sa créance qui, de l'avis de Callidus, était non garantie » (dossier conjoint des intimés, vol. III, p. 188).

D. *La demande de financement provisoire de Bluberi et le nouveau plan de Callidus*

[18] Le 6 février 2018, Bluberi dépose une des demandes à l'origine des présents pourvois. Elle demande au tribunal l'autorisation de conclure un accord de financement du litige par un tiers (« AFL »)

litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors.

[2] Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

avec un bailleur de fonds de litiges coté en bourse, IMF Bentham Limited ou sa filiale canadienne, Corporation Bentham IMF Capital (collectivement, « Bentham »). Bluberi demande également l'autorisation de grever son actif d'une charge superprioritaire de 20 millions de dollars en faveur de Bentham (« charge liée au financement du litige »).

[19] L'AFL prévoit que Bentham financera le litige relatif aux réclamations réservées de Bluberi et qu'en retour elle recevra un pourcentage de toute somme convenue par règlement ou accordée à l'issue d'un procès. Toutefois, dans l'éventualité où Bluberi serait déboutée, Bentham perdra la totalité des fonds investis. L'AFL prévoit aussi que Bentham peut mettre fin au recours si, agissant de façon raisonnable, elle n'est plus convaincue du bien-fondé du litige ou de sa viabilité commerciale.

[20] Callidus et certains créanciers non garantis qui ont voté en faveur de son plan (qui sont maintenant intimés au présent pourvoi et se font appeler le « groupe de créanciers ») contestent la demande de Bluberi au motif que l'AFL est un plan d'arrangement et qu'à ce titre, il doit être soumis au vote des créanciers[2].

[21] Le 12 février 2018, Callidus dépose l'autre demande qui est à l'origine des présents pourvois, laquelle vise à soumettre un autre plan d'arrangement au vote des créanciers (« nouveau plan »). Le nouveau plan est pour l'essentiel identique au premier plan, sauf que Callidus propose que la somme à distribuer soit augmentée de 250 000 $ (passant de 2,63 millions à 2,88 millions de dollars). Callidus a en outre déposé une preuve de réclamation modifiée qui ramène à *zéro* la valeur de la garantie liée à sa créance de 3 millions de dollars. Callidus considère que cette évaluation est juste parce que Bluberi n'a aucun autre élément d'actif que les revendications réservées. Sur cette base, elle fait valoir qu'elle se trouve dans la situation d'un créancier non garanti et

[2] Fait à remarquer, le groupe de créanciers a informé Callidus qu'il appuierait le nouveau plan. Il lui a aussi demandé de rembourser tous les frais juridiques découlant de cet appui. Par ailleurs, le groupe de créanciers ne s'est pas engagé à voter d'une certaine façon, et a confirmé que chacun de ses membres évaluerait toutes les possibilités qui s'offraient à lui.

Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)*

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in

demande au juge surveillant la permission de voter sur le nouveau plan avec les autres créanciers non garantis. Vu l'importance de sa réclamation, le plan serait nécessairement adopté par les créanciers si Callidus était autorisée à voter. Bluberi s'oppose à la demande de Callidus.

[22] Le juge surveillant instruit ensemble la demande de financement provisoire de Bluberi ainsi que la demande présentée par Callidus concernant son nouveau plan. Il est à souligner que le contrôleur appuie la position de Bluberi.

III. Historique judiciaire

A. *Cour supérieure du Québec, 2018 QCCS 1040 (le juge Michaud)*

[23] Le juge surveillant rejette la demande de Callidus et refuse de soumettre le nouveau plan au vote des créanciers. Il accueille la demande de Bluberi, l'autorisant ainsi à conclure un accord de financement du litige avec Bentham aux conditions énoncées dans l'AFL et ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige.

[24] En ce qui a trait à la demande de Callidus, le juge surveillant décide que cette dernière ne peut voter sur le nouveau plan parce qu'elle agit dans un [TRADUCTION] « but illégitime » (par. 48 (CanLII)). Il reconnaît que les créanciers ont habituellement le droit de voter dans leur propre intérêt. Or, étant donné que le premier plan — qui était presque identique au nouveau plan — a été rejeté par les créanciers, le juge surveillant conclut qu'en demandant à voter sur le nouveau plan, Callidus tentait de contourner le résultat du premier vote. Il écrit notamment :

> [TRADUCTION] Tenant compte de leur intérêt, la Cour a accepté à l'automne 2017 que le plan de Callidus soit soumis au vote des créanciers, étant entendu que, en tant que créancière garantie, celle-ci ne voterait pas. Toutefois, si, dans les circonstances actuelles, Callidus était autorisée à voter sur son propre plan, elle le ferait dans un but illégitime d'autant plus qu'il est probable que son vote

the New Plan meeting the two thirds threshold for approval under the CCAA.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement

permettrait d'atteindre le seuil de deux tiers nécessaire pour que le nouveau plan soit approuvé en vertu de la LACC.

Comme l'a souligné SMT, la principale créancière non garantie, Callidus souhaite voter afin d'annuler le vote de SMT, qui a empêché que son plan soit approuvé lors de l'assemblée des créanciers.

C'est une chose de laisser les créanciers voter sur un plan présenté par un créancier garanti, c'en est une autre de laisser ce créancier garanti voter sur son propre plan et exercer ainsi un contrôle sur le vote à seule fin d'être libéré de toute responsabilité. [par. 45-47]

[25] Le juge surveillant conclut que, dans les circonstances, permettre à Callidus de voter serait à la fois [TRADUCTION] « injuste et déraisonnable » (par. 47). Il note aussi que, tout au long de la procédure introduite en vertu de la *LACC*, Callidus a « manqué de transparence » (par. 41) et qu'elle « n'est motivée que par le litige [en cours] » (par. 44). En somme, il conclut que la conduite de Callidus est contraire à « l'opportunité, [à] la bonne foi et [à] la diligence » requises, et il ordonne que Callidus ne puisse pas voter sur le nouveau plan (par. 48, citant *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 70).

[26] Puisque Callidus n'a pas été autorisée à voter sur le nouveau plan et que SMT a manifesté sans équivoque son intention de voter contre celui-ci, le juge surveillant conclut que le plan n'a aucune possibilité raisonnable de recevoir l'aval des créanciers. Il refuse donc de le soumettre au vote des créanciers.

[27] Pour ce qui est de la demande de Bluberi, le juge surveillant examine trois questions qui sont pertinentes pour les présents pourvois : (1) si l'AFL devait être soumis au vote des créanciers; (2) dans la négative, si l'AFL devait être approuvé par le tribunal; et (3) le cas échéant, s'il devait ordonner que la charge liée au financement du litige de 20 millions de dollars grève les actifs de Bluberi.

[28] Le juge surveillant décide qu'il n'est pas nécessaire de soumettre l'AFL au vote des créanciers parce qu'il ne s'agit pas d'un plan d'arrangement. Il considère qu'un tel plan suppose [TRADUCTION] « un

or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

arrangement ou une transaction entre un débiteur et ses créanciers » (par. 71, citant *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, par. 92 (« *Crystallex* »)). À son avis, l'AFL est dépourvu de cette caractéristique essentielle. Il conclut aussi qu'il n'est pas nécessaire que l'AFL soit assorti d'un plan étant donné que Bluberi a exprimé l'intention d'en déposer un plus tard.

[29] Après en avoir examiné les modalités, le juge surveillant conclut que l'AFL respecte le critère d'approbation applicable en matière de financement d'un litige par un tiers qui est établi dans les décisions *Bayens c. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, par. 41, et *Hayes c. The City of Saint John*, 2016 NBQB 125, par. 4 (CanLII). Plus particulièrement, il considère que le taux de retour de Bentham est raisonnable eu égard à son niveau d'investissement et de risque. Il rejette en outre l'argument avancé par Callidus et le groupe de créanciers, qui soutenaient que l'AFL donne trop de latitude à Bentham. Il conclut que l'AFL ne permet pas à Bentham d'exercer une influence indue sur le déroulement du litige lié aux réclamations réservées et souligne que des clauses générales semblables à celles qu'il contient ont déjà été approuvées dans le contexte de la *LACC* (par. 82, citant *Schenk c. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, par. 23).

[30] Enfin, le juge surveillant ordonne que les actifs de Bluberi soient grevés de la charge liée au financement du litige. Il juge que, même s'il est élevé, le montant en question est raisonnable étant donné : le montant des dommages-intérêts qui sont réclamés à Callidus; l'engagement financier de Bentham dans le litige; et le fait que Bentham n'exige aucune provision pour frais ou intérêts (c.-à-d. qu'elle ne tirera profit de l'accord que si le procès ou le règlement est couronné de succès). En termes simples, Bentham prend des risques importants et il est raisonnable qu'elle obtienne certaines garanties en échange.

[31] Callidus, de nouveau appuyée par le groupe de créanciers, interjette appel de l'ordonnance du juge surveillant et met en cause Bentham.

B. *Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted

B. *Cour d'appel du Québec, 2019 QCCA 171 (les juges Dutil et Schrager et le juge Dumas (ad hoc))*

[32] La Cour d'appel accueille l'appel et conclut que [TRADUCTION] « [l]'exercice par le juge de son pouvoir discrétionnaire [n'était] pas fondé en droit, non plus qu'il ne reposait sur un traitement approprié des faits, de sorte que, peu importe la norme de contrôle appliquée, il [était] justifié d'intervenir en appel » (par. 48 (CanLII)). En particulier, la cour relève deux erreurs qui sont pertinentes pour les présents pourvois.

[33] D'une part, la cour conclut que le juge surveillant a commis une erreur en concluant que Callidus a agi dans un but illégitime en demandant l'autorisation de voter sur son nouveau plan. À son avis, Callidus aurait dû être autorisée à voter. La cour s'appuie grandement sur l'idée que les créanciers ont le droit de voter en fonction de leur propre intérêt. Elle juge que l'exercice du pouvoir discrétionnaire qui consiste à empêcher un créancier de voter dans un but illégitime devrait être [TRADUCTION] « réservé aux cas les plus évidents » (par. 62, renvoyant à *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, par. 45). Selon elle, en tentant de façon transparente d'être libérée des réclamations de Bluberi à son égard, Callidus ne pouvait être considérée comme ayant agi dans un but illégitime. La cour conclut également que la conduite de Callidus, avant et pendant la procédure introduite en vertu de la *LACC*, ne pouvait justifier la conclusion qu'il existe un but illégitime.

[34] D'autre part, la cour conclut que le juge surveillant a eu tort d'approuver l'AFL en tant qu'accord de financement provisoire parce qu'à son avis, il n'est pas lié aux opérations commerciales de Bluberi. Elle conclut que le juge surveillant a [TRADUCTION] « donné à la notion de financement provisoire une interprétation non fondée en droit et qu'il a mal appliqué cette notion aux circonstances factuelles de l'affaire » (par. 78).

[35] À la lumière de ce qu'elle percevait comme une erreur, la cour substitue son opinion selon laquelle l'AFL est un plan d'arrangement et que pour

to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

cette raison, il aurait dû être soumis au vote des créanciers. Elle conclut [TRADUCTION] « [qu'u]n arrangement ou une proposition peut englober une transaction visant les réclamations des créanciers ainsi que le processus suivi pour y donner suite » (par. 85). La cour juge que l'AFL est un plan d'arrangement parce qu'il a une incidence sur la participation des créanciers à l'indemnité susceptible d'être accordée à la suite d'un litige, qu'il oblige ceux-ci à attendre l'issue de tout litige, et qu'il est possible que les créanciers se retrouvent les mains vides. De plus, la cour conclut que le projet de Bluberi « dans son entièreté », soit la poursuite des réclamations réservées et l'AFL, doit être soumis à l'approbation des créanciers (par. 89).

[36] Bluberi et Bentham (collectivement, les « appelantes »), encore une fois appuyées par le contrôleur, se pourvoient maintenant devant notre Cour.

IV. Questions en litige

[37] Les pourvois soulèvent deux questions :

(1) Le juge surveillant a-t-il commis une erreur en empêchant Callidus de voter sur son nouveau plan au motif qu'elle agissait dans un but illégitime?

(2) Le juge surveillant a-t-il commis une erreur en approuvant l'AFL en tant que plan de financement provisoire, selon les termes de l'art. 11.2 de la *LACC*?

V. Analyse

A. *Considérations préliminaires*

[38] Pour répondre aux questions ci-dessus, nous devons les situer dans le contexte contemporain de l'insolvabilité au Canada, et plus précisément du régime de la *LACC*. Ainsi, avant de passer à ces questions, nous examinons (1) la nature évolutive des procédures intentées sous le régime de la *LACC*; (2) le rôle que joue le juge surveillant dans ces procédures; et (3) la portée du contrôle, en appel, de l'exercice du pouvoir discrétionnaire du juge surveillant.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate 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* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

(1) La nature évolutive des procédures intentées sous le régime de la *LACC*

[39] La *LACC* est l'une des trois principales lois canadiennes en matière d'insolvabilité. Les autres sont la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985 c. B-3 (« *LFI* »), qui traite de l'insolvabilité des personnes physiques et des sociétés, et la *Loi sur les liquidations et les restructurations*, L.R.C. 1985 c. W-11 (« *LLR* »), qui traite de l'insolvabilité des institutions financières et de certaines autres personnes morales, telles que les compagnies d'assurance (*LLR*, par. 6(1)). Bien que la *LACC* et la *LFI* permettent toutes deux la restructuration de compagnies insolvables, l'accès à la *LACC* est limité aux sociétés débitrices qui sont aux prises avec des réclamations dont le montant total est supérieur à 5 millions de dollars (*LACC*, par. 3(1)).

[40] Ensemble, les lois canadiennes sur l'insolvabilité poursuivent un grand nombre d'objectifs réparateurs généraux qui témoignent de la vaste gamme des conséquences potentiellement « catastrophiques » qui peuvent découler de l'insolvabilité (*Sun Indalex Finance, LLC c. Syndicat des Métallos*, 2013 CSC 6, [2013] 1 R.C.S. 271, par. 1). Ces objectifs incluent les suivants : régler de façon rapide, efficace et impartiale l'insolvabilité d'un débiteur; préserver et maximiser la valeur des actifs d'un débiteur; assurer un traitement juste et équitable des réclamations déposées contre un débiteur; protéger l'intérêt public; et, dans le contexte d'une insolvabilité commerciale, établir un équilibre entre les coûts et les bénéfices découlant de la restructuration ou de la liquidation d'une compagnie (J. P. Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2016* (2017), 9, p. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2e éd. 2013), p. 4-5 et 14; 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 arrangements avec les créanciers des compagnies* (2003), p. 13-14; R. J. Wood, *Bankruptcy and Insolvency Law* (2e éd. 2015), p. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[41] Parmi ces objectifs, la *LACC* priorise en général le fait d'« éviter les pertes sociales et économiques résultant de la liquidation d'une compagnie insolvable » (*Century Services*, par. 70). C'est pourquoi les affaires types qui relèvent de cette loi ont historiquement facilité la restructuration de l'entreprise débitrice qui n'a pas encore déposé de proposition en la maintenant dans un état opérationnel, c'est-à-dire en permettant qu'elle poursuive ses activités. Lorsqu'une telle restructuration n'était pas possible, on considérait qu'il fallait alors procéder à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI*. C'est précisément le résultat qui était recherché dans l'affaire *Century Services* (voir par. 14).

[42] Cela dit, la *LACC* est fondamentalement une loi sur l'insolvabilité, et à ce titre, elle a aussi [TRADUCTION] « comme objectifs simultanés de maximiser le recouvrement au profit des créanciers, de préserver la valeur d'exploitation dans la mesure du possible, de protéger les emplois et les collectivités touchées par les difficultés financières de l'entreprise [. . .] et d'améliorer le système de crédit de manière générale » (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 14; voir aussi *Ernst & Young Inc. c. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 (« *Essar* »), par. 103). Afin d'atteindre ces objectifs, les procédures intentées sous le régime de la *LACC* ont évolué de telle sorte qu'elles permettent des solutions qui évitent l'émergence, sous une forme restructurée, de la société débitrice qui existait avant le début des procédures, mais qui impliquent plutôt une certaine forme de liquidation des actifs du débiteur sous le régime même de la Loi (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibium for Insolvency Law », p. 19-21). Ces cas, qualifiés de [TRADUCTION] « procédures de liquidation sous le régime de la *LACC* », sont maintenant courants dans le contexte de la *LACC* (voir *Third Eye Capital Corporation c. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, par. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor

[43] Les procédures de liquidation sous le régime de la *LACC* revêtent différentes formes et peuvent, entre autres, inclure la vente de la société débitrice à titre d'entreprise en activité; la vente « en bloc » des éléments d'actif susceptibles d'être exploités par un acquéreur; une liquidation partielle de l'entreprise ou une réduction de ses activités; ou encore une vente de ses actifs élément par élément (B. Kaplan, « Liquidating CCAAs : Discretion Gone Awry? » dans J. P. Sarra, dir., *Annual Review of Insolvency Law* (2008), 79, p. 87-89). Les résultats commerciaux ultimement obtenus à l'issue des procédures de liquidation introduites sous le régime de la *LACC* sont eux aussi variés. Certaines procédures peuvent avoir pour résultat la continuité des activités de la débitrice sous la forme d'une autre entité viable (p. ex., les sociétés liquidées dans *Indalex* et *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (C.J. Ont., Div. gén.)), alors que d'autres peuvent simplement aboutir à la vente des actifs et de l'inventaire sans donner naissance à une nouvelle entité (p. ex., la procédure en cause dans *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, par. 7 et 31). D'autres encore, comme dans le dossier qui nous occupe, peuvent donner lieu à la vente de la plupart des actifs de la débitrice en vue de la poursuite de son activité, laissant à la débitrice et aux parties intéressées le soin de s'occuper des actifs résiduaires.

[44] Les tribunaux chargés de l'application de la *LACC* ont d'abord commencé à approuver ces formes de liquidation en exerçant le vaste pouvoir discrétionnaire que leur confère la Loi. L'émergence de cette pratique a fait l'objet de critiques, essentiellement parce qu'elle semblait incompatible avec l'objectif de « restructuration » de la *LACC* (voir, p. ex., *Uti Energy Corp. c. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, par. 15-16, conf. 1999 ABQB 379, 11 C.B.R. (4th) 204, par. 40-43; A. Nocilla, « The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada » (2014), 56 *Rev. can. dr. comm.* 73, p. 88-92).

[45] Toutefois, depuis que l'art. 36 de la *LACC* est entré en vigueur en 2009, les tribunaux l'utilisent pour consentir à une liquidation sous le régime de la *LACC*. L'article 36 confère aux tribunaux le pouvoir

company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However,

[3] We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

d'autoriser la vente ou la disposition des actifs d'une compagnie débitrice hors du cours ordinaire de ses affaires[3]. Fait important, lorsque le Comité sénatorial permanent des banques et du commerce a recommandé l'adoption de l'art. 36, il a fait observer que la liquidation n'est pas nécessairement incompatible avec les objectifs réparateurs de la *LACC* et qu'il pourrait s'agir d'un moyen « soit pour obtenir des capitaux [et faciliter la restructuration] ou éviter des pertes plus graves aux créanciers, soit pour se concentrer sur ses activités solvables » (p. 163). D'autres auteurs ont observé que la liquidation peut [TRADUCTION] « être un moyen de restructurer une entreprise » en lui permettant de survivre, quoique sous une forme corporative différente ou sous la gouverne de propriétaires différents (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 169; voir aussi K. P. McElcheran, *Commercial Insolvency in Canada* (4e éd. 2019), p. 311). D'ailleurs, dans l'arrêt *Indalex*, la compagnie a vendu ses actifs sous le régime de la *LACC* afin de protéger les emplois de son personnel, même si elle ne pouvait demeurer leur employeur (voir par. 51).

[46] En définitive, le poids relatif attribué aux différents objectifs de la *LACC* dans une affaire donnée peut varier en fonction des circonstances factuelles, de l'étape des procédures ou des solutions qui sont présentées à la cour pour approbation. En l'espèce, il est possible d'établir un parallèle avec le contexte de la *LFI*. Dans l'arrêt *Orphan Well Association c. Grant Thornton Ltd.*, 2019 CSC 5, [2019] 1 R.C.S. 150, par. 67, notre Cour a expliqué que, de façon générale, la *LFI* vise deux objectifs : (1) la réhabilitation financière du failli, et (2) le partage équitable des actifs du failli entre les créanciers. Or, dans les cas où

[3] Mentionnons que, bien que l'art. 36 codifie désormais le pouvoir du juge surveillant de rendre une ordonnance de vente et de dévolution, et qu'il énonce les facteurs devant orienter l'exercice de son pouvoir discrétionnaire d'accorder une telle ordonnance, il est muet quant aux circonstances dans lesquelles les tribunaux doivent approuver une liquidation sous le régime de la *LACC* plutôt que d'exiger des parties qu'elles procèdent à la liquidation par voie de mise sous séquestre ou sous le régime de la *LFI* (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 167-168; A. Nocilla, « Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36 » (2012) 52 *Rev. can. dr. comm.* 226, p. 243-244 et 247). Cette question demeure ouverte et n'a pas été soumise à la Cour dans *Indalex* non plus que dans les présents pourvois.

in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

la société débitrice ne s'extirpera jamais de la faillite, seul le dernier objectif est pertinent (voir par. 67). Dans la même veine, sous le régime de la *LACC*, lorsque la restructuration d'une société débitrice qui n'a pas déposé de proposition est impossible, une liquidation visant à protéger sa valeur d'exploitation et à maintenir ses activités courantes peut devenir l'objectif réparateur principal. En outre, lorsque la restructuration ou la liquidation est terminée et que le tribunal doit décider du sort des actifs résiduels, l'objectif de maximiser le recouvrement des créanciers à partir de ces actifs peut passer au premier plan. Comme nous l'expliquerons, la structure de la *LACC* laisse au juge surveillant le soin de procéder à un examen et à une mise en balance au cas par cas de ces objectifs réparateurs.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco*

(2) Le rôle du juge surveillant dans les procédures intentées sous le régime de la *LACC*

[47] Un des principaux moyens par lesquels la *LACC* atteint ses objectifs réside dans le rôle particulier de surveillance qu'elle réserve aux juges (voir Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 18-19). Chaque procédure fondée sur la *LACC* est supervisée du début à la fin par un seul juge surveillant. En raison de ses rapports continus avec les parties, ce dernier acquiert une connaissance approfondie de la dynamique entre les intéressés et des réalités commerciales entourant la procédure.

[48] La *LACC* mise sur la position avantageuse qu'occupe le juge surveillant en lui accordant le vaste pouvoir discrétionnaire de rendre toute une gamme d'ordonnances susceptibles de répondre aux circonstances de chaque cas et de « [s'adapter] aux besoins commerciaux et sociaux contemporains » (*Century Services*, par. 58) en « temps réel » (par. 58, citant 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. 484). Le point d'ancrage de ce pouvoir discrétionnaire est l'art. 11, qui confère au juge le pouvoir de « rendre toute ordonnance qu'il estime indiquée ». Cette disposition a été décrite

Inc. (Re) (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or

comme étant le « moteur » du régime législatif (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (C.A. Ont.), par. 36).

[49] Quoique vaste, le pouvoir discrétionnaire conféré par la *LACC* n'est pas sans limites. Son exercice doit tendre à la réalisation des objectifs réparateurs de la *LACC*, que nous avons expliqués ci-dessus (voir *Century Services*, par. 59). En outre, la cour doit garder à l'esprit les trois « considérations de base » (par. 70) qu'il incombe au demandeur de démontrer : (1) que l'ordonnance demandée est indiquée, et (2) qu'il a agi de bonne foi et (3) avec la diligence voulue (par. 69).

[50] Les deux premières considérations, l'opportunité et la bonne foi, sont largement connues dans le contexte 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 » (par. 70). Par ailleurs, l'exigence bien établie selon laquelle les parties doivent agir de bonne foi dans les procédures d'insolvabilité est depuis peu mentionnée de façon expresse à l'art. 18.6 de la *LACC*, qui dispose :

Bonne foi

18.6 (1) Tout intéressé est tenu d'agir de bonne foi dans le cadre d'une procédure intentée au titre de la présente loi.

Bonne foi — pouvoirs du tribunal

(2) S'il est convaincu que l'intéressé n'agit pas de bonne foi, le tribunal peut, à la demande de tout intéressé, rendre toute ordonnance qu'il estime indiquée.

(Voir aussi *LFI*, art. 4.2; *Loi nº 1 d'exécution du budget de 2019*, L.C. 2019, c. 29, art. 133 et 140.)

[51] La troisième considération, celle de la diligence, requiert qu'on s'y attarde. Conformément au régime de la *LACC* en général, la considération de diligence décourage les parties de rester sur leurs positions et fait en sorte que les créanciers n'usent

position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

pas stratégiquement de ruse ou ne se placent pas eux-mêmes dans une position pour obtenir un avantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (C.J. Ont. (Div. gén.)), p. 31). La procédure prévue par la *LACC* se fonde sur les négociations et les transactions entre le débiteur et les intéressés, le tout étant supervisé par le juge surveillant et le contrôleur. Il faut donc nécessairement que, dans la mesure du possible, ceux qui participent au processus soient sur un pied d'égalité et aient une compréhension claire de leurs droits respectifs (voir McElcheran, p. 262). La partie qui, dans le cadre d'une procédure fondée sur la *LACC*, n'agit pas avec diligence et en temps utile risque de compromettre le processus et, de façon plus générale, de nuire à l'efficacité du régime de la Loi (voir, p. ex., *North American Tungsten Corp. c. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6 par. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada c. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276 par. 11; *Caterpillar Financial Services Ltd. c. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, par. 51-52, où les tribunaux se sont penchés sur le manque de diligence d'une partie).

[52] Nous soulignons que les juges surveillants s'acquittent de leur rôle de supervision avec l'aide d'un contrôleur qui est nommé par le tribunal et dont les compétences et les attributions sont énoncées dans la *LACC* (voir art. 11.7, 11.8 et 23 à 25). Le contrôleur est un expert indépendant et impartial qui agit comme [TRADUCTION] « les yeux et les oreilles du tribunal » tout au long de la procédure (*Essar*, par. 109). Il a essentiellement pour rôle de donner au tribunal des avis consultatifs sur le caractère équitable de tout plan d'arrangement proposé et sur les ordonnances demandées par les parties, y compris celles portant sur la vente d'actifs et le financement provisoire (voir *LACC*, al. 23(1)d) et i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 566 et 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

[54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

(3) Le contrôle en appel de l'exercice du pouvoir discrétionnaire du juge surveillant

[53] Les décisions discrétionnaires des juges chargés de la supervision des procédures intentées sous le régime de la *LACC* commandent un degré élevé de déférence. Ainsi, les cours d'appel ne seront justifiées d'intervenir que si le juge surveillant a commis une erreur de principe ou exercé son pouvoir discrétionnaire de manière déraisonnable (voir *Grant Forest Products Inc. c. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, par. 98; *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, par. 23). Elles doivent prendre garde de ne pas substituer leur propre pouvoir discrétionnaire à celui du juge surveillant (*New Skeena Forest Products Inc.*, *Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, par. 20).

[54] Cette norme déférente de contrôle tient compte du fait que le juge surveillant possède une connaissance intime des procédures intentées sous le régime de la *LACC* dont il assure la supervision. À cet égard, les observations formulées par le juge Tysoe dans *Canadian Metropolitan Properties Corp. c. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 (« *Re Edgewater Casino Inc.* »), par. 20, sont pertinentes :

> [TRADUCTION] . . . une des fonctions principales du juge chargé de la supervision de la procédure fondée sur la *LACC* est d'essayer d'établir un équilibre entre les intérêts des différents intéressés durant le processus de restructuration, et il sera bien souvent inopportun d'examiner une des décisions qu'il aura rendues à cet égard isolément des autres. [. . .] Les procédures intentées sous le régime de la *LACC* sont de nature dynamique et le juge surveillant a une connaissance intime du processus de restructuration. La nature du processus l'oblige souvent à prendre des décisions rapides dans des situations complexes.

[55] En gardant ce qui précède à l'esprit, nous passons maintenant aux questions soulevées par le présent pourvoi.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is

B. *Callidus ne devrait pas être autorisée à voter sur son nouveau plan*

[56] En général, un créancier peut voter sur un plan d'arrangement ou une transaction qui a une incidence sur ses droits, sous réserve des dispositions de la *LACC* qui peuvent limiter son droit de voter (p. ex., par. 22(3)), ou de l'exercice justifié par le juge surveillant de son pouvoir discrétionnaire de limiter ou de supprimer ce droit. Nous concluons qu'une telle limite découle de l'art. 11 de la *LACC*, qui confère au juge surveillant le pouvoir discrétionnaire d'empêcher le créancier de voter lorsqu'il agit dans un but illégitime. Le juge surveillant est mieux placé que quiconque pour déterminer s'il doit exercer ce pouvoir dans un cas donné. À notre avis, le juge surveillant n'a, en l'espèce, commis aucune erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de voter sur le nouveau plan.

(1) Les paramètres du droit d'un créancier de voter sur un plan d'arrangement

[57] L'approbation par les créanciers d'un plan d'arrangement ou d'une transaction est l'une des principales caractéristiques de la *LACC*, tout comme la supervision du processus assurée par le juge surveillant. Lorsqu'un plan est proposé, le juge surveillant peut, sur demande, ordonner que soit convoquée une assemblée des créanciers pour que ceux-ci puissent voter sur le plan proposé (*LACC*, art. 4 et 5). Le juge surveillant a le pouvoir discrétionnaire de décider ou non d'ordonner qu'une assemblée soit convoquée. Pour les besoins du vote à l'assemblée des créanciers, la compagnie débitrice peut établir des catégories de créanciers, sous réserve de l'approbation du tribunal (*LACC,* par. 22(1)). Peuvent faire partie de la même catégorie les créanciers « ayant des droits ou intérêts à ce point semblables [. . .] qu'on peut en conclure qu'ils ont un intérêt commun » (*LACC*, par. 22(2); voir aussi L. W. Houlden, G. B. Morawetz, et J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4e éd. (feuilles mobiles)), vol. 4, §149). Si la « double majorité » requise dans chaque catégorie de créanciers — rappelons qu'il s'agit de la majorité en *nombre* d'une catégorie, qui représente aussi les deux-tiers en *valeur* des réclamations de cette catégorie — vote

commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any

en faveur du plan, le juge surveillant peut homologuer celui-ci (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, par. 34; voir la *LACC*, art. 6). Le juge surveillant tiendra ce qu'on appelle communément une [TRADUCTION] « audience d'équité » pour décider, entre autres choses, si le plan est juste et raisonnable (Wood, p. 490-492; Sarra, *Rescue! The Companies' Creditors Arrangement Act*, p. 529; Houlden, Morawetz et Sarra, §45). Une fois homologué par le juge surveillant, le plan lie chaque catégorie de créanciers qui a participé au vote (*LACC*, par. 6(1)).

[58] Les créanciers qui ont une réclamation prouvable contre le débiteur et dont les intérêts sont touchés par un plan d'arrangement proposé ont habituellement le droit de voter sur un tel plan (Wood, p. 470). En fait, aucune disposition expresse de la *LACC* n'interdit à un créancier de voter sur un plan d'arrangement, y compris sur un plan dont il fait la promotion.

[59] Nonobstant ce qui précède, les appelantes soutiennent qu'une interprétation téléologique du par. 22(3) de la *LACC* révèle que, de façon générale, un créancier ne devrait pas pouvoir voter sur son propre plan. Le paragraphe 22(3) prévoit :

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Les appelantes font remarquer que le par. 22(3) devait permettre d'harmoniser le régime de la *LACC* avec le par. 54(3) de la *LFI*, qui dispose que « [u]n créancier qui est lié au débiteur peut voter contre, mais non pour, l'acceptation de la proposition. » Elles soulignent que, en vertu du par. 50(1) de la *LFI*, seuls les débiteurs peuvent faire la promotion d'un plan; ainsi, le « débiteur » auquel renvoie le par. 54(3) s'entend de *tous* les promoteurs de plan. Elles soutiennent que, si le par. 54(3) vise tous les promoteurs de plan, le par. 22(3) de la *LACC* doit également les viser. Pour cette raison, les appelantes nous demandent d'étendre la restriction au droit de

creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

voter imposée par le par. 22(3) de manière à ce qu'elle s'applique non seulement aux créanciers « lié[s] à la compagnie », comme le prévoit la disposition, mais aussi à tous les créanciers qui font la promotion d'un plan. Elles soutiennent que cette interprétation donne effet à l'intention sous-jacente aux deux dispositions, intention qui, de dire les appelantes, est de faire en sorte qu'un créancier qui est en conflit d'intérêts ne puisse pas « diluer » ou supplanter le vote des autres créanciers.

[60] Nous n'acceptons pas cette interprétation forcée du par. 22(3). Il n'est nullement question dans cette disposition de conflit d'intérêts entre les créanciers et les promoteurs d'un plan en général. Les restrictions au droit de voter imposées par le par. 22(3) ne s'appliquent qu'aux créanciers qui sont « lié[s] à la compagnie [débitrice] ». Ce libellé est « précis et non équivoque », et il doit ainsi « joue[r] un rôle primordial dans le processus d'interprétation » (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). À notre avis, l'analogie que les appelantes font avec la *LFI* ne suffit pas à écarter le libellé clair de cette disposition.

[61] Bien que les appelantes aient raison de dire que l'adoption du par. 22(3) visait à harmoniser le traitement réservé aux parties liées par la *LACC* et la *LFI*, son historique montre qu'il ne s'agit pas d'une disposition générale relative aux conflits d'intérêts. Avant qu'elle soit modifiée et qu'on y incorpore le par. 22(3), la *LACC* permettait clairement aux créanciers de présenter un plan d'arrangement (voir Houlden, Morawetz et Sarra, §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17). À l'opposé, en vertu de la *LFI*, seuls les débiteurs pouvaient déposer une proposition. Il faut présumer que le législateur était au fait de cette différence évidente entre les deux lois (voir *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 59; voir aussi *Third Eye*, par. 57). Le législateur a malgré tout importé dans la *LACC*, avec les adaptations nécessaires, le texte de la disposition de la *LFI* portant sur les créanciers liés. Aller au-delà de ce libellé suppose d'accepter que le législateur n'a pas choisi les bons mots pour donner effet à son intention, ce que nous ne ferons pas.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed

[62] En fait, le législateur n'a pas reproduit de façon irréfléchie, au par. 22(3) de la *LACC,* le texte du par. 54(3) de la *LFI*. Au contraire, il a apporté deux modifications au libellé du par. 54(3) pour l'adapter à celui employé dans la *LACC*. Premièrement, il a remplacé le terme « proposition » (défini dans la *LFI*) par les mots « transaction ou arrangement » (employés tout au long dans la *LACC*). Deuxièmement, il a remplacé « débiteur » par « compagnie », reconnaissant ainsi que les compagnies sont les seuls débiteurs qui existent dans le contexte de la *LACC*.

[63] Notre opinion est en outre appuyée par Industrie Canada, selon qui l'adoption du par. 22(3) se justifie par la volonté de « réduire la capacité des compagnies débitrices d'établir un plan de restructuration apportant des avantages supplémentaires à des personnes qui leur sont liées » (Bureau du surintendant des faillites Canada, *Projet de loi C-12 : analyse article par article* (en ligne), cl. 71, art. 22 (nous soulignons); voir aussi Comité sénatorial permanent des banques et du commerce, p. 166).

[64] Enfin, nous soulignons que la *LACC* prévoit d'autres mécanismes qui réduisent le risque qu'un créancier en situation de conflit d'intérêts par rapport au plan qu'il propose puisse biaiser le vote des créanciers. Bien que nous rejetions l'interprétation donnée par les appelantes au par. 22(3), ce paragraphe interdit tout de même aux créanciers liés à la compagnie débitrice de voter en faveur de *tout* plan. De plus, les créanciers qui n'ont pas suffisamment d'intérêts en commun pourraient être contraints de voter dans des catégories distinctes (par. 22(1) et (2)); et, comme nous l'expliquerons, le juge surveillant peut empêcher un créancier de voter si ce dernier agit dans un but illégitime.

(2) Le pouvoir discrétionnaire d'interdire à un créancier de voter dans un but illégitime

[65] Il est acquis aux débats que la *LACC* ne contient aucune disposition énonçant les circonstances dans lesquelles un créancier, autrement admissible à voter sur un plan, peut être empêché de le faire. Toutefois, les juges chargés d'appliquer la *LACC* sont souvent appelés à « sanctionner des mesures non expressément prévues par la *LACC* »

a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: ". . . courts [must] 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" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the

(*Century Services*, par. 61; voir aussi par. 62). Dans l'arrêt *Century Services*, notre Cour a souscrit à l'approche « hiérarchisée » qui vise à déterminer si le tribunal a compétence pour sanctionner une mesure proposée : « . . . les tribunaux procédèrent 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* » (par. 65). Dans la plupart des cas, une interprétation téléologique et large des dispositions de la *LACC* suffira à « justifier les mesures nécessaires à la réalisation de ses objectifs » (par. 65).

[66] Après avoir appliqué cette approche, nous concluons que l'art. 11 de la *LACC* confère au tribunal le pouvoir d'interdire à un créancier de voter sur un plan d'arrangement ou une transaction s'il agit dans un but illégitime.

[67] Les tribunaux reconnaissent depuis longtemps que le libellé de l'art. 11 de la *LACC* indique que le législateur a sanctionné « l'interprétation large du pouvoir conféré par la *LACC* qui a été élaborée par la jurisprudence » (*Century Services*, par. 68). L'article 11 est ainsi libellé :

Pouvoir général du tribunal

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.

Selon le libellé clair de la disposition, le pouvoir conféré par l'art. 11 n'est limité que par les restrictions imposées par la *LACC* elle-même, ainsi que par l'exigence que l'ordonnance soit « indiquée » dans les circonstances.

[68] Lorsqu'une partie sollicite une ordonnance relativement à une question qui entre dans le champ de compétence du juge surveillant, mais pour laquelle aucune disposition de la *LACC* ne confère plus

provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia

précisément compétence, l'art. 11 est nécessairement la disposition à laquelle on peut recourir d'emblée pour fonder la compétence du tribunal. Comme l'a dit le juge Blair dans l'arrêt *Stelco*, l'art. 11 [TRADUCTION] « fait en sorte que la plupart du temps, il est inutile de recourir à la compétence inhérente » dans le contexte de la *LACC* (par. 36).

[69] La supervision des négociations entourant le plan, tout comme le vote et le processus d'approbation, relève nettement de la compétence du juge surveillant. Comme nous l'avons dit, aucune disposition de la *LACC* ne vise le cas où un créancier par ailleurs admissible à voter sur un plan peut néanmoins être empêché de le faire. Il n'existe non plus aucune disposition de la *LACC* selon laquelle le droit que possède un créancier de voter sur un plan est absolu et que ce droit ne peut pas être écarté par l'exercice légitime du pouvoir discrétionnaire du tribunal. Toutefois, étant donné le régime de la *LACC*, dont l'un des aspects essentiels tient à la participation du créancier au processus décisionnel, les créanciers ne devraient être empêchés de voter que si les circonstances l'exigent. Autrement dit, il faut nécessairement procéder à un examen discrétionnaire axé sur les circonstances propres à chaque situation.

[70] L'article 11 constitue donc manifestement la source de la compétence du juge surveillant pour rendre une ordonnance discrétionnaire empêchant un créancier de voter sur un plan d'arrangement. L'exercice du pouvoir discrétionnaire doit favoriser la réalisation des objets réparateurs de la *LACC* et être fondé sur les considérations de base que sont l'opportunité, la bonne foi et la diligence. Cela signifie que, lorsqu'un créancier cherche à exercer ses droits de vote de manière à contrecarrer, à miner ces objectifs ou à aller à l'encontre de ceux-ci — c'est-à-dire à agir dans un « but illégitime » — le juge surveillant a le pouvoir discrétionnaire d'empêcher le créancier de voter.

[71] Le pouvoir discrétionnaire d'empêcher un créancier de voter dans un but illégitime au sens de la *LACC* s'apparente au pouvoir discrétionnaire semblable qui existe en vertu de la *LFI*, lequel a été reconnu dans l'arrêt *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R.

Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this

(2d) 296. Dans *Laserworks*, la Cour d'appel de la Nouvelle-Écosse a conclu que le pouvoir discrétionnaire d'empêcher un créancier de voter de cette façon découlait du pouvoir du tribunal, inhérent au régime établi par la *LFI*, de superviser [TRADUCTION] « [c]haque étape du processus de faillite » (par. 41), comme l'indiquent les par. 43(7), 108(3) et 187(9) de la Loi. La cour a expliqué que le par. 187(9) confère expressément le pouvoir de remédier à une « injustice grave », laquelle se produit « lorsque la *LFI* est utilisée dans un but illégitime » (par. 54). La cour a statué que « [l]e but illégitime est un but qui est accessoire à l'objet pour lequel la loi en matière de faillite et d'insolvabilité a été adoptée par le législateur » (par. 54).

[72] Bien qu'elle ne soit pas déterminante, l'existence de ce pouvoir discrétionnaire en vertu de la *LFI* étaye l'existence d'un pouvoir discrétionnaire semblable en vertu de la *LACC* pour deux raisons.

[73] D'abord, cette conclusion serait compatible avec le fait que la Cour a reconnu que la *LACC* « établit un mécanisme plus souple, dans lequel les tribunaux disposent d'un plus grand pouvoir discrétionnaire » que sous le régime de la *LFI* (*Century Services*, par. 14 (nous soulignons)).

[74] Ensuite, la Cour a reconnu les bienfaits de l'harmonisation, dans la mesure du possible, des deux lois. À titre d'exemple, dans l'arrêt *Indalex*, la Cour a souligné que « pour éviter de précipiter une liquidation sous le régime de la *LFI*, les tribunaux privilégieront une interprétation de la *LACC* qui confère [. . .] aux créanciers [des droits analogues] » à ceux dont ils jouissent en vertu de la *LFI* (par. 51; voir également *Century Services*, par. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, par. 34-46). Ainsi, lorsque les lois permettent une interprétation harmonieuse, il y a lieu de retenir cette interprétation [TRADUCTION] « afin d'écarter les embûches pouvant découler du choix des créanciers de "recourir à la loi la plus favorable" [en matière d'insolvabilité] » (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, par. 78; voir aussi par. 73). À notre avis, la manière dont a été formulé le « but illégitime » dans l'arrêt *Laserworks* — c'est-à-dire un but accessoire à l'objet de la loi en

discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

matière d'insolvabilité — s'harmonise parfaitement avec la nature et la portée du pouvoir discrétionnaire judiciaire que confère la *LACC*. En effet, comme nous l'avons expliqué, ce pouvoir discrétionnaire doit être exercé conformément aux objets de la *LACC* en tant que loi en matière d'insolvabilité.

[75] Nous soulignons également que la reconnaissance de l'existence de ce pouvoir discrétionnaire sous le régime de la *LACC* favorise l'équité fondamentale qui [TRADUCTION] « imprègne le droit et la pratique en matière d'insolvabilité au Canada » (Sarra, « The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 27; voir également *Century Services*, par. 70 et 77). Comme le fait observer la professeure Sarra, l'équité commande que les juges surveillants soient en mesure de reconnaître les situations où les parties empêchent la réalisation des objectifs de la loi et de prendre des mesures utiles à leur égard :

> [TRADUCTION] Le régime d'insolvabilité canadien repose sur la présomption que les créanciers et le débiteur ont pour objectif commun de maximiser les recouvrements. L'aspect substantiel de la justice dans le régime d'insolvabilité repose sur la présomption que toutes les parties concernées sont exposées à de réels risques économiques. L'injustice réside dans les situations où seules certaines personnes sont exposées aux risques, tandis que d'autres tirent en fait avantage de la situation. [. . .] Si l'on veut que la *LACC* reçoive une interprétation téléologique, les tribunaux doivent être en mesure de reconnaître les situations où les gens ont des intérêts opposés et s'emploient activement à contrecarrer les objectifs de la loi. [Nous soulignons.]

(« The Oscillating Pendulum : Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law », p. 30)

Dans le même ordre d'idées, la surveillance du régime de droit de vote prévu par la *LACC* qu'exerce le juge surveillant ne doit pas seulement assurer une application stricte de la Loi, mais doit aussi favoriser la réalisation de ses objectifs. Nous estimons que la réalisation des objectifs de politique de la *LACC* nécessite la reconnaissance du pouvoir discrétionnaire d'empêcher un créancier de voter s'il agit dans un but illégitime.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business

[4] It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

[76] La question de savoir s'il y a lieu d'exercer le pouvoir discrétionnaire dans une situation donnée appelle une analyse fondée sur les circonstances propres à chaque situation qui doit mettre en balance les divers objectifs de la *LACC*. Comme le démontre le présent dossier, le juge surveillant est le mieux placé pour procéder à cette analyse.

(3) Le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter

[77] À notre avis, la décision du juge surveillant d'empêcher Callidus de voter sur le nouveau plan ne révèle aucune erreur justifiant l'intervention d'une cour d'appel. Comme nous l'avons expliqué, il faut adopter l'attitude de déférence appropriée à l'égard des décisions discrétionnaires de ce genre. Il convient de mentionner que, lorsqu'il a rendu sa décision, le juge surveillant connaissait très bien les procédures fondées sur la *LACC* relatives à Bluberi. Il les avait présidées pendant plus de 2 ans, avait reçu 15 rapports du contrôleur et avait délivré environ 25 ordonnances.

[78] Le juge surveillant a tenu compte de l'ensemble des circonstances et a conclu que le vote de Callidus viserait un but illégitime (par. 45 et 48). Nous sommes d'accord avec cette conclusion. Il savait qu'avant le vote sur le premier plan, Callidus avait choisi de n'évaluer *aucune partie* de sa réclamation à titre de créancier non garanti et s'était par la suite abstenue de voter — bien que le contrôleur l'ait expressément invité à le faire[4]. Le juge surveillant savait aussi que le premier plan de Callidus n'avait pas reçu l'aval des autres créanciers à l'assemblée des créanciers tenue le 15 décembre 2017, et que Callidus avait choisi de ne pas profiter de l'occasion pour modifier ou augmenter la valeur de son plan à ce moment-là, ce qu'elle était en droit de faire (voir *LACC*, art. 6 et 7; contrôleur, m.i., par. 17). Entre l'insuccès du premier plan et la proposition du nouveau plan — qui était identique au premier plan, hormis la modeste augmentation de 250 000 $ — les

[4] Il convient de souligner que la déclaration du contrôleur à cet égard ne permettait pas de décider si Callidus aurait finalement eu le droit de voter sur le premier plan. Comme Callidus n'a même pas essayé de voter sur le premier plan, cette question n'a jamais été soumise au juge surveillant.

affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at

circonstances factuelles se rapportant aux affaires financières ou commerciales de Bluberi n'avaient pas réellement changé. Pourtant, Callidus a tenté d'évaluer la *totalité* de sa sûreté à *zéro* et, sur cette base, a demandé l'autorisation de voter sur le nouveau plan à titre de créancier non garanti. Si Callidus avait été autorisée à voter de cette façon, le nouveau plan aurait certainement satisfait au critère d'approbation prévu par le par. 6(1). Dans ces circonstances, la seule conclusion possible était que Callidus tentait d'évaluer stratégiquement la valeur de sa sûreté afin de prendre le contrôle du vote et ainsi contourner la démocratie entre les créanciers que défend la *LACC*. En termes simples, Callidus cherchait à « se donner une seconde chance » et à manipuler le vote sur le nouveau plan. Le juge surveillant n'a pas commis d'erreur en exerçant son pouvoir discrétionnaire pour empêcher Callidus de le faire.

[79] En effet, comme le fait observer le contrôleur, [TRADUCTION] « [u]ne fois que le plan d'arrangement ou la proposition ont été présentés aux créanciers du débiteur aux fins d'un vote, le fait d'ordonner la tenue d'une seconde assemblée des créanciers pour voter sur un plan à peu près semblable ne favoriserait pas la réalisation des objectifs de politique de la LACC, pas plus qu'il ne servirait ou n'accroîtrait la confiance du public dans le processus ou ne servirait par ailleurs les fins de la justice » (m.i., par. 18). C'est particulièrement le cas en l'espèce étant donné que la tenue d'une autre assemblée pour voter sur le nouveau plan aurait coûté plus de 200 000 $ (voir les motifs du juge surveillant, par. 72).

[80] Ajoutons que la façon d'agir de Callidus était manifestement contraire à l'attente selon laquelle les parties agissent avec diligence dans les procédures d'insolvabilité — ce qui, à notre avis, comprend le fait de faire preuve de diligence raisonnable dans l'évaluation de leurs réclamations et sûretés. Pendant toute la période pertinente, les réclamations retenues de Bluberi ont constitué les seuls éléments d'actif garantissant la réclamation de Callidus. Cette dernière n'a rien relevé dans le dossier qui indique que la valeur des réclamations retenues a changé. Si Callidus estimait que les réclamations retenues n'avaient aucune valeur, on se serait attendu à ce qu'elle ait évalué sa sûreté en conséquence avant

such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to

le vote sur le premier plan, voire même plus tôt. Nous ouvrons une parenthèse pour souligner que, peu importe le moment, la tentative d'évaluer ainsi la sûreté aurait pu fort bien échouer. Cela aurait empêché Callidus de voter à titre de créancier non garanti même si elle ne poursuivait pas de but illégitime.

[81] Comme nous l'avons indiqué, les décisions discrétionnaires appellent une norme de contrôle empreinte d'une grande déférence. La déférence commande que l'examen d'une décision discrétionnaire commence par la qualification appropriée du fondement de la décision. Soit dit en tout respect, la Cour d'appel a échoué à cet égard. La Cour d'appel s'est saisie des commentaires quelque peu critiques formulés par le juge surveillant à l'égard de l'objectif de Callidus d'être libérée des réclamations retenues et de la conduite de celle-ci tout au long des procédures pour affirmer qu'il ne s'agissait pas de considérations pouvant donner lieu à une conclusion de but illégitime. Toutefois, comme nous l'avons expliqué, ce ne sont pas ces considérations qui ont amené le juge surveillant à tirer sa conclusion. Sa conclusion reposait nettement sur la tentative de Callidus de manipuler le vote des créanciers pour faire en sorte que son nouveau plan soit retenu alors que son premier plan ne l'avait pas été (voir les motifs du juge surveillant, par. 45-48). Nous ne voyons rien dans les motifs de la Cour d'appel qui s'attaque à cette irrégularité déterminante, qui va beaucoup plus loin que le simple fait pour un créancier d'agir dans son propre intérêt.

[82] En résumé, nous ne voyons rien dans les motifs du juge surveillant sur ce point qui justifie l'intervention d'une cour d'appel. Callidus a été à juste titre empêchée de voter sur le nouveau plan.

[83] Avant de passer au prochain point, soulignons que la Cour d'appel a abordé deux questions supplémentaires : Callidus est-elle « liée » à Bluberi au sens du par. 22(3) de la *LACC*? Si Callidus est autorisée à voter, convient-il de lui ordonner de voter dans une catégorie distincte des autres créanciers de Bluberi (voir la *LACC*, par. 22(1) et (2))? Vu notre conclusion que le juge surveillant n'a pas commis d'erreur en interdisant à Callidus de voter sur le nouveau plan au motif qu'elle avait agi dans un but illégitime, il n'est

address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing

pas nécessaire de se prononcer sur l'une ou l'autre de ces questions. Cependant, rien dans les présents motifs ne doit être interprété comme souscrivant à l'analyse que la Cour d'appel a faite de ces questions.

C. *L'AFL de Bluberi devrait être approuvé à titre de financement temporaire*

[84] À notre avis, le juge surveillant n'a commis aucune erreur en approuvant l'AFL à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*. Le financement temporaire est un outil souple qui peut revêtir différentes formes. Comme nous l'expliquerons, le financement d'un litige par un tiers peut constituer l'une de ces formes. La question de savoir s'il y a lieu d'approuver le financement d'un litige par un tiers à titre de financement temporaire commande une analyse fondée sur les faits de l'espèce qui doit tenir compte du libellé de l'art. 11.2 et des objectifs réparateurs de la *LACC* de façon plus générale.

(1) Le financement temporaire et l'art. 11.2 de la *LACC*

[85] Bien qu'il soit expressément prévu par l'art. 11.2 de la *LACC*, le financement temporaire n'est pas défini dans la Loi. La professeure Sarra l'a décrit comme [TRADUCTION] « vis[ant] principalement le fonds de roulement dont a besoin la société débitrice pour continuer de fonctionner pendant la restructuration ainsi que les fonds nécessaires pour payer les frais liés au processus de sauvetage » (*Rescue! The Companies' Creditors Arrangement Act*, p. 197). Utilisé de cette façon, le financement temporaire — parfois appelé financement de [TRADUCTION] « débiteur-exploitant » — protège la valeur d'exploitation de la compagnie débitrice pendant qu'elle met au point une solution viable à ses problèmes d'insolvabilité (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (C.J. Ont. (Div. gén.)), par. 7, 9 et 24; *Boutiques San Francisco Inc. c. Richter & Associés Inc.*, 2003 CanLII 36955 (C.S. Qc), par. 32). Cela dit, le financement temporaire ne se limite pas à fournir un fonds de roulement

at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

immédiat aux compagnies débitrices. Conformément aux objectifs réparateurs de la *LACC*, le financement temporaire permet essentiellement de préserver et de réaliser la valeur des éléments d'actif du débiteur.

[86] Depuis 2009, le par. 11.2(1) de la *LACC* a codifié le pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire et d'accorder une charge ou une sûreté correspondante, d'un montant qu'il estime indiqué, en faveur du prêteur :

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

[87] L'étendue du pouvoir discrétionnaire du juge surveillant d'approuver le financement temporaire ressort du libellé du par. 11.2(1). Abstraction faite des protections concernant le préavis et les sûretés constituées avant le dépôt des procédures, le par. 11.2(1) ne prescrit aucune forme ou condition type[5]. Il prévoit simplement que le financement doit être d'un montant qui est « indiqué » et qui tient compte de « l'état de l'évolution de l'encaisse et des besoins de [la compagnie] ».

[5] A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

[5] Une autre exception a été codifiée dans les modifications apportées en 2019 à la *LACC* qui créent le par. 11.2(5) (voir *Loi nº 1 d'exécution du budget de 2019*, art. 138). Cet article prévoit que, lorsqu'une ordonnance relative à la demande initiale a été demandée, « le tribunal ne rend l'ordonnance visée au paragraphe [11.2](1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période ». Cette disposition ne s'applique pas en l'espèce, et les parties ne l'ont pas invoquée. Toutefois, il se peut qu'elle ait pour effet d'empêcher les juges surveillants d'approuver des AFL à titre de financement temporaire au moment où l'ordonnance relative à la demande initiale est rendue.

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA*

[88] Le juge surveillant peut également accorder au prêteur une « charge super prioritaire » qui aura priorité sur toute réclamation des créanciers garantis, en vertu du par. 11.2(2) :

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

[89] Ces charges, également appelées « superprivilèges », réduisent les risques des prêteurs, les incitant ainsi à aider les compagnies insolvables (Innovation, Sciences et Développement économique Canada, *Archivé — Projet de loi C-55 : analyse article par article*, dernière mise à jour le 29 décembre 2016 (en ligne), cl. 128, art. 11.2; Wood, p. 387). Sur le plan pratique, ces charges constituent souvent le seul moyen d'encourager ce type de prêt. Généralement, le prêteur se protège contre le risque de crédit en prenant une sûreté sur les éléments d'actifs de l'emprunteur. Or, les compagnies débitrices qui sont sous la protection de la *LACC* ont souvent donné en gage la totalité ou la presque totalité de leurs actifs à d'autres créanciers. En l'absence d'une charge super prioritaire, le prêteur qui accepte d'apporter un financement temporaire prendrait rang derrière les autres créanciers (McElcheran, p. 298-299). Bien que la charge super prioritaire subordonne les sûretés des créanciers garantis à celle du prêteur qui apporte un financement temporaire — un résultat qui a suscité la controverse en common law — le législateur a signifié son acceptation générale des transactions allant de pair avec ces charges en adoptant le par. 11.2(2) (voir M. B. Rotsztain et A. Dostal, « Debtor-In-Possession Financing », dans S. Ben-Ishai et A. Duggan, dir., *Canadian Bankruptcy and Insolvency Law : Bill C-55, Statute c. 47 and Beyond* (2007), 227, p. 228-229 et 240-250). En effet, cet équilibre a été expressément pris en considération par le Comité sénatorial permanent des banques et du commerce, qui a recommandé la codification du financement temporaire dans la *LACC* (p. 111-115).

[90] Au bout du compte, la question de savoir s'il y a lieu d'approuver le financement temporaire projeté est une question à laquelle le juge surveillant est le

sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

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

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges

mieux placé pour répondre. La *LACC* énonce un certain nombre de facteurs qui encadrent l'exercice de ce pouvoir discrétionnaire. L'inclusion de ces facteurs dans le par. 11.2 reposait sur le point de vue du Comité sénatorial permanent des banques et du commerce selon lequel ils permettraient de respecter les « principes fondamentaux » ayant guidé la conception des lois en matière d'insolvabilité au Canada, notamment « l'équité, la prévisibilité et l'efficience » (p. 115; voir également Innovation, Sciences et Développement économique Canada, cl. 128, art. 11.2). Pour décider s'il y a lieu d'accorder le financement temporaire, le juge surveillant doit prendre en considération les facteurs non exhaustifs suivants :

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

(*LACC*, par. 11.2(4))

[91] Avant l'entrée en vigueur en 2009 des dispositions susmentionnées, les tribunaux utilisaient le pouvoir discrétionnaire général que confère l'art. 11 pour autoriser le financement temporaire

(*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and

et la constitution des charges super prioritaires s'y rattachant (*Century Services*, par. 62). L'article 11.2 codifie en grande partie les approches adoptées par ces tribunaux (Wood, p. 388; McElcheran, p. 301). En conséquence, il est possible, le cas échéant, de s'inspirer de la jurisprudence relative au financement temporaire antérieure à la codification.

[92] Comme c'est le cas pour les autres mesures susceptibles d'être prises sous le régime de la *LACC*, le financement temporaire est un outil souple qui peut revêtir différentes formes ou faire intervenir différentes considérations dans chaque cas. Comme nous l'expliquerons plus loin, le financement d'un litige par un tiers peut, dans les cas qui s'y prêtent, constituer l'une de ces formes.

(2) Les juges surveillants peuvent approuver le financement d'un litige par un tiers à titre de financement temporaire

[93] Le financement d'un litige par un tiers met généralement en cause [TRADUCTION] « un tiers, n'ayant par ailleurs aucun lien avec le litige, [qui] accepte de payer une partie ou la totalité des frais de litige d'une partie, en échange d'une portion de la somme recouvrée par cette partie au titre des dommages-intérêts ou des dépens » (R. K. Agarwal et D. Fenton, « Beyond Access to Justice : Litigation Funding Agreements Outside the Class Actions Context » (2017), 59 *Rev. can. dr. comm.* 65, p. 65). Le financement d'un litige par un tiers peut revêtir diverses formes. Un modèle courant met en cause un bailleur de fonds de litiges qui s'engage à payer les débours du demandeur et à indemniser ce dernier dans l'éventualité d'une adjudication des dépens défavorable, en échange d'une partie de la somme obtenue dans le cadre d'un procès ou d'un règlement couronné de succès (voir *Dugal c. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] En dehors du cadre de la *LACC*, l'approbation des accords de financement d'un litige par un tiers a été quelque peu controversée. Une partie de cette controverse découle de la possibilité que ces accords portent atteinte aux doctrines de common

maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

[6] The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

law concernant la champartie (*champerty*) et le soutien abusif (*maintenance*)[6]. Le délit de soutien abusif interdit [TRADUCTION] « l'immixtion trop empressée dans une action avec laquelle on n'a rien à voir » (L. N. Klar et autres, *Remedies in Tort* (feuilles mobiles), vol. 1, par L. Berry, dir., p. 14-11, citant *Langtry c. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), p. 661). La champartie est une sorte de soutien abusif qui comporte un accord prévoyant le partage de la somme obtenue ou de tout autre profit réalisé dans le cadre d'une action réussie (*McIntyre Estate c. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193 (C.A. Ont.), par. 26).

[95] S'appuyant sur la jurisprudence voulant que les conventions d'*honoraires conditionnels* ne constituent pas de la champartie lorsqu'elles ne sont pas motivées par un but illégitime (p. ex., *McIntyre Estate*), les tribunaux d'instance inférieure en sont venus progressivement à reconnaître que les accords de *financement d'un litige* ne constituent pas non plus de la champartie *en soi*. Cette évolution s'est opérée surtout dans le contexte des recours collectifs, en réaction aux obstacles, comme les adjudications de dépens défavorables, qui entravaient l'accès des parties à la justice (voir *Dugal*, par. 33; *Marcotte c. Banque de Montréal*, 2015 QCCS 1915, par. 43-44 (CanLII); *Houle c. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, par. 52, conf. par 2018 ONSC 6352, 429 D.L.R. (4th) 739 (C. div.); voir également *Stanway c. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, par. 13). La jurisprudence relative à l'approbation des accords de financement de litige par un tiers dans le contexte des recours collectifs — et même les paramètres de leur légalité en général — continue d'évoluer, et aucune des parties au présent pourvoi ne nous a invités à l'analyser.

[6] L'ampleur de la controverse varie selon les provinces. En Ontario, les accords de champartie sont interdits par la loi (voir *An Act respecting Champerty*, R.S.O. 1897, c. 327). Au Québec, les questions relatives à la champartie et au soutien abusif ne se posent pas de façon aussi aiguë parce que la champartie et le soutien abusif ne font pas partie du droit comme tel (voir *Montgrain c. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, « New Frontier : The Emergence of Litigation Funding in the Canadian Insolvabilité Landscape » dans J. P. Sarra et autres, dir., *Annual Review of Insolvency Law 2018* (2019), 221, p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection,

[96] Cela dit, dans la mesure où les accords de financement de litige par un tiers ne sont pas illégaux *en soi*, il n'y a aucune raison de principe qui permet d'empêcher les juges surveillants d'approuver ce type d'accord à titre de financement temporaire dans les cas qui s'y prêtent. Nous reconnaissons que cette forme de financement diffère des formes plus courantes de financement temporaire qui visent simplement à aider le débiteur à [TRADUCTION] « payer les frais courants » (voir *Royal Oak*, par. 7 et 24). Toutefois, dans des circonstances semblables à celles en l'espèce, lorsqu'il existait un seul élément d'actif susceptible de monétisation au bénéfice des créanciers, l'objectif visant à maximiser le recouvrement des créanciers a occupé le devant de la scène. En pareilles circonstances, le financement de litige favorise la réalisation de l'objectif fondamental du financement temporaire : permettre au débiteur de réaliser la valeur de ses éléments d'actif.

[97] Nous concluons que les accords de financement de litige par un tiers peuvent être approuvés à titre de financement temporaire dans le cadre des procédures fondées sur la *LACC* lorsque le juge surveillant estime qu'il serait juste et approprié de le faire, compte tenu de l'ensemble des circonstances et des objectifs de la Loi. Cela implique la prise en considération des facteurs précis énoncés au par. 11.2(4) de la *LACC*. Cela dit, ces facteurs ne doivent pas être appliqués machinalement ou examinés individuellement par le juge surveillant. En effet, ils ne seront pas tous importants dans tous les cas, et ils ne sont pas non plus exhaustifs. Des enseignements supplémentaires peuvent être tirés d'autres domaines où des accords de financement de litige par un tiers ont été approuvés.

[98] Ce qui précède est compatible avec la pratique qui a déjà cours devant les tribunaux d'instance inférieure. Plus particulièrement, dans *Crystallex*, la Cour d'appel de l'Ontario a approuvé un accord de financement de litige par un tiers dans des circonstances très semblables à celles en l'espèce. Cette affaire mettait en cause une société minière ayant le droit d'exploiter un grand gisement d'or au Venezuela. Crystallex est finalement devenue insolvable, et (comme Bluberi) il ne lui restait plus qu'un seul élément d'actif important : une réclamation

Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word

d'arbitrage de 3,4 milliards de dollars américains contre le Venezuela. Après s'être placée sous la protection de la *LACC*, Crystallex a demandé l'approbation d'un accord de financement de litige par un tiers. L'accord prévoyait que le prêteur avancerait des fonds importants pour financer l'arbitrage en échange, notamment, d'un pourcentage de la somme nette obtenue à la suite d'une sentence ou d'un règlement. Le juge surveillant a approuvé l'accord à titre de financement temporaire en vertu de l'art. 11.2. La Cour d'appel a conclu à l'unanimité que le juge surveillant n'avait commis aucune erreur dans l'exercice de son pouvoir discrétionnaire. Elle a conclu que l'art. 11.2 [TRADUCTION] « n'empêche pas le juge surveillant d'approuver, s'il y a lieu, avant qu'un plan soit approuvé, l'octroi d'une charge garantissant un financement qui pourra continuer après que la compagnie aura émergé de la protection de la *LACC* » (par. 68).

[99] Dans *Crystallex*, l'un des principaux arguments soulevés par les créanciers — et l'un de ceux qu'ont soulevés Callidus et le groupe de créanciers dans le présent pourvoi — était que l'accord de financement de litige en cause était un plan d'arrangement et non pas un financement temporaire. Il s'agissait d'un argument important car, si l'accord était en fait un plan, il aurait dû être soumis à un vote des créanciers conformément aux art. 4 et 5 de la *LACC* avant de recevoir l'aval du tribunal. La cour, dans *Crystallex*, a rejeté cet argument, et nous en faisons autant.

[100] La *LACC* ne définit pas le plan d'arrangement. En fait, la *LACC* ne fait aucunement allusion aux plans — elle fait uniquement état d'un « arrangement » ou d'une « transaction » (voir art. 4 et 5). S'appuyant sur l'ancienne jurisprudence anglaise, les auteurs de *Bankruptcy and Insolvency Law of Canada* proposent la définition générale suivante de ces termes :

> [TRADUCTION] La « transaction » suppose d'emblée l'existence d'un différend au sujet des droits visés par la transaction et d'un règlement de ce différend selon des conditions jugées satisfaisantes par le débiteur et le créancier. L'accord visant à accepter une somme inférieure à 100 ¢ par dollar constituerait une transaction lorsque

than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least

le débiteur conteste la dette ou n'a pas les moyens de la payer. Le mot « arrangement » a un sens plus large que le mot « transaction » et ne se limite pas à quelque chose qui ressemble à une transaction. Il viserait tout plan de réorganisation des affaires du débiteur : *Re Guardian Assur. Co.*, [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations*, [1935] A.C. 185 (C.P.).

(Houlden, Morawetz et Sarra, §33)

[101] Malgré leur vaste portée apparente, ces termes connaissent quand même certaines limites. Selon une jurisprudence plus récente, ils exigeraient, à tout le moins, une certaine transaction à l'égard des droits des créanciers. Dans *Crystallex*, par exemple, on a conclu que l'accord de financement de litige en cause (également appelé [TRADUCTION] « facilité de DE Tenor ») ne constituait pas un plan d'arrangement parce qu'il ne comportait pas [TRADUCTION] « une transaction visant les conditions [des] dettes envers [des créanciers] ni ne [. . .] privait [ceux-ci] de [. . .] leurs droits reconnus par la loi » (par. 93). La Cour d'appel a fait sien le raisonnement suivant du tribunal de première instance, auquel nous souscrivons pour l'essentiel :

[TRADUCTION] Le « plan d'arrangement » et la « transaction » ne sont pas définis dans la *LACC*. Il doit toutefois s'agir d'un arrangement ou d'une transaction entre un débiteur et ses créanciers. La facilité de DE Tenor ne constitue pas, à première vue, un arrangement ou une transaction entre Crystallex et ses créanciers. Fait important, les détenteurs de billets ne sont pas privés de leurs droits par la facilité de DE Tenor. Les détenteurs de billets sont des créanciers non garantis. Leurs droits se résument à poursuivre en vue d'obtenir un jugement et à faire exécuter ce jugement. S'ils ne sont pas payés, ils ont le droit de demander une ordonnance de faillite en vertu de la LFI. Sous le régime de la *LACC*, ils ont le droit de voter sur un plan d'arrangement ou une transaction. La facilité de DE Tenor ne les prive d'aucun de ces droits.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, par. 50)

[102] Il n'est pas nécessaire de définir exhaustivement les notions de plan d'arrangement ou de transaction pour trancher les présents pourvois. Il suffit de conclure que les plans d'arrangement doivent au

some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing.

moins comporter une certaine transaction à l'égard des droits des créanciers. Il s'ensuit que l'accord de financement de litige par un tiers visant à apporter un financement à la compagnie débitrice pour réaliser la valeur d'un élément d'actif ne constitue pas nécessairement un plan d'arrangement. Nous sommes d'avis de laisser aux juges surveillants le soin de déterminer si, compte tenu des circonstances particulières de l'affaire dont ils sont saisis, l'accord de financement de litige par un tiers comporte des conditions qui le convertissent effectivement en plan d'arrangement. Si l'accord ne comporte pas de telles conditions, il peut être approuvé à titre de financement temporaire en vertu de l'art. 11.2 de la *LACC*.

[103] Ajoutons que, dans certaines circonstances, l'accord de financement de litige par un tiers peut contenir ou incorporer un plan d'arrangement (p. ex., s'il contient un plan prévoyant la distribution aux créanciers des sommes obtenues dans le cadre du litige). Subsidiairement, le juge surveillant peut décider que, bien que l'accord lui-même ne constitue pas un plan d'arrangement, il y a lieu de l'accompagner d'un plan et de le soumettre à un vote des créanciers. Cela dit, nous le répétons, les accords de financement de litige par un tiers ne constituent pas nécessairement, ni même généralement, des plans d'arrangement.

[104] Rien de ce qui précède n'est sérieusement contesté en l'espèce. Les parties s'entendent essentiellement pour dire que les accords de financement de litige par un tiers *peuvent* être approuvés à titre de financement temporaire. Le différend qui les oppose porte sur la question de savoir si le juge surveillant a commis une erreur en exerçant son pouvoir discrétionnaire d'approuver l'AFL en l'absence d'un vote des créanciers, soit parce qu'il constituait un plan d'arrangement, soit parce qu'il aurait dû être accompagné d'un plan d'arrangement. Nous abordons maintenant cette question.

(3) Le juge surveillant n'a pas commis d'erreur en approuvant l'AFL

[105] À notre avis, il n'y a aucune raison d'intervenir dans l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver l'AFL à titre de

The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors

financement temporaire. Se fondant sur les principes applicables à l'approbation d'accords semblables dans le contexte des recours collectifs (par. 74, citant *Bayens*, par. 41; *Hayes*, par. 4), le juge surveillant a estimé que l'AFL était juste et raisonnable. Plus particulièrement, il a examiné soigneusement les conditions selon lesquelles les avocats de Bentham et de Bluberi seraient payés si le litige était couronné de succès, les risques qu'ils prenaient en investissant dans le litige et l'étendue du contrôle qu'exercerait désormais Bentham sur le litige (par. 79 et 81). Le juge surveillant a également pris en compte les objectifs uniques des procédures fondées sur la *LACC* en établissant une distinction entre l'AFL et des accords apparemment semblables qui n'avaient pas été approuvés dans le contexte des recours collectifs (par. 81-82, établissant une distinction avec l'affaire *Houle*). Sa prise en compte de ces objectifs ressort également du fait qu'il s'est fondé sur *Crystallex*, qui, comme nous l'avons expliqué, portait sur l'approbation d'un financement temporaire dans des circonstances très semblables à celles en l'espèce (voir par. 67 et 71). Nous ne voyons aucune erreur de principe ni rien de déraisonnable dans cette approche.

[106] Certes, le juge surveillant n'a pas examiné à fond chacun des facteurs énoncés au par. 11.2(4) de la *LACC* de façon individuelle avant de tirer sa conclusion, mais cela ne constituait pas une erreur en soi. L'examen des motifs du juge surveillant dans leur ensemble, conjugué à la reconnaissance de son expérience évidente des procédures intentées par Bluberi sous le régime de la *LACC*, nous mène à conclure que les facteurs énumérés au par. 11.2(4) concernent des questions qui n'auraient pu échapper à son attention et à son examen adéquat. Il convient de rappeler qu'au moment où il a rendu sa décision, le juge surveillant était saisi des procédures en question depuis plus de deux ans et avait pu bénéficier de l'aide du contrôleur. En ce qui a trait à chacun des facteurs énoncés au par. 11.2(4), nous soulignons ce qui suit :

- le rôle de surveillance du juge lui aurait permis de connaître la durée prévue des procédures intentées par Bluberi sous le régime de la *LACC* ainsi que la mesure dans laquelle les dirigeants de Bluberi bénéficiaient du soutien des créanciers

appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));
- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and
- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion.

(al. 11.2(4)a) et c)), mais nous constatons que ces facteurs semblent revêtir beaucoup moins d'importance que les autres dans le contexte de la présente affaire (voir par. 96);

- l'AFL lui-même indique « la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures » (al. 11.2(4)b));
- le juge surveillant était d'avis que l'AFL favoriserait la conclusion d'un plan viable, car il a accepté (1) le fait que Bluberi avait l'intention de présenter un plan et (2) l'argument de Bluberi selon lequel l'approbation de l'AFL l'aiderait à conclure un plan [TRADUCTION] « visant à atteindre une réalisation maximale » de ses éléments d'actif (par. 68, citant la demande de 9354-9186 Québec inc. et de 9354-9178 Québec inc., par. 99; al. 11.2(4)d));
- le juge surveillant était au courant de la « nature et [de] la valeur » des biens de Bluberi, qui se limitaient clairement aux réclamations retenues (al. 11.2(4)e));
- le juge surveillant a conclu implicitement que la charge relative au financement de litige ne causerait pas un préjudice sérieux aux créanciers, car il a affirmé que [TRADUCTION] « [c]ompte tenu du résultat du vote [sur le premier plan] et des circonstances particulières de la présente affaire, la seule possibilité de recouvrement réside dans l'action que vont intenter les débiteurs » (par. 91 (nous soulignons); al. 11.2(4)f));
- le juge surveillant était aussi bien au fait des rapports du contrôleur, et s'est appuyé sur le plus récent d'entre eux à divers endroits dans ses motifs (voir, p. ex., par. 64-65 et note 1; al. 11.2(4)g)). Il convient de souligner que le contrôleur appuyait l'approbation de l'AFL à titre de financement temporaire.

[107] À notre avis, il est manifeste que le juge surveillant a mis l'accent sur l'équité envers toutes les parties, les objectifs précis de la *LACC* et les circonstances particulières de la présente affaire lorsqu'il a approuvé l'AFL à titre de financement temporaire. Nous ne pouvons affirmer qu'il a commis une erreur

Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

dans l'exercice de son pouvoir discrétionnaire. Nous ne savons pas avec certitude si l'AFL était aussi favorable aux créanciers de Bluberi qu'il aurait pu l'être — dans une certaine mesure, il donne priorité au recouvrement de Bentham sur le leur — mais nous nous en remettons néanmoins à l'exercice par le juge surveillant de son pouvoir discrétionnaire.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[108] Dans la mesure où la Cour d'appel a conclu le contraire, en toute déférence, nous ne sommes pas d'accord. De façon générale, nous estimons que la Cour d'appel a encore une fois omis de faire preuve de la déférence nécessaire à l'égard du juge surveillant. Plus particulièrement, nous souhaitons faire des observations sur trois des erreurs qu'aurait décelées la Cour d'appel dans la décision du juge surveillant.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[109] Premièrement, il découle de notre conclusion selon laquelle les AFL peuvent constituer un financement temporaire que la Cour d'appel a eu tort de conclure que l'approbation de l'AFL à titre de financement temporaire [TRADUCTION] « transcendait la nature de ce type de financement » (par. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[110] Deuxièmement, à notre avis, la Cour d'appel a eu tort de conclure que l'AFL était un plan d'arrangement, et qu'il était possible d'établir une distinction entre l'espèce et les faits de l'affaire *Crystallex*. La Cour d'appel a conclu que l'AFL et la charge relative au financement de litige super prioritaire s'y rattachant constituaient un plan parce qu'ils subordonnaient les droits des créanciers de Bluberi à ceux de Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that

[111] Nous souscrivons à l'opinion du juge surveillant selon laquelle l'AFL ne constitue pas un plan d'arrangement parce qu'il ne propose aucune transaction visant les droits des créanciers. Pour reprendre la formule qu'a employée la Cour d'appel dans *Crystallex*, la réclamation de Bluberi s'apparente à une [TRADUCTION] « marmite d'or » (par. 4). Les plans d'arrangement établissent la façon dont le contenu de cette marmite sera distribué. Ils n'indiquent généralement pas ce que la compagnie débitrice devra faire pour la remplir. Le fait que les créanciers puissent en fin de compte remporter plus ou moins d'argent ne modifie en rien la nature ou

is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
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> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New

l'existence de leurs droits d'avoir accès à la marmite une fois qu'elle est remplie, pas plus qu'on ne saurait dire qu'il s'agit d'une « transaction » à l'égard de leurs droits. Lorsque la « marmite d'or » aura été obtenue — c'est-à-dire dans l'éventualité d'une action ou d'un règlement — les sommes nettes seront distribuées aux créanciers. En l'espèce, si les réclamations retenues permettent de recouvrer des sommes qui dépassent le total des dettes de Bluberi, les créanciers seront payés en entier; si les sommes sont insuffisantes, un plan d'arrangement ou une transaction établira la façon dont les sommes seront distribuées. Bluberi s'est engagée à proposer un tel plan (voir les motifs du juge surveillant, par. 68, établissant une distinction avec *Cliffs Over Maple Bay Investments Ltd. c. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] C'est exactement la même conclusion qui a été tirée dans *Crystallex* dans des circonstances semblables :

> [TRADUCTION] Les faits de l'espèce sont inhabituels : la « marmite d'or » ne contient qu'un seul élément d'actif qui, s'il est réalisé, rapportera beaucoup plus que ce qui est nécessaire pour rembourser les créanciers. Le juge surveillant était le mieux placé pour établir un équilibre entre les intérêts de toutes les parties intéressées. J'estime que l'exercice par le juge surveillant de son pouvoir discrétionnaire d'approuver le prêt de DE Tenor était raisonnable et approprié, bien qu'il ait eu pour effet de limiter la position de négociation des créanciers.
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> . . . L'approbation du prêt de DE Tenor a certes amoindri l'influence que pouvaient exercer les détenteurs de billets lors de la négociation d'un plan, et rendu plus complexe la négociation d'un plan, mais ce prêt ne constituait pas une transaction visant les conditions de leurs dettes ni ne les privait de l'un de leurs droits reconnus par la loi. Il ne s'agit donc pas d'un arrangement, et un vote des créanciers n'était pas nécessaire. [par. 82 et 93]

[113] Nous ne souscrivons pas à l'opinion de la Cour d'appel selon laquelle il y a lieu d'établir une distinction avec *Crystallex* parce que, dans cette affaire, les créanciers disposaient d'un seul moyen de recouvrement (c.-à-d. l'arbitrage) tandis que, dans la

Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement

présente affaire, il y en a deux (c.-à-d. l'introduction d'une action à l'égard des réclamations retenues et le nouveau plan de Callidus). Étant donné que le juge surveillant avait conclu que Callidus ne pouvait pas voter sur le nouveau plan, ce plan ne constituait pas une solution de rechange viable à l'AFL. La [TRADUCTION] « seule possibilité de recouvrement » qui s'offrait aux créanciers de Bluberi résidait donc dans l'AFL et l'introduction d'une action à l'égard des réclamations retenues (motifs du juge surveillant, par. 91). Fait peut-être plus important, même si les créanciers avaient disposé de plusieurs moyens de recouvrement, tant dans l'affaire *Crystallex* que dans la présente affaire, la simple existence de ces moyens n'aurait pas nécessairement modifié la nature des accords de financement de litige par un tiers en cause ni n'aurait eu pour effet de les convertir en plans d'arrangement. La question que doit se poser le juge surveillant dans chaque affaire est de savoir si l'accord qui lui est soumis doit être approuvé à titre de financement temporaire. Certes, les autres moyens de recouvrement dont disposent les créanciers peuvent entrer en ligne de compte dans la prise de cette décision discrétionnaire, mais ils ne sont pas déterminants.

[114] Ajoutons que la charge relative au financement de litige ne convertit pas l'AFL en plan d'arrangement en [TRADUCTION] « subordonn[ant] » les droits des créanciers (motifs de la Cour d'appel, par. 90). Nous reconnaissons que cette charge aurait pour effet de placer les créanciers garantis comme Callidus derrière Bentham dans l'ordre de priorité, mais ce résultat est expressément prévu par l'art. 11.2 de la *LACC*. Cette « subordination » ne convertit pas le financement temporaire autorisé par la loi en plan d'arrangement. Retenir cette interprétation aurait pour effet d'annihiler le pouvoir du juge surveillant d'approuver ces charges sans un vote des créanciers en vertu du par. 11.2(2).

[115] Troisièmement, nous estimons que la Cour d'appel a eu tort de conclure que le juge surveillant aurait dû soumettre l'AFL accompagné d'un plan à l'approbation des créanciers (par. 89). Comme nous l'avons indiqué, la décision d'exiger que le débiteur accompagne d'un plan son accord de financement

with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

de litige par un tiers est une décision discrétionnaire qui appartient au juge surveillant.

[116] Enfin, sur les instances des appelantes, nous soulignons que l'affirmation de la Cour d'appel selon laquelle l'AFL [TRADUCTION] « s'apparente [en quelque sorte] à un placement à échéance non déterminée » était inutile et pouvait prêter à confusion (par. 90). Cela dit, il s'agissait manifestement d'une remarque incidente. Dans la mesure où la Cour d'appel s'est fondée sur cette qualification pour conclure que l'AFL constituait un plan d'arrangement, nous avons déjà expliqué pourquoi nous croyons que la Cour d'appel a fait erreur sur ce point.

VI. Conclusion

[117] Pour ces motifs, à l'issue de l'audience, nous avons accueilli les pourvois et rétabli l'ordonnance du juge surveillant. Les dépens devant notre Cour et la Cour d'appel ont été adjugés aux appelantes.

Pourvois accueillis avec dépens devant la Cour et la Cour d'appel.

Procureurs des appelantes/intervenantes 9354-9186 Québec inc. et 9354-9178 Québec inc. : Davies Ward Phillips & Vineberg, Montréal.

Procureurs des appelantes/intervenantes IMF Bentham Limited (maintenant connue sous le nom d'Omni Bridgeway Limited) et Corporation Bentham IMF Capital (maintenant connue sous le nom de Corporation Omni Bridgeway Capital (Canada)) : Woods, Montréal.

Procureurs de l'intimée Callidus Capital Corporation : Gowling WLG (Canada), Montréal.

Procureurs des intimés International Game Technology, Deloitte S.E.N.C.R.L., Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx et François Pelletier : McCarthy Tétrault, Montréal.

Procureurs de l'intervenante Ernst & Young Inc. : Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

Procureurs des intervenants l'Institut d'insolvabilité du Canada et l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : Norton Rose Fulbright Canada, Montréal.

SUPERIOR COURT

Commercial Division

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
N°: 500-11-042345-120

DATE : November 20, 2012

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

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

AVEOS FLEET PERFORMANCE INC. /
AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.
Insolvent Debtor/Petitioner

and

AERO TECHNICAL US, INC.
Insolvent Debtor

and

FTI CONSULTING CANADA INC.
Monitor

and

NORTHGATEARINSO CANADA INC.
Petitioner

and

CREDIT SUISSE AG CAYMAN ISLANDS BRANCH
Secured creditor

JUDGMENT

INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[1] R.S.C. 1985, c. C-25

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos

was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were

not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1st, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1st, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the

C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1st, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
>
> In deciding whether to make the order, the court is to consider, among other things,
>
> a) whether the monitor approved the proposed disclaimer or resiliation;
>
> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

[43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1st (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly

understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

[47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

[48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

[49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

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[2] *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à),* 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.

[3] *Timminco Limited* (Re), op.cit, at par. 52-27

[4] *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5th) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4th) (ONCA)

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7]. Section 19 C.C.A.A. introduced

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[5] *Century Services Inc. vs. Canada (Attorney General),* [2010] 3 S.C.R. 379
[6] Re *Hart Stores Inc*., 2012 QCCS 1094
[7] R.S.C. *c*. B.-3

in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which

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[8] *Pine Valley Mining Corporation (Re),* 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 O.N.S.C. 1746, para. 29-31, 33-35

[9] *Canwest Global Communications Corp. (Re),* op.cit.

[10] *Timminco Limited (Re*), op.cit., para. 44

[11] Section 8 C.C.A.A.

the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28th, except for 50 which were problematic and could not be completed until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28th, if N.G.A. needed to maintain the data in the system after April 28th, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28th but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set

forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28th.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30th day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

Montreal, November 20, 2012

MARK SCHRAGER, J.S.C.

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Monitor

Dates of Hearings: September 28, October 18, 19 and 30, 2012

COURT OF APPEAL FOR ONTARIO

CITATION: Bayford v. Boese, 2021 ONCA 442
DATE: 20210622
DOCKET: C67599

Doherty, Nordheimer and Harvison Young JJ.A.

BETWEEN

Brenda Bayford

Plaintiff (Respondent)

and

Brian Boese, Kaitlyn Boese, Alexander Boese,
Erin McTeer and Michelle McTeer

Defendants (Appellant)

Earl A. Cherniak, Q.C., Ian M. Hull and Doreen Lok Yin So, for the appellant

Taayo Simmonds, for the respondent

Heard: December 16, 2020 by video conference

On appeal from the judgment of Justice Sylvia Corthorn of the Superior Court of Justice, dated October 1, 2019.

Harvison Young J.A.:

[1] The appellant, Brian Boese, appeals from the trial judge's judgment declaring that his brother Bruce's will had been validly executed in accordance with s. 4(1) of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("SLRA"). The only issue on this appeal is whether the trial judge erred in finding that the respondent

Brenda Bayford had discharged her burden to prove the formal validity of the will, which she claimed to have found a number of weeks after his death in June 2015.

[2] For the reasons that follow, I conclude that the appeal must be allowed on the grounds that the trial judge fell into palpable and overriding error. Having carefully reviewed the record before us and the submissions of counsel, I am of the view that the trial judge misunderstood the appellant's position and, as a result, mistakenly considered the expert evidence to be irrelevant. This tainted her approach to the rest of the evidence.

(1) Factual background

[3] Bruce Boese was the owner of a farm. He never married and had no children. Brenda Bayford was a long-time friend of Bruce. She had assisted Bruce with the operation of the farm for the two decades before his death and described him as her best friend. Bruce executed a will in 1992, which named his parents as the sole beneficiaries of his estate. Because they had pre-deceased Bruce, Bruce's estate would pass on an intestacy to Brian (50%) and the two daughters of his deceased sister Rhonda (50%) in the absence of a subsequent valid will.

[4] In 2009, Bruce named Brenda as his attorney for property and personal care. In the summer of 2013, Ms. Fraser, the legal assistant of Bruce's long-time lawyer, Timothy Colbert, prepared a draft will. There was no allegation that the substantive terms of the will reflected anything other than the instructions given by

Bruce to Mr. Colbert. Ms. Fraser prepared the will based on instructions from Mr. Colbert, and it was sent to Bruce for review and comment. Bruce did not, however, attend at Mr. Colbert's office to revise and/or execute that document before he died. There is no dispute that the 2013 draft will named Brenda as the sole trustee of the estate nor that it left her the farm property.

[5] The 2013 will is dated August 15, 2013. The date is typed and appears on the third and final page of the document. It has the word "DRAFT" stamped on every page. Two copies were marked as exhibits at trial. One copy included only Bruce's signature with no witness signatures ("Version 1"). "Version 2" included Bruce's signature and those of the two witnesses, Ms. Gordon and Ms. Desarmia.

[6] The central factual issue at trial was whether, as Brenda claimed, Version 2 had been signed and witnessed before Bruce's death, or whether, as Brian claimed, the witnesses' signatures had only been added after Bruce's death and after Brenda discovered that Version 1 was not valid without the signatures of witnesses.

[7] After Bruce's death, Brenda searched for a will. She testified that she first found Version 1 of the 2013 will that had only Bruce's signature, but not those of the witnesses. She took it to Mr. Colbert's office the day after Bruce's death and testified that she was surprised to find that Mr. Colbert's office did not have a fully executed copy of the Will. On that occasion, Mr. Colbert's assistant, Ms. Fraser,

made a copy of the original of Version 1 and returned it to Brenda. Although there is no dispute that Ms. Fraser also advised Brenda on that occasion that, Version 1 was not valid without having been witnessed, other aspects of that conversation were disputed and will be discussed below.

[8] Brenda's evidence, accepted by the trial judge, was that a few weeks later, after having run into the one of the two witnesses who subsequently testified that they witnessed Bruce sign the will on August 15, 2013, she returned to Bruce's house and searched again. This time, she testified, she found Version 2, signed and witnessed, on top of a kitchen cupboard, and not in the filing cabinet where she had found Version 1.

[9] Brian's position at trial was that Brenda, with the cooperation of Ms. Desarmia and Ms. Gordon, created Version 2 after Bruce's death, and after she discovered that Version 1, though signed, was not valid. The fact that the original of Version 1 was never produced at trial supported this inference, as did the numerous inconsistencies in Brenda's evidence at trial, all of which the trial judge resolved in her favour. In particular, her explanations as to what happened to the original Version 1 were inconsistent and lacking in credibility.

[10] On appeal, Brian maintains his position that the reason that the original of Version 1 has never been produced is that this is the document that was "witnessed" at some point in the weeks following Bruce's death. His central

argument is that the trial judge misapprehended the content and significance of expert evidence which was that Bruce's signatures on Version 1 and Version 2 were copies of one another, and that this misapprehension tainted the rest of her findings. The handwriting expert was called to compare the signatures between Version 1 and Version 2. At trial, neither original version was available, and so the trial judge, and the handwriting expert, had to rely on the photocopies.

[11] Brenda has filed a motion for fresh evidence because the original of Version 2 has been found, having been produced by her former lawyers. As I will explain later in these reasons, I would not admit this fresh evidence as it is unlikely to be conclusive of the issues on appeal, and it is not necessary to deal with the issues fairly.

(2) The evidence

[12] Because a number of inconsistencies in the evidence form part of the context for the assessment of the expert opinion, it will be useful to set them out along with the trial judge's findings on those points.

(a) The whereabouts of the original of Version 1

[13] No original of either Version 1 or Version 2 was produced at trial. Brenda testified at trial that after she found Version 2, she visited a law firm and left the originals of both Version 1 and Version 2 with the lawyer she retained. Under cross-examination, however, she was taken to her examination for discovery where she

was asked what had become of the original of Version 1 and responded that she had misplaced it. When presented at trial with that response, she stated that she did not remember that series of questions, saying that “I know it went to the lawyer”, and “I may have said that, but everything went to my lawyer”.

[14] The trial judge found that the answer at trial was simply a correction of her answer at discovery. She went on to observe that “the existence of the original of Version 1 does not affect the validity of Version 2” (at para. 61). This raises the concern that the trial judge was not alive to the appellant’s position that the reason there was no original of Version 1 is that it had become Version 2. She also held, at para. 63, that “[i]t was not incumbent upon Ms. Bayford to produce the original of Version 1” but rather upon Brian as it was significant to his theory of the case.

(b) The evidence of Ms. Desarmia and Ms. Gordon

[15] Ms. Desarmia and Ms. Gordon, friends of Brenda who also knew Bruce, both testified that they had gone to Bruce’s farm on August 15, 2013 for different reasons. Ms. Desarmia went to help Brenda work on a Halloween display that Brenda was planning for her house, and Ms. Gordon went to get tomatoes for hamburgers she was planning to cook that evening for a family celebration.

[16] According to Ms. Desarmia, she saw Bruce at the farm, who expressed frustration about not being able to get his will done. Ms. Desarmia explained that he did not need to go to his lawyer’s office to get his will done, and she offered to

assist by witnessing his signature on the will. Ms. Gordon testified that Bruce asked her if she would do him the favour of witnessing his will. Both witnesses testified that they witnessed Bruce sign the will and then each signed the will in the kitchen.

[17] There were a number of discrepancies in the precise details of the two witnesses' signature, for example, who was standing and who was sitting, whether they all used the same pen, and the order of signatures. The trial judge found those all to have been "in keeping with the frailty of human memory" (at para. 80) and "in keeping with the nature of the event" (at para. 84) and accepted their evidence.

(c) The visit to the lawyer's office the day after Bruce's death

[18] Brenda testified that the day after Bruce died, she took Version 1, which had Bruce's signature in ink, to Mr. Colbert's office where she spoke to his assistant, Ms. Fraser. Brenda stated that she was taken aback to discover that the office did not have the fully executed version of the will. The trial judge found that Ms. Fraser made a photocopy of Version 1 and returned the original Version 1 to Brenda.

[19] Ms. Fraser testified at the trial. Although she testified that Brenda said, in response to Ms. Fraser's explanation that because the will was not witnessed, it was not valid, "I saw him sign it", Brenda denied having made that comment and the trial judge accepted Brenda's evidence on the point. She also accepted that Brenda was "taken aback" that there was no original fully executed version of the will in light of the fact that the version Brenda had was stamped "DRAFT".

(d) Finding Version 2

[20] Brian called Mr. Leonard Stavenow, the proprietor of an equipment rental store in the area. Brenda had gone into the store about two weeks after Bruce's death, and spoke to Mr. Stavenow about having lost her best friend. He testified that Brenda confided in him about the status of the will, and that she had said both "it was not signed" and that the "rough copy shows intent".

[21] At trial, Brenda stated that she did not recall telling Mr. Stavenow that the will was not signed. The trial judge noted that Brenda was taken to a transcript from her examination for discovery, where she had first said that she told Mr. Stavenow that the will was not signed and then had changed or corrected her answer to say that she told Mr. Stavenow that the will was not witnessed. The trial judge found no contradiction between Brenda's evidence at trial and her evidence on examination for discovery on this point. The trial judge also found that although Mr. Stavenow presented as a straightforward person and was a credible witness, the conversation had lasted only three to five minutes and concluded that he had misunderstood what Brenda said to him. She concluded that he was not reliable as to what Brenda had said about Version 1.

[22] Brenda testified that about three or more weeks after Bruce's death, she had a chance meeting with her friend Ms. Desarmia and told her that she could only find Version 1. This meeting occurred after Brenda attended at Mr. Stavenow's

store. Ms. Desarmia, in response, informed her that she had in fact witnessed Bruce's signing of the 2013 will. Brenda immediately returned to the farm and searched for an executed and witnessed will, which she ultimately found in an envelope on top of a cupboard in the kitchen (Version 2). Brenda testified that although she was not in the kitchen at the time that the will was executed on August 15, 2013, she was outside around the machine shed about 100 feet away. This raises the question as to why she would not have known at the time that Bruce had asked them to witness the will, particularly given Ms. Desarmia's evidence that she remained at the farm for a few hours after that to assist Brenda with the Halloween display.

[23] The trial judge accepted Brenda's evidence on all points where it contradicted with that of other witnesses. She also accepted her evidence about the circumstances and place of her discovery of Version 2 of the will.

(e) Ms. Lewis' expert evidence

[24] Against this backdrop, the evidence of the handwriting expert was important. Ms. Lewis was qualified to give expert evidence on the following 2 issues:

(i) Whether Version 1 and Version 2 were forgeries, based on a comparison with other documents that contain signatures that were known to be Bruce's; and

(ii) Whether Bruce's signature that appears in Version 1 and Version 2 are the same – with one signature being a copy of the other.

[25] As explained above, because no originals were available at trial, Ms. Lewis had only the two photocopies to compare. With respect to the first question, Ms. Lewis testified that she was unable to draw a conclusion as to whether Bruce was the person who signed the two versions. With respect to the second question, however, she testified that "those two questioned documents … had copies of the same signature." She explained that she had prepared a transparency chart of the two signatures from the two versions of the will and that she had positioned one signature on top of the other "to make it easy to look at them and see that the design is the same, the spacing is the same, the details are accurate."

[26] She explained that this was important because in forensic document examination, "one of the rules is that no one writes exactly the same way twice because handwriting doesn't really allow us to precisely reproduce a signature in every detail just because the active writing always includes a little bit of natural variation in the writing." She used the transparency overlay in this case because she wanted to show the two questioned signatures together because "they are the same signature, in my opinion." Using the transparency was useful because one could see that each signature fit accurately over the other. She concluded that "[t]he two signatures were copied from one signature. I should say they are one signature."

(3) The law

[27] Questions of fact are reviewable on a standard of palpable and overriding error, while questions of law are reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-10.

[28] A misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. Doherty J.A. noted, at p. 218, that most errors that constitute a misapprehension of evidence will not be regarded as involving a question of law. However, appellate intervention is warranted where the misapprehension of evidence is palpable and overriding, such that it is plain to see or obvious and goes to the very core of the outcome of the case: see *Waxman v. Waxman*, 2004 CanLII 39040 (Ont. C.A.), at paras. 296-97, leave to appeal refused, [2004] S.C.C.A. No. 291; *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, 151 O.R. (3d) 609, at para. 125, leave to appeal refused, [2020] S.C.C.A. No. 409.

[29] The onus of proving the formal validity of a will lies on the propounder of the will, in this case, the respondent Brenda: see *Vout v. Hay*, [1995] 2 S.C.R. 876, at p. 887.

[30] The requirements for the formal validity of a will are set out at s. 4(1) of the SLRA, as it was at the relevant time:

> (a) at its end [the will] is signed by the testator or by some other person in his or her presence and by his or her direction;
>
> (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
>
> (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

[31] The purpose of the statutory requirement of two or more witnesses is to prevent fraud by ensuring that there is probative evidence to support a conclusion that the testator wanted to give effect to the contents of their will by signing it in the presence of others. The testator's intent is thus irrelevant to the formal validity of a will.

(4) Analysis

[32] A review of the evidence of the handwriting expert, Ms. Lewis, along with the positions of the parties at trial as well as the other evidence and the trial judge's reasons, indicates that the trial judge's main error was misapprehending the import of the expert's evidence. This bore on the central issue of the case, which was whether Bruce signed the will in 2013 before two attesting witnesses who were present at the time and who signed as witnesses before him.

[33] First, the trial judge understated the content of Ms. Lewis' opinion. Ms. Lewis did not say merely that it was "completely likely" that Bruce's signature on Version

1 and Version 2 were copies of the same signature. She said, and demonstrated with the overlay of the two signatures, that they were copied from one signature. While Ms. Lewis stated that it is always preferable to have originals, these were "above average" copies and she was very satisfied that they were accurate.

[34] The most serious problem with the trial judge's reasons with respect to the expert's evidence, however, is that it is not at all clear that she appreciated its significance. The expert's evidence was that Bruce's signatures were the same signature or copies of each other and that no one signs the exact same way twice. In essence, this meant that Bruce could not have signed both Version 1 and Version 2 separately with original signatures. While the expert did acknowledge in cross-examination that tracing could explain this, she also stated that she did not include this possibility in her report because "the evidence I observed didn't lead me to believe it was a possibility".

[35] It was established in Brenda's and Ms. Fraser's evidence that the document Brenda brought to Mr. Colbert's office, Version 1, had an ink signature. It was similarly accepted by the trial judge that Brenda had brought the original Version 1 will to Mr. Colbert's office. One of the possible implications then, of the expert's evidence, was that Bruce's signature on Version 2 was a reproduced copy of Version 1. The original Version 1, which was unwitnessed when Brenda found it after Bruce's death, could also have been converted into Version 2 by having "witnesses" sign it directly.

[36] There is nothing in the trial judge's reasons to indicate that she understood that if the signature on Version 2 was a copy from or the same as the signature on the unwitnessed Version 1, and not simply another original signature that Bruce had signed on a separate occasion in the presence of the two witnesses, there would be significant reason to doubt the validity of the Version 2 will. Put simply, it is not clear that the trial judge understood that the expert's evidence supported an inference that the two witnesses signed Version 1 after Bruce's death. She specifically observed that it was "in any event, difficult to understand how Ms. Lewis' evidence is helpful to Brian." Her statement that Brian's description of Ms. Lewis' evidence as "clear and equivocal" was an "overstatement" is inaccurate. The bottom line of Ms. Lewis' evidence was, as I have set out, very clear. Apart from this comment, the trial judge did not indicate whether or not she was accepting any, all or none of Ms. Lewis' evidence.

[37] The trial judge's failure to expressly grapple with this evidence was a serious error in the circumstances of this case. Had she clearly understood the potential implications of Ms. Lewis' conclusion that the two signatures were copies of the same signature, she would most likely have approached the other evidence somewhat differently, including the missing Version 1 with Bruce's ink signature on it and the inconsistencies in Brenda's evidence regarding how she discovered Version 2 of the will.

[38] For instance, there is nothing to indicate that the trial judge understood the significance of the missing original Version 1 with Bruce's signature on it, particularly given the fact that, as the trial judge did note, Brenda gave inconsistent explanations as to what had happened to it. The trial judge stated twice that the existence of the original Version 1 does not affect the validity of Version 2. To the contrary, the significance and relevance was the possibility that the original Version 1 was the very version that Brenda had arranged to have the "witnesses" sign, or that the signature on Version 1 was copied to create Version 2 which was then signed by the two witnesses. The expert's evidence that the signatures were copies of each other supported these theories.

[39] In addition, had the trial judge understood the implications of the expert's evidence in light of Brian's theory of the case, she would likely have approached Brenda's evidence on how she discovered Version 2 differently. In accepting Brenda's evidence, the trial judge noted:

> The theory of Brian's case is that Ms. Bayford colluded, conspired, or connived with Ms. Desarmia and Ms. Gordon to create Version 2. I find that Ms. Bayford's conduct in the days and weeks following Bruce's death runs contrary to that theory. Ms. Bayford's conduct enhances the credibility of her evidence as to when and how she discovered the existence of Version 2:
>
> - Why would she, on the day following Bruce's death, attend at Mr. Colbert's office with Version 1 and acknowledge to Ms. Fraser that she did not have a fully-executed version of the 2013 Will?

- Why, approximately 12 days after speaking with Ms. Fraser, would Ms. Bayford acknowledge publicly (to Mr. Stavenow in front of others) that the 2013 Will was unsigned in some way?

[40] The trial judge's questions suggest that she misunderstood Brian's position and mistakenly considered the expert evidence to be irrelevant. First, the uncontradicted evidence that Brenda took Version 1 to Mr. Colbert's office the day after Bruce's death is entirely consistent with Brian's theory of the case that, at this point, there was no Version 2. It is also consistent with Ms. Fraser's evidence that Brenda said "I saw him sign it" when Ms. Fraser informed Brenda that, because it was not witnessed, Version 1 was not a valid will. This suggests that Brenda did not realize that the will needed to be witnessed by two witnesses to the testator's signing of the will. In other words, a plausible answer to the first question is that when Brenda took Version 1 into Mr. Colbert's office, she thought it was valid and was taken aback, not upon being told that the office did not have a fully executed copy of the will, but upon being told that Version 1 was not valid. The trial judge accepted Brenda's evidence on the point. Further, rather than ask why Brenda brought Version 1 to Mr. Colbert's office after Bruce's death, the expert's evidence should have caused the trial judge to ask how Brenda could attend the office with an original of Version 1, with a yet to be discovered original Version 2 existing contemporaneously in the farm's kitchen and containing an identical signature.

[41] Second, there is an obvious response on the evidence presented at trial to the second question posed by the trial judge with respect to Brenda's conversation with Mr. Stavenow. That response is that when she visited Mr. Stavenow's store, Brenda had not yet considered the possibility of creating Version 2 out of the signed Version 1. This explanation would be consistent with Brian's theory of the case and the expert's evidence that Bruce's signatures on both versions were the same or copies of each other. It would also be consistent with the events as found by the trial judge, which was that Brenda's visit to Mr. Stavenow's store preceded both her chance meeting with Ms. Desarmia and her discovery of Version 2 several weeks after Bruce's death. However, there is no indication that the trial judge appreciated this possibility, despite Brian's argument regarding Brenda's collusion to create Version 2 and the expert evidence.

[42] As I outlined earlier, there were a number of inconsistencies in Brenda's evidence. While a trial judge's findings of fact attract significant deference, and the bar for misapprehension of evidence is high, it is met in this case. Had she been alive to the essence of Brian's claim and the significance of Ms. Lewis' evidence, which she did not reject, the trial judge still might have resolved the inconsistencies as she did. But her dismissal of all of the inconsistencies in Brenda's favour in the absence of a full appreciation of the substance and significance of the expert's evidence went to the heart of this case and its outcome. The misapprehension of

the expert evidence was obvious and essential to her conclusion that Version 2 was valid and constitutes palpable and overriding error.

[43] The trial judge made a number of other, related errors. She stated correctly that intent is not relevant to the formal validity of a will, and she correctly indicated that the evidence of Bruce's intention was inadmissible. However, she included Brenda's evidence of Bruce's intention to change his will in her recitation of the facts and noted at the beginning of her analysis, at para. 32, that "Brian is not alleging that the 2013 Will reflects anything other than the instructions given by Bruce to Mr. Colbert with respect to the substantive terms of the will", which suggests that intent did play a part in her conclusion that Version 2 was valid.

[44] In addition, the trial judge erred in stating that it was up to Brian to produce the original of Version 1, stating that Ms. Lewis was working with only photocopies and that "Brian did not call any evidence to explain why Ms. Lewis was not given the opportunity to inspect the original documents": at para. 68. This comment is problematic for two reasons. First, it was Brenda who, as the propounder of the will, had the burden of proving its formal validity. Second, it was precisely the fact that she was unable to provide the original of Version 1 that gave rise to this issue of validity.

[45] In short, given the expert's evidence which the trial judge misinterpreted but did not reject, the trial judge erred in finding that Brenda had discharged her onus

of proving the formal validity of the will. As the signatures were “the same”, the absence of the original Version 1 was a serious problem which was not overcome by the other evidence, whose frailties were not addressed or arguably even appreciated by the trial judge in light of her misunderstanding of the expert’s opinion.

[46] For these reasons I am satisfied that Brenda did not meet her onus of establishing the formal validity of the will.

(5) The fresh evidence

[47] Brenda seeks to introduce the original Version 2 of the will as fresh evidence on this appeal. She submits that the tests for the admission of fresh evidence in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775 and *Sengmueller v. Sengmueller* (1994), 111 D.L.R. (4th) 19 (Ont. C.A.), at p. 23, are met because the original Version 2 was not available at trial and could not be adduced with the exercise of due diligence, and it is necessary to deal fairly with the heart of the issue on appeal, which is the authenticity of Version 2 of the will.

[48] I disagree. The evidence does not meet the test for the admission of fresh evidence. The existence of the original Version 2 of the will is not likely to be conclusive of whether Version 2 of the will is valid. This is because it does not explain what happened to the original Version 1. Given Brian’s position that Version 2 was created by using the original Version 1, which did have Bruce’s

original signature on it, and by having the two witnesses sign it, and the expert's evidence that Bruce's signatures in both versions are the same, the continuing absence of the original Version 1 (which Brenda claims exists somewhere) continues as a problem for Brenda. The validity of the original Version 2 of the will remains in question. This evidence is not necessary to deal fairly with the issues on appeal and declining to admit it would not result in a substantial injustice.

(6) Disposition and costs

[49] The appeal is allowed, the judgment below is set aside and the action is dismissed. The will dated August 15, 2013 is invalid. If the parties are unable to come to an agreement on costs, they may make written submissions not exceeding 5 pages, the appellant Brian within 10 days of the release of this decision and the respondent Brenda within 7 days after that.

Released: June 22, 2021 "D.D."

"A. Harvison Young J.A."
"I agree Doherty J.A."
"I agree I.V.B. Nordheimer J.A."

In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2021 ABCA 85

Date: 20210305
Docket: 2101-0011-AC
Registry: Calgary

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

- and -

In the Matter of the Compromise or Arrangement of Bellatrix Exploration Ltd.

Between:

BP Canada Energy Group ULC

Applicant

- and -

National Bank of Canada

Respondent

- and -

Bellatrix Exploration Ltd.

Respondent

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Permission to Appeal

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

I. Introduction

[1] The applicant, BP Canada Energy Group ULC, ("BPC") seeks leave to appeal to this Court from a decision of Romaine J whereby she rejected various submissions of BPC concerning the disposition of proceedings as to Bellatrix Exploration Ltd. ("Bellatrix") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"): 2020 ABQB 809, [2020] AJ No 1453 (QL) ("Reasons").

[2] BPC's application before me is governed by s 13 of the *CCAA* which reads as follows:

Leave to appeal	Permission d'en appeler
13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs	13 Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards

[3] The test for grant of leave to appeal under s 13 of the *CCAA* was encapsulated in ***Re: Blue Range Resource Corporation***, 1999 ABCA 255 at paras 2-5, 244 AR 103 as being a burden to show "serious and arguable grounds that are of real and significant interest to the parties" coupled with this Court's finding that "significance to the practice", "precedential value" and "whether the appeal will unduly hinder the progress of the action" are also factors which fit into the determination under the broad language of s 13 of the *CCAA*: see also ***Liberty Oil & Gas Ltd., Re***, 2003 ABCA 158 paras 15-16, 44 CBR (4th) 96.

[4] The *CCAA* is part of an integrated legislative scheme which includes the expeditious but just reorganization or winding down of companies which have fallen onto hard times. The role of the first instance judge is crucial: compare ***9354-9186 Quebec inc. c. Callidus Capital Corp***., 2020 SCC 10 paras 38-52, 67-68, 444 DLR (4th) 373. There, Wagner CJC wrote:

> 39 The CCAA is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), which covers insolvencies of both individuals and companies, and *the Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("WURA"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (WURA, s. 6(1)). While both the CCAA and the BIA enable reorganizations of insolvent companies, access to the CCAA is restricted to debtor companies facing total claims in excess of $5 million (CCAA, s. 3(1)).
>
> 40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "*The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law*", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law* 2016 (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate 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* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[5] By the terms of the common law criteria developed for the statutory test, leave to appeal is assessed in the round. As stated by Wagner CJC in ***Callidus Capital***, that corresponds to the role played by the first instance judges:

> 47 One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each CCAA proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.
>
> 48 The CCAA capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (Century Services, at para. 58) in "real-time" (para. 58, citing 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. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).
>
> 49 The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see Century Services, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69)."

[6] Within such a (necessarily) discretionary zone of judicial action, the grant of leave to appeal is not automatic howsoever imaginatively the supporting argument is formulated. Rather, leave seems inappropriate for matters of essentially academic interest even if the answer might be of some interest to the practice; *CCAA* proceedings are no place for the endless mullings of Lord Chancellor Eldon. Nor does it appear likely to be beneficial to anyone to grant leave to appeal from case-specific decisions where the applicable standard of review is likely to sweep aside any future appeal.

[7] Nor is leave to be granted merely because success by the applicant might be profitable *to the applicant* in reconfiguring the distribution of losses (often the hard reality of *CCAA* proceedings) and the applicant has an interesting point: compare and ***Cantore v Nemaska Lithium Inc***, 2020 QCCA 1333, [2020] QJ No 7849 (QL) under motion to SCC at [2020] SCCA No 436 (QL) and S***henker v Nemaska Lithium Inc***, 2020 QCCA 1488, [2020] QJ No 9974 (QL) under motion to SCC at [2021] SCCA No 9 (QL). In ***Shenker***, Marcotte JA addressed what was a novel but developing trend towards 'reverse vesting orders' which she said, at para 36, did "appear to qualify as being significant to the practice of insolvency". But she concluded that the arguments for Cantore were a "bargaining tool" and she was not persuaded that his motion was not "purely strategic". As to both Cantore and Shenker, she observed that:

> 42 This makes the leave to appeal a risky proposition that could turn into the potential "catastrophe" that the CCAA judge referred to in his reasons, one in which all stakeholders, including creditors, employees, suppliers, the Cree community and the local economies stand to lose. In such event, the rights being debated even if important may become theoretical.
>
> 43 As far as Shenker is concerned, while the issues that he proposes to raise with respect to overreaching third party releases are not devoid of merit, granting leave is likely to seriously prejudice creditors, with limited gains to be had on the part of shareholders whose rights remain entirely subordinated to those of the creditors. If

> the manner of constituting the releases makes them invalid or unopposable, then Shenker, and any other party with a claim against directors, may still have a recourse.

[8] In other words, the 'real world' context is something to consider and the criteria are not assessed in isolation from each other. On the other hand, a matter might be significant to the practice if there is an important matter of interpretation that genuinely and arguably arises in the context, especially if it is a matter that has been problematic or disputed within the practice for some time and needs clarification and such clarification can be provided promptly without damage to the ongoing *CCAA* proceedings and to the parties. That said, if the significance of the issue raised arises merely because an applicant has developed a creative interpretive theory as a flyer, the other circumstances of the matter would be engaged to justify a finding that the practice significance criterion was met.

[9] The line of cases on leave to appeal also point out that deference is owed to the impugned decision unless the judge "acted unreasonably, erred in principle, or made a manifest error" as set out by Strekaf JA in ***BMO Nesbitt Burns Inc. v. Bellatrix Exploration Ltd***, 2020 ABCA 264 at paras 7-8, 81 CBR (6th) 161:

> 7 The test for leave to appeal in CCAA proceedings requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering the following four factors (Liberty Oil & Gas Ltd., Re, 2003 ABCA 158 (Alta. C.A.) at paras 15-16):
>
> (1) Whether the point on appeal is of significance to the practice;
>
> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action.
>
> 8 "An appellate court should exercise its power sparingly, when asked to intervene in issues which arise in CCAA proceedings": *Blue Range Resource Corp., Re*, 1999 ABCA 255 (Alta. C.A.) at para 3. Decisions of a supervising chambers judge are accorded considerable deference and will be interfered with only if the judge acted unreasonably, erred in principle, or made a manifest error: *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178 (Alta. C.A.) at para 3. The applicant must point to an error on a question of law, or a palpable and overriding error in findings of fact or in the exercise of discretion: *Canadian Airlines Corp., Re*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) at paras 28-29.

In an analogical sense, one might therefore characterize this language about the test for leave as amounting to what Courts in the United States of America refer to as the "law of the case" respecting leave to appeal. The parties have accepted the criteria explained by Strekaf JA although they seem to construe their scope differently.

[10] On the subject of deference, there was a brief debate in the oral submissions before me as to whether Romaine J's decision might be entitled to some lower level of deference because the case management judge had been Jones J and thus, so the argument went, he had greater familiarity with the matter. (Jones J had expressly determined that he was not 'seized' with this matter.) Generally, though not inevitably, courts should resist *gradations* of deference because it tends to be an unwieldy element of analysis: compare ***Canada v Vavilov***, 2019 SCC 65 at paras 27-31. 441 DLR (4th) 1. In this case, I note that Romaine J has immense experience in matters of this kind: note paras 40 and 47 of ***Callidus Capital***, above.

[11] True, even experts can be wrong and there is equally no concept of 'hyper-deference' for text book authors: ***Wilson v DePuy International Ltd***, 2019 BCCA 440 at para 38, 31 BCLR (6th) 215, leave denied [2020] SCCA No 36 (QL) (SCC No 39044). Further still, extricable questions of law are reviewed for correctness regardless of expertise: compare (as to class action gatekeeping deference) ***AIC Limited v Fischer***, 2013 SCC 69 at para 65, [2013] 3 SCR 949. Moreover, here there were agreed facts. Nonetheless, where reasonableness is the review standard, Romaine J's expertise is a factor.

[12] Also applicable to this motion is s 14.5(1)(f) of the *Alberta Rules of Court*, AR 124/2010 as amended, which allows for appeals to the Court where permission to appeal is granted on "any decision where permission to appeal is required by an enactment". There is no material difference between "leave" to appeal and "permission" to appeal in this context. The word "permission" is a modern expression lately adopted in the *Alberta Rules* and in provincial legislation as the nomenclature for the gatekeeping functions to be performed by single judges of this Court.

II. Synopsis

[13] The following synopsis does not rehearse all the facts. Instead, I choose to focus on what I think to be the principal points.

[14] At the heart of the matter in this motion are BPC's contentions arising from the terms of a contract involving it and Bellatrix for the supply of natural gas (the "GasEDI Agreement"). The parties appear to have originally entered into this agreement as of March 1, 2010. There were two transaction confirmations as of December 12, 2017. There was a pricing formula based on posted index prices at specific or designated downstream pricing hubs in the US and Ontario, on a month to month basis.

[15] On October 2, 2019, Bellatrix was granted protection under the *CCAA*. As part of the *CCAA* proceedings, Bellatrix sought on November 25, 2019 to disclaim the GasEDI Agreement under s 32(1) of the *CCAA*. On November 26, 2019 Bellatrix stopped delivering gas to BPC. BPC and Bellatrix were unable to agree on a substitute arrangement after that. Section 32(1) which provides for "Disclaimer or resiliation of agreements" in the English language official version and for "Résiliation de contrats" in the French official language version.

[16] These official language versions are to be read such as to identify and apply their shared meaning: ***R v Mac***, 2002 SCC 24, [2002] 1 SCR 856; ***Schreiber v Canada (Attorney General)***, 2002 SCC 62 at paras 55-56, [2002] 3 SCR 269; ***R v Daoust***, 2004 SCC 6 at para 26, [2004] 1 SCR 217; ***Re: Canada 3000 Inc***., 2006 SCC 24 at para 49, [2006] 1 SCR 865; ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3 at para 203 per Cromwell J, [2012] 1 SCR 23; ***R v Quesnelle***, 2014 SCC 46 at paras 52-53, [2014] 2 SCR 390; ***R v M(TJ)***, 2021 SCC 6 at para 16, [2021] SCJ No 6 (QL).

[17] The shared meaning principle is applied to accord with s 16 of the *Constitution Act, 1982*, s 133 of the *Constitution Act, 1867*, and the *Official Languages Act*, RSC 1985, c 31. This principle is applicable to the interpretation of s 32 of the *CCAA*. The mainly relevant provisions of s 32 of the *CCAA* read as follows:

Disclaimer or resiliation of agreements	Résiliation de contrats
32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation	32 (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.
Court may prohibit disclaimer or resiliation	Contestation
(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the	(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal

monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.	d'ordonner que le contrat ne soit pas résilié.
[...]	[...]
Loss related to disclaimer or resiliation	Pertes découlant de la résiliation
(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.	(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.
[...]	[...]
Exceptions	Exceptions
(9) This section does not apply in respect of	(9) Le présent article ne s'applique pas aux contrats suivants :
(a) an eligible financial contract;	a) les contrats financiers admissibles;
(b) a collective agreement;	b) les conventions collectives;
(c) a financing agreement if the company is the borrower; or	c) les accords de financement au titre desquels la compagnie est l'emprunteur;
(d) a lease of real property or of an immovable if the company is the lessor	d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

[18] Reference to the French language official version is appropriate generally for federal legislation. But, in this case, such reference is particularly driven by the suggestion made by BPC in oral argument that the word "resiliate" included the concept of "breach" and that, accordingly, the operative effect of s 32(9) was to exclude the ability of an insolvent party to breach or repudiate an agreement in the nature of an "eligible financial contract" ("EFC") under that subsection of the *CCAA*. This argument was hinted at in BPC's Memorandum at para 10, referring to Bellatrix's position that "a company in CCAA is permitted to simply breach executory contracts with impunity even when they cannot be *disclaimed or resiliated* under the governing legislation". The hint there was that disclaimer and resiliation were significantly different phenomena. Nonetheless, this argument has no bottom. Nothing in the shared meaning of the provisions seems to connote that Parliament was referring in s 32(9) to anything other than the form of disclaimer exemption enacted by design for specific purposes.

[19] The main point for BPC was that on receipt of notice of the disclaimer in late 2019, BPC was entitled to reject it on the basis that the disclaimer was invalid under s 32(9)(a) of the *CCAA*. BPC took the position that the GasEDI Agreement was an EFC and s 32(1) therefore did not apply to it. As noted below, BPC carries forward from that position with a number of domino effects.

[20] BPC went on to contend that Bellatrix was therefore obliged to continue *to execute* on the GasEDI Agreement. BPC rejected the suggestion that Bellatrix could just desist, for lack of capacity, from carrying out the GasEDI Agreement outside s 32 of the *CCAA*, rendering BPC an unsecured creditor for whatever BPC could prove to be its claim. Along this line, BPC effectively suggested that Bellatrix had a continuing obligation to supply gas at the relevant price under the GasEDI Agreement. Further dominoes discussed below concern alleged further rights claimed by BPC in the *CCAA* process.

[21] Put one way, that delivery price was 'uncommercial' from Bellatrix's perspective. It appears that Bellatrix and the Monitor estimated a saving of approximately $14,500,000 for desisting the GasEDI Agreement and re-organizing Bellatrix's failing business activities. It was with that in mind that Bellatrix, with the Monitor's approval, issued the notice of disclaimer of the GasEDI Agreement. Using Bellatrix's estimate, BPC contended that its anticipated calculable *gain* from the continuation of the GasEDI Agreement would be calculable as being arguably the same amount as the Bellatrix Monitor anticipated to be the effective calculable *loss* to Bellatrix (and hence its creditors) arising from continuation of the GasEDI Agreement to its conclusion on its terms.

[22] Based on its interpretation of the GasEDI Agreement and of the meaning of an EFC under s 32(9)(a) of the *CCAA*, BPC applied for an order from Jones J to declare the GasEDI Agreement was an "eligible financial contract" such that it could not be disclaimed.

[23] Indeed, Jones J found that the GasEDI Agreement was an EFC under s 32 of the *CCAA* and, as a result, the type of statutory disclaimer provided for under s 32(1) was not applicable under the circumstances: see ***Re: Bellatrix Exploration Ltd***, 2020, 77 CBR (6th) 230, [2020] AJ No 329 (QL). Leave to appeal that decision to this Court was granted at 2020 ABCA 178. A panel of this Court heard that appeal and that judgment is presently on reserve.

[24] It is important to note that although BPC sought a decision from Jones J that the effect of the EFC finding was that Bellatrix was obliged to continue to execute under the GasEDI Agreement, Jones J specifically did *not* make such a ruling: see Reasons at para 15; Formal Order of Jones J reproduced at p 230 of BPC's Memorandum. Moreover, Jones J said he was "not seized with this matter" and BPC could apply "for such further advice or direction as may be required with respect to any remainder of relief" as sought by BPC. That appears to have been the doorway to the hearing before Romaine J.

[25] BPC further argued that the failure of Bellatrix to execute the terms of the GasEDI Agreement constituted a post-filing (ie after *CCAA* protection commenced) obligation of Bellatrix

and that BPC was therefore entitled to compensation out of funds that the Monitor acquired by the ultimate sale of all of the Bellatrix assets as part of the *CCAA* process to Spartan Delta Corporation as approved on May 8, 2020: see Reasons at paras 24-25.

[26] BPC contended, in effect, that – rather as if BPC was a creditor who agreed to advance to the debtor *after* CCAA protection has commenced in order to keep the debtor in operation and to enhance the value of the debtor's assets or perhaps even save the debtor – BPC was entitled to recovery of its profit from the GasEDI Agreement even in priority to secured creditors of Bellatrix, let alone the unsecured creditors of Bellatrix.

[27] It must be noted as well that as of the date of Romaine J's Reasons, BPC had paid into trust the sum of US$1,583,859.38 for what it owed Bellatrix before *CCAA* protection "subject to any valid rights of set-off": Reasons at para 12.

[28] BPC submitted that if it was not found to be a priority claim by the foregoing logic, the disclaimer provision of s 32(9)(a) of the *CCAA* would become meaningless. BPC contended that if *CCAA* debtors were allowed to breach EFCs at will, the result would be the same as if there were a court-approved disclaimer by the insolvent party. BPC said this would reduce the solvent counterparty BPC to a provable but unsecured claim unless otherwise provided under the contract. Put another way, BPC reasoned that the prohibition on disclaimer of EFCs under s 32(9)(a) of the *CCAA* would be nugatory in such situations, which would be the same as if the EFC were properly disclaimed.

[29] BPC raises the additional issue which concerns the money that BPC owed to Bellatrix for supplies of gas under the GasEDI Agreement prior to commencement of the *CCAA* protection. BPC argues, using similar reasoning to the above, that it, BPC, is entitled to set off this debt against the debt owed to BPC by Bellatrix under the GasEDI Agreement because it could not be disclaimed and it was a post-protection form of debt which continued to build up after *CCAA* protection commenced. Set off rights, says BPC, are preserved to creditors under s 21 of the *CCAA*:

Law of set-off or compensation to apply	Compensation
21 The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be	21 Les règles de compensation s'appliquent à toutes les réclamations produites contre la compagnie débitrice et à toutes les actions intentées par elle en vue du recouvrement de ses créances, comme si elle était demanderesse ou défenderesse, selon le cas

[30] Set-off rights are also pointed to in relation to solvent counterparties to an EFC under s 34(8) of the *CCAA*. It provides:

Permitted actions	Opérations permises
(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:	(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat:
(a) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and	a) la compensation des obligations entre la compagnie et les autres parties au contrat;
(b) any dealing with financial collateral including	b) toute opération à l'égard de la garantie financière afférente, notamment:
(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and	(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,
(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral	(ii) la compensation, ou l'affectation de son produit ou de sa valeur

[31] In the end, the crucial points for BPC turn largely on BPC's interpretation of s 32 of the *CCAA* and what BPC says are its special contractual rights as against Bellatrix and its special priority status respecting assets of Bellatrix derived from those special rights. Without entirely conceding the point, BPC was in a position of acknowledging that if this Court decided the GasEDI Agreement was not an EFC on the other appeal, the threshold for this motion would disappear. Counsel for Bellatrix suggested that were that to happen, BPC just lapses into an unsecured creditor status for whatever claim BPC could prove, and set-off said to arise from the alleged increasing debt to BPC would not apply. At this stage it is appropriate to further elaborate on the positions of the parties respecting these issues.

III. Grounds of the Motion

[32] At para 22 of its Memorandum under the title "The point on appeal is of significance to the practice", BPC argued that there were two "discrete questions of law" as follows:

> (a) is a CCAA debtor obligated to perform executory contracts that cannot be lawfully disclaimed or resiliated?
>
> (b) does the CCAA's express preservation of rights of set-off permit the solvent party to an undisclaimed executory contract to avail itself of contractual and other set-off rights.

[33] Further under the same title, at paras 23 and 24 of its Memorandum, BPC said that it was agreeing with Bellatrix that there was not yet sufficient judicial guidance as to what constitutes an EFC. That issue is in reserve before the other panel and thus cannot be addressed by me. BPC goes on to say under this title that "in the absence of strict compliance with the statutory requirements for a valid disclaimer, the relevant executory contract will remain 'in full force and effect'," citing ***Re: League Assets Corp***, 2016 BCSC 2262 at para 61, 42 CBR (6th) 217. In the Analysis part of my reasons I do not find ***League Assets Corp*** to be authority for the proposition asserted.

[34] In sum, this part of BPC's argument is whether "a company in *CCAA* may simply breach its undisclaimed *executory contracts*". As so expressed in the italicized part, that proposed ground of appeal is much more general than the specific issue whether a debtor company can disclaim an EFC.

[35] Next, under the title "The point on appeal is significant to the proceeding", BPC accepts that Bellatrix's assets have been liquidated. BPC asserts, at para 26 of its Memorandum, that it "stands to gain approximately $14.5 million from funds currently held by the Monitor" whereas the Agent of the Lienholders argues those moneys should go to the Lienholders.

[36] Next, under the title "The Appeal is *prima facie* meritorious", BPC again argues at para 27 that the issue is "whether in law a party (having obtained this Court's protection under the *CCAA*) is required to perform obligations *under executory contracts* that cannot be lawfully disclaimed under section 32 of the *CCAA*, and whether a party to an industry-standard agreement can rely on contractually protected rights of set-off." To repeat, the first part of this argument is considerably larger than the point whether the exception to disclaimer under s 32(9)(a) of the *CCAA* applies. The second part as to "*contractually protected* rights of set-off" is also noteworthy in how the argument further unfolds in the BPC Memorandum.

[37] Further under this title as to *prima facie* merit, BPC seems to revive some of the content of the six grounds (paras 14(a) to (f)) set out in its Application for Permission to Appeal. At para 29 of its written submission, BPC seems to elaborate from the two grounds set out in para 32 above, and seems to expand to four grounds as follows:

> 29 Moreover, the issues raised by BP on this appeal are *prima facie* meritorious. The Chambers Judge, in her decision, made at least four *manifest* errors of law, in that she:
>
> (a) gave effect to an interpretation of the disclaimer provisions of the CCAA in which the power of companies to disclaim executory contracts is not only unlimited, but entirely unnecessary as any contract not capable of being disclaimed may simply be breached (rendering the restrictions on disclaimer of EFCs meaningless);
>
> (b) incorrectly classified the BP claim as a pre-filing unsecured claim, notwithstanding that the disputed Notice of Disclaimer and concurrent Bellatrix breach occurred after the filing date (suggesting CCAA s. 32(7) can somehow apply to an undisclaimed contract, or an EFC);
>
> (c) misinterpreted the plain terms of the GasEDI Agreement, which gave BP a right of setoff and the ability to withhold the December Payment and apply those funds to the damages resulting from the Bellatrix breaches (a right expressly preserved under the CCAA); and
>
> (d) concluded BP was not entitled to legal set-off, without considering the test for legal setoff at all.

[38] As to the reading of s 32, BPC's Memorandum essentially argues that the effect of the Romaine J's Reasons is that "the entirety of s. 32 of the *CCAA* is unnecessary" (Memorandum at para 35) and, more specifically, that it renders s 32(9) a "practical nullity" (Memorandum at para 32), renders s 32(7) a "true nullity" (Memorandum at para 33), and that s 32(4) "fares no better" (Memorandum at para 34).

[39] I will address these points in the Analysis part of these reasons below. First, I turn to Romaine J's reasons.

IV. Reasons of Romaine J

[40] There was an agreed statement of facts before Romaine J. Once again, I elect to focus only on specific elements of the case as were set out in her Reasons.

[41] Romaine J noted the practical situation as to the sale to Spartan and the assumption by Spartan of "all of Bellatrix's liabilities in respect of its wells, environmental obligations, pre-filing cure costs in respect of assumed contracts and certain other assumed labilities": Reasons at para 25. Romaine J described the situation of the First Lien Lenders and said:

> 27 On May 22, 2020, the Court granted a Stay Extension and Distribution Order authorizing Bellatrix to distribute $47.5 million, a portion of the net proceeds from the Spartan sale, to the Agent of the First Lien Lenders in partial satisfaction of their secured claim. Bellatrix held back certain funds from distribution, including funds for disputed claims such as the BP claim.
>
> 28 Bellatrix remains indebted to the First Lien Lenders in excess of $44.5 million. Bellatrix may not be able to pay the secured claim of the First Lien lenders in full given the results of the sale process. In the circumstances, a claims process has not been initiated in these CCAA proceedings.
>
> 29 The First Lien Lenders seek a declaration that they have a first priority interest in all the property of Bellatrix, including funds held back in relation to the BP claim, a declaration that amounts owing to BP, if any, are an unsecured claim, and an order directing the Monitor to make a further distribution to the Agent in the amount of approximately $28.9 million. Bellatrix supports this position and submits that the Agent for the First Lien Holders is entitled to distribution of the sale proceeds and the December payment of approximately $1.6 million held in trust by the Monitor in priority to BP.
>
> 30 In a cross application, BP seeks judgement for damages in an amount equivalent to US$14.2 million, an order lifting the stay in the CCAA proceedings to permit BP to enforce the judgement, and an order directing the Monitor to pay BP the approximately US$1.6 million December payment from the held-back funds, an order directing Bellatrix to pay the remainder of the claimed damages out of the sale of proceeds of its assets, or, in the alternate, granting BP a charge over the property of Bellatrix in the amount of the claimed damages with priority over the secured creditors and pari passu with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP."

[42] Romaine J also addressed the circumstances respecting the seeming decision of BPC not to seek any remedy compelling Bellatrix to perform the GasEDI Agreement during the period leading up to the sale of the assets of Bellatrix to Spartan, and that BPC, instead, chose to build up and pursue a claim for damages "with priority over the secured creditors and *pari passu* with the Interim Lenders Charge, or in the further alternative, an order declaring that any funds held by the Monitor and Bellatrix up to the amount of the claimed damages are held in trust for BP": Reasons at paras 15-30. BPC seems to take exception to this aspect of her analysis, but it seems relevant to me and not incorrect.

[43] By way of interpreting the protection offered to a non-defaulting counterparty to an EFC under s 32(9)(a) of the *CCAA*, Romaine J referred, at para 37, to the Insolvency Institute of Canada *Report of the Task Force on Derivatives* dated September 26, 2013, which explained that the two

main purposes of this EFC exception were "(i) to protect non-defaulting counterparties from the risk of increasing exposure to the insolvent counterparty under the EFC and (ii) to reduce systemic risk in Canadian and global financial markets".

[44] Assuming, *arguendo*, that the "law of the case" at this point is that which was determined by Jones J -- namely that the GasEDI Agreement was an EFC -- the analysis of Romaine J remains. Romaine J was fully aware of the position argued for BPC that to allow Bellatrix to repudiate or breach the GasEDI Agreement outside of s 32 of the *CCAA* would defeat the purpose of s 32(9)(a) of the *CCAA*. She noted that under s 32(4) of the *CCAA*, the judge was to consider a number of factors in deciding whether or not to permit the disclaimer. She rejected BPC's position thus:

> 41 BP submits that, unless it is granted the relief it seeks, the practical effect of Bellatrix's conduct would be to render the disclaimer rules of the CCAA meaningless. It notes that a valid disclaimer under section 32(7) of the CCAA results in a "provable claim", unsecured unless otherwise provided for in the disclaimed contract. However, if CCAA debtors are allowed to breach executory contracts at will, the result is identical: the solvent party has a provable claim, unsecured unless otherwise provided for under the contract. BP submits that, if that is true, section 32(7) of the CCAA is without a purpose, as there is no practical difference between contracts that can and cannot be lawfully disclaimed. Either way, if the debtor chooses to breach the contract, the solvent counterparty is left with the same remedy -- which in many cases, is no remedy at all.
>
> 42 Therefore, BP submits that the "clear implication" of the statutory disclaimer provisions of the CCAA is that a company is required to perform its obligations under executory contracts as of the filing date, unless and until those contracts can be validly disclaimed under section 32.
>
> 43 As noted previously, the exception from EFCs included in the disclaimer provisions of the Act do not expressly provide that an EFC must be performed. Such a mandatory requirement would thwart the objectives of the CCAA, since compelling a CCAA debtor to performs an EFC that it cannot afford to perform would in many cases affect its ability to attempt to restructure.
>
> 44 The disclaimer provisions, while initiated by the debtor, provide the solvent party to a disclaimable contract an opportunity to object to the disclaimer and a process for doing so. Section 32(4) of the Act sets out factors that the court must consider in deciding the issue.
>
> 45 While the solvent party to a contract that the debtor merely stops performing may not have available to it the same statutory process, it may apply to the court for an order compelling performance as BP initially purported to do. The court supervising the CCAA proceedings in its consideration of such an application

> would likely take into account factors similar to those set out in section 32(4), including whether compelling performance would interfere with the prospect of a viable arrangement, and whether refusing such an order would cause significant financial hardship to a party to the contract.
>
> 46 While the considerations may be similar, a disclaimer proceeding is initiated by the debtor, provides for a statutory process and mandates a termination date for the disclaimer. As noted by Morawetz, J. in Re Target Canada Co, 2015 CarswellOnt 3274, the disclaimer is beneficial to creditors generally because it enables the debtor to move forward with a liquidation plan without further delay. In contrast, the unilateral non-performance of a contract gives rise to uncertainty for both the debtor and the counterparty as to the status of the contract, including whether or not the solvent counterparty at its election will accept the termination of the contract as repudiated, and the date of its termination.
>
> 47 The disclaimer provisions are thus not rendered meaningless by the existence of a less formal option, but provide an opportunity for orderly termination and certainty to the parties to the disclaimed contract. Implying an obligation to perform an uneconomic contract that may affect the ability of the CCAA debtor to attempt to restructure would require more direct statutory language.

[45] Romaine J went on to determine that, also assuming the GasEDI Agreement was an EFC, BPC had not terminated the GasEDI Agreement and was not seeking a set off in order to "reduce exposure to risk". It appears that she read s 34(8) of the *CCAA* as providing for permissible actions by EFC *creditors* as exceptions to the limitations arising under s 34(1) of the CCAA. BPC's position is that s 34(8)(a) is not pertinent to this situation but s 21 of the *CCAA* is. I am not persuaded that BPC is correct on this if BPC is right that the GasEDI Agreement was an EFC. Parliament chose to enact set-off terms for EFCs. At some stage a first instance judge facing a set-off argument would presumably address the section.

[46] On the other hand, BPC explains its set-off position in these terms:

> 39 BP was thus entitled to assert a right of set-off in respect of the December Payment, a right which was confirmed by the GasEDI Agreement, which provided for the payment of stipulated damages to a non-defaulting party, the right to suspend payments owing to the defaulting party, and the right to apply those withheld funds to the amount owing by the defaulting party in each subsequent period of default. At the time of the December Payment, the default of Bellatrix had been ongoing for at least 30 days; under the GasEDI Agreement, the default of Bellatrix resulted in a liquidated claim for monetary damages, due and owing at the time of the December Payment, which BP had the right to set off against any amount otherwise owing.

[47] In my view, BPC's position on this pre-supposes that the GasEDI Agreement could not be disclaimed because it is the alleged continuation of Bellatrix's obligations to BPC that gives rise to a claim by BPC to set off against the existing claim of Bellatrix for gas supplied prior to *CCAA* protection. In other words, as I note in paras 29-31 of my reasons above, BPC's claim of set-off arising after the beginning of the *CCAA* protection is also contingent on the finding that the GasEDI Agreement was an EFC. It is also contingent on proof of damages to BPC arising from the failure of Bellatrix to continue to deliver gas. Despite that, BPC argues that set-off is still available to it on "legal" grounds to recover the roughly $1,600,000 in trust.

[48] Returning to Romaine J's decision, it cannot be said that she was entirely oblivious to the concepts related in s 21 of the *CCAA* even if she did not directly mention the section by number. BPC argues that she failed to consider "legal" set off in addition to "contractual" set-off. In light of her discussion of equitable set-off at paras 55 to 63 of her Reasons, I am not persuaded that she missed the point. I return to the subject of set-off later in the Analysis.

[49] Romaine J went on to discuss other arguments before her as to lifting the *CCAA* stay and to what was said to be unjust enrichment of Bellatrix, wrongful conduct and bad faith of Bellatrix. None of these points were argued before me so I say nothing about them except as to one aspect. I have difficulty discerning what sort of bad faith would be said to arise merely because an insolvent debtor corporation seeks the protection of the *CCAA* when unable to pay out all its creditors in full. It eludes me what difference it makes from the perspective of bad faith that the contract that the debtor is unable to complete happens to be an executory contract. The parties opposing BPC contend that these assertions by BPC are essentially tendentious, and in service of the ultimate theory of resolving a priority dispute in favor of BPC.

[50] Nor do I find fingerprints of bad faith in the record of these proceedings. In quite a different context, the Supreme Court of Canada in ***Wastech Services Ltd v*** G***reater Vancouver Sewerage and Drainage District,*** 2021 SCC 7, [2021] SCJ No 7 (QL) recently identified some markers of bad faith in execution of a contract. To the extent those markers might be transferable to the present context of disclaiming a contract I do not see any of those markers here.

V. Analysis

[51] As do the parties, I will follow the criteria developed under s 13 of the CCAA, albeit not in the traditional order. To set the stage for this, I would draw again from ***Callidus Capital*** dealing further with the purposes of the *CCAA* at paras 41-46, notably as to what are called "liquidating *CCAA*s":

> 41 Among these objectives, the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (Century Services, at para. 70). As a result, the typical CCAA case has historically involved

an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state -- that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the BIA regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the CCAA is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Ac*t, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd*., 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, CCAA proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the CCAA landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "*Liquidating CCAAs: Discretion Gone Awry?*", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 CCAA courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the CCAA being a "restructuring statute" (see, e.*g.*, *Uti Energy Corp. v. Fracmaster Ltd*., 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11

C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "*The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada*" (2014), 56 Can. Bus. L.J. 73, at pp. 88-92).

45 However, since s. 36 of the CCAA came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.3 Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the CCAA, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the CCAA in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the CCAA take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the BIA context. In *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the BIA serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the CCAA leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge."

Those comments resonate here, at least for me.

Arguable Merit

[52] It is appropriate to deal firstly with arguable merit under s 13 of the *CCAA*. To begin with, I reject the interstitial submission for BPC that there was an error on the part of Romaine J in concluding that the claim of BPC was a claim that arose after CCAA protection came into effect.

[53] As Paperny JA said in ***Repsol Canada Energy Partnership v Delphi Energy Corp***, 2020 ABCA 364 at paras 18-20, 2020 CarswellAlta 1855:

> 18 As was noted by Romaine J at para 25 of *SemCanada*, a "claim" for the purpose of the CCAA includes any "indebtedness, liability or obligation that would be provable under the Bankruptcy and Insolvency Act, RSC 1985, c B-3". Section 121(1) of the BIA defines "provable claims" as "all debts and liabilities, present and future, to which the bankrupt is subject … or to which the bankrupt may become subject... by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt..."; s 121(2) of the BIA makes clear that this includes contingent or unliquidated claims: *SemCanada* at paras 25-26.
>
> 19 The Supreme Court of Canada has confirmed that a claim may be provable in bankruptcy even if it is a contingent claim: see *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.) at para 28; *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 (S.C.C.) at para 36. "A 'contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'"": *Orphan Well Association*, citing *Peters v. Remington*, 2004 ABCA 5 (Alta. C.A.) at para 23.
>
> 20 More recently, the Quebec Court of Appeal commented that "post-debts are only those incurred after and also resulting from an obligation originating after Determination", and that "an obligation can be contingent, unliquidated, or not exigible as at the day of Determination, but existing and able to give rise to a claim if a court decision 'deems it provable'": *Arrangement relatif à Métaux Kitco inc*., 2017 QCCA 268 (C.A. Que.) at para 77-78 [unofficial English translation].

[54] Patently, BPC has been arguing that its claims arise from the operation of the GasEDI Agreement. It seems to me that Paperny JA's reasoning in ***Repsol*** is impeccable on this point: compare also ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***., 2021 ABCA 16 at para 87, [2021] AJ No 84 (QL).

[55] National Bank also makes a further argument that post-*CCAA* protection debts may still have no effect on priority: compare ***Arrangement relatif à Gestion Éric Savard inc***, 2019 QCCA 1434 at paras 19-21, 2019 CarswellQue 7641. There is something to be said for that argument but I can leave the resolution of that point for another day. The element of the BPC submission that

their claim is a post-*CCAA* protection claim, whether analogous to a post-protection lender or otherwise, is not arguable under the applicable leave test.

[56] Even if there were some sort of notional accumulating indebtedness such as might arise from interest on a pre-*CCAA* protection indebtedness, that would not, *ipso jure*, be the same thing as the priming charges as to which a *CCAA* judge might grant advance priority: compare ***Canada v Canada North Group***, reserved (December 1, 2020) [2019] SCCA No 366 (QL) (SCC No 38871) from 2019 ABCA 314, 437 DLR (4th) 122.

[57] Next, I see no merit in the additional imbricated point for BPC that either the GasEDI Agreement or s 32 of the CCAA creates some sort of security instrument. I do not find substance in the challenge to Romaine J's interpretation that the GasEDI Agreement did not contain a security instrument to enforce delivery of gas. She gave her reading of the GasEDI Agreement in this respect mention at paras 5 and 98 of her Reasons: "The GasEDI Agreement does not provide BP with a security interest in respect of Bellatrix's obligations under the contract." I cannot see any vulnerability in that conclusion in light of the record.

[58] BPC suggests that correctness applies to the interpretation of the GasEDI Agreement on the basis it is a standard form agreement: see eg ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co***., 2016 SCC 37 at paras 4, 21-24, [2016] 2 SCR 23. There is certainly something to be said for this view, but largely because contractual interpretation of standard terms should have a steadiness upon which an edifice of commerce can safely sit. As Lord Steyn wrote in ***Jindal Iron and Steel Co Ltd & Ors v. Islamic Solidarity Shipping Company Jordan Inc*** [2004] UKHL 49 at para 16, [2005] 1 All ER 175, referring to an observation of Lord Mansfield made in 1774:

> In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.

To be precise, Lord Steyn's homage to the great Mansfield was in part to uphold the idea of *stare decisis*, which itself should not be an artificial obstacle to societal evolution. But the wider point of predictability remains.

[59] Contractual interpretation law does not add strength to BPC's argument. Architectures of law have been established as to security interests in various statutes, both federal and provincial, and with considerable precision as to what constitutes a security interest and what is relevant to assessing priorities as between securities. It strikes me that BPC's position would undermine predictability as it amounts to an argument that a creditor might acquire, *mirabile dictu*, a security interest surpassing all others arising from its reading of s 32 of the *CCAA* and the content of the GasEDI Agreement. This approach would make a judicial interpretation a contributor to

inconsistency, an undesirable thing: see ***Ledcor*** at para 39; see also the concurring reasons of Brown J in ***Wastech*** at paras 117-122.

[60] More specifically to this case, I consider it noteworthy that Bellatrix suggests that there were other EFC creditors of Bellatrix, and that they had elected to provide for specific security remedies in their cases. Bellatrix said it would be at least ironic if BPC ended up with a better level of security than their EFC creditors who acted on their securities and accepted disclaimers from Bellatrix. Needless to say, as noted for the National Bank, other creditors had also chosen to establish security rights from the outset. The submissions of BPC about s 32(9)(a) having established a security interest for BPC is unsupportable on this record.

[61] As noted above, BPC's submissions as to s 32(9) of the *CCAA* go past whether the disclaimer by Bellatrix was ineffective under the section due to the GasEDI Agreement being an EFC. BPC would have me grant leave to argue to a panel of this Court that the ineligibility of Bellatrix and its Monitor to make an effective disclaimer under the *CCAA* means that Bellatrix was obliged to *continue to be bound* by the terms of the GasEDI Agreement. On this premise, even if Bellatrix was in no position to deliver gas under the GasEDI Agreement, the gain or profit that BPC would have acquired by Bellatrix continuing to deliver under the GasEDI Agreement would notionally continue to grow and to grow in a form of a constructive trust over the assets of Bellatrix collected by the Monitor.

[62] BPC cites no authority for this extraordinary (and multifaceted) proposition which is fundamentally based on legal fictions. The case of ***Re: League Assets Corp*** cited by BPC is quite distinguishable and does not go anywhere near that far.

[63] Section 32 of the *CCAA* should be read in light of the objectives, context, intent and policies of Parliament (which objectives, context, intent and policies are described in ***Callidus Capital***): see ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21, saying that the "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see also ***Canada Trustco Mortgage Co. v Canada***, 2005 SCC 54 para 10, [2005] 2 SCR 601, cited in ***Callidus Capital*** at para 60 and in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 at para 88, [2019] 1 SCR 150.

[64] Section 32 should also be read consistently with the applicable canons of interpretation, including that the provision is part of a larger scheme across several pieces of legislation, and accordingly it should be read in harmony with the scheme and not so as to render any other parts of the scheme ineffective. This canon of interpretation also dates back to Lord Mansfield in ***R v Loxdale*** (1758) 1 Burr 445 at p 447 where he said:

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and explanatory of each other.

This was lately cited by the UKSC in ***T W Logistics Ltd v Essex County Council and another***, [2021] UKSC 4 at para 75; see likewise ***Food and Drug Administration et al. v. Brown & Williamson Tobacco Corp. et al***., 529 U.S. 120 (2000) where O'Connor J pointed to the need to see a statutory system as "as a symmetrical and coherent regulatory scheme".

[65] Similarly, Antonin Scalia and Bryan Garner wrote in *Reading Law: The Interpretation of Legal Texts* (2012) at p. 180:

> The imperative of harmony among provisions is more categorical than most canons of construction because it is invariably true that intelligent drafters do not contradict themselves ... Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously".

See also ***Geophysical Service Inc v EnCana Corporation***, 2017 ABCA 125 at para 38, [2017] 9 WWR 55, leave denied [2017] SCCA No 260 (QL) (SCC No 37634).

[66] Rather than serving the objectives of the *CCAA*, BPC's thesis would undermine the operation of the statute. A court should not look with eagle eyes for technicalities that would frustrate key parts of legislation: see eg ***Rollingson Racing Stable Ltd v Horse Racing Alberta***, 2020 ABCA 419 at para 30, [2020] AJ No 1272 (QL), under motion to SCC [2021] SCCA No 21 (QL) (SCC No 39546). A party in the position of BPC would virtually possess a veto over the liquidation of the company including a position tantamount to an ability to refuse to consent to its sale except on terms satisfactory to that party. In my view, BPC's interpretation would create an absurdity such as was rejected in ***Keatley Surveying Ltd v Teranet Inc***, 2019 SCC 43 at para 96, 437 DLR (4th) 567 where Côté and Brown JJ wrote, citing ***Rizzo*** at para 27, that "the legislature does not intend to produce absurd consequences", and "that an interpretation is "absurd" if it "defeat[s] the purpose of a statute or render[s] some aspect of it pointless or futile."

[67] BPC paints a tenebrous portrait of the future of s 32(9)(a) of the *CCAA* if the reading of Romaine J is affirmed. I agree with her that the BPC concern is over-stated. The proposed ground of appeal that Romaine J erred in her interpretation of s 32 of the *CCAA* is not arguable in this case. The motion for grant of leave in this case stumbles at the first hurdle.

[68] As to the further ground of appeal related to set-off, this argument hinges on the interpretation of s 32 in my view. In my view, the GasEDI Agreement ceased to be operative after the *CCAA* protection came into effect. The debt of BPC to Bellatrix existed before that happened. No gradual accumulation of 'claims' by BPC by its notional theory of continuation of the GasEDI Agreement occurred and no such thing can cancel any of that debt out.

[69] The set-off argument has other problems.

[70] To begin with, I agree with National Bank that the record did not provide Romaine J with evidence of moneys owing to BPC by Bellatrix at the time of the December payment due in respect

of which it could exercise any contractual or equitable right of set-off. As exemplified by the decision of ***Re: Androscoggin Energy LLC*** (2005), 8 CBR (5th) 1 (Ont SCJ), the right to set-off must be grounded in the specific agreement or the rules of equity. The fact that the *CCAA* recognizes the application of the law of set-off does not mean it enacts an entitlement to set-off unmoored to the legal foundation for such.

[71] Apart from the rationalization by BPC of what it said to be its increasing claim against Bellatrix based on a mark to market price differential – at paras 39-40 of the its Memorandum – Romaine J does not appear to have been provided with an *evidential* case for damages to BPC that could be set off against the money BPC paid into trust.

[72] Romaine J did not err, as urged by BPC, in concluding that if the GasEDI Agreement was an EFC then the relevant provision as to set-off was s 34(8) of the *CCAA*. As a result of the language in s 34(8) of the CCAA, it would fall to BPC to show a liquidated claim – compare ***Citibank Canada v Confederation Life Insurance*** (1996), 42 CBR (3d) 288 at para 37.

[73] Similarly, the terms of s 34(8) of the *CCAA* would require termination of the EFC. Parliament is taken to know the common law. That would include the disallowance of simultaneous approbation and reprobation of the same contract. Nor, in my respectful opinion did Romaine J err in her analysis as to equitable set-off.

[74] Moreover, the invocation by BPC of the dollar figure which was estimated by the Monitor as an actuating factor in the disclaimer is not proof of a *gain* in fact by Bellatrix let alone a *loss* in the corresponding amount by BPC. Assuming that BPC might have a calculable loss of profit arising from the premature demise of the GasEDI Agreement, BPC would still have to make out the quantification of such a claim. And it would do so as an unsecured creditor.

[75] Furthermore, the argument that the residue of moneys held by the Monitor after the disposition of Bellatrix's assets and liabilities would contain any moneys arising from the cessation of the GasEDI Agreement is largely speculative. It does not rise to a question of law alone for the purposes of leave to appeal. For another thing, the sale of the Bellatrix assets to Spartan was unquestionably the result of negotiations, and the alleged 'gain' by Bellatrix of what it saved from backing out of the GasEDI Agreement may not even exist. Leave to appeal should not be granted to explore legal issues in an evidential void. This proposed ground of appeal also fails at the first stage.

Significance to the Action / Parties

[76] On balance, the delay caused as to the distribution of what's left of the Bellatrix moneys including, potentially, to employees of Bellatrix (as explained by counsel for Bellatrix) makes the outcome of greater significance to them than the doomed claim and set-off claim of BPC. Even assuming the secured creditors get all the remainder, their claims are established.

Significance to the Practice / Hinder the Action

[77] As noted at the outset, a material legal question of significance to the practice can arise in cases with otherwise relatively modest ramifications for the parties and where the point is one of those thorny issues which tends to be evasive of review. That is not this case. The grounds proposed are novel because they lack merit. That factor favors dismissal of the motion.

[78] As already mentioned, the resolution of Bellatrix's assets has occurred, but the distribution of what is left has not. There are eligible claimants waiting on the distribution. Counsel for Bellatrix spoke movingly about the wish of Bellatrix not to have disappointed so many people. Asking them to wait further as the corpus of the funds is gradually reduced by costs and economic factors is still a hindering of the process. That factor also favors dismissal of the motion.

VI. Conclusion

[79] The motion by BPC for leave to appeal is dismissed.

Application heard on February 17, 2021

Reasons filed at Calgary, Alberta
this 5th day of March, 2021

Watson J.A.

Appearances:

H.A. Gorman, Q.C./G. Benediktsson
for the Applicant

K.J. Bourassa/J.W. Reid
for the Respondent National Bank of Canada

R.J. Chadwick/C. Descours
for the Respondent Bellatrix Exploration Ltd.

J.G.A Kruger, Q.C.
for PricewaterhouseCoopers Inc. in its capacity as the Court appointed Monitor of Bellatrix Exploration Ltd.

In the Court of Appeal of Alberta

Citation: Bellatrix Exploration Ltd v BP Canada Energy Group ULC, 2020 ABCA 178

Date: 20200501
Docket: 2001-0039-AC
Registry: Calgary

Between:

Bellatrix Exploration Ltd.

Applicant
(Appellant)

- and -

BP Canada Energy Group ULC

Respondent
(Respondent)

- and -

Borden Ladner Gervais LLP

Interested Party
(Monitor)

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Jo'Anne Strekaf

Introduction

[1] The applicant is an oil and gas corporation that has recently filed for protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*). As part of the *CCAA* proceedings, the applicant sought to disclaim a contract between it and the respondent for the supply of natural gas. The respondent objected to the disclaimer and obtained an order from a judge in the *CCAA* proceedings declaring the contract to be an "eligible financial contract" and statutorily exempt from disclaimer (Decision): *Bellatrix Exploration Ltd, Re*, 2020 CarswellAlta 350, [2020] AJ No 329. The applicant seeks leave to appeal the Decision pursuant to s 13 of the *CCAA*.

[2] Leave is granted for the reasons that follow.

Background

[3] The applicant owns and operates oil and natural gas reserves mainly in west central Alberta. The applicant entered into a long-term arrangement to supply the respondent with natural gas through a series of agreements (collectively referred to as the Contract). At the time of the Contract, the market price of natural gas in Alberta was depressed by an overabundance of supply. The respondent owned pipelines which would allow natural gas to be transported to markets outside Alberta where the natural gas could be sold for a higher price.

[4] The Contract provided that the applicant would deliver natural gas to the respondent in Alberta priced at a formula expressed as the average of the California (Malin), Midwest Chicago Citygate and Dawn, Ontario natural gas spot prices less a fixed transportation fee until October 31, 2020.

[5] Due to the economic downturn, the applicant filed for protection under the *CCAA* on October 2, 2019. Section 32 of the *CCAA* allows corporations undergoing a restructuring to disclaim certain ongoing contractual obligations.

[6] After reviewing the applicant's financial affairs, the court appointed monitor approved the disclaimer of the Contract because the price differential between the Alberta price for gas and the price in the other markets narrowed and it became financially beneficial to sell the natural gas inside Alberta rather than to pay the transportation fee to access other markets. The applicant believes it can realize an additional $14.2 million by disclaiming the Contract and delivering its gas to other purchasers in Alberta rather than to the respondent at the Contract price. On November 25, 2019, the applicant notified the respondent that it had disclaimed the Contract pursuant to s 32

of the *CCAA*. Such disclaimer takes effect 30 days after notice is given, or such later date fixed by the court (s 32(5)).

[7] The respondent applied to the court in the *CCAA* proceedings for an order declaring that the Contract is an "eligible financial contract", which cannot be disclaimed pursuant to s 32(9)(a) of the *CCAA*. The *CCAA* judge concluded that the Contract qualified as an eligible financial contract for purposes of the *CCAA*, and granted the respondent's application.

[8] The applicant ceased delivering gas to the respondent on November 25, 2019 when the disclaimer notice was issued to avoid the respondent exercising rights of set-off, and did not resume delivering gas to the respondent after the Decision was rendered on February 4, 2020.

[9] The applicant seeks leave to appeal the Decision pursuant to s 13 of the *CCAA*.

Relevant Legislation

[10] "Eligible financial contract" is a defined term under the *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)*, SOR/2007-257, s 2 (the *Regulation*):

> 2. The following kinds of **financial agreements** are prescribed for the purpose of the definition eligible financial contract in subsection 2(1) of the *Companies' Creditors Arrangement Act*:
>
> (a) **a derivatives agreement, whether settled by payment or delivery, that**
>
> (i) trades on a futures or options exchange or board, or other regulated market, or
>
> (ii) **is the subject of recurrent dealings** in the derivatives markets or **in the over-the-counter** securities or **commodities markets**;
>
> (b) an agreement to
>
> (i) borrow or lend securities or commodities, including an agreement to transfer securities or commodities under which the borrower may repay the loan with other securities or commodities, cash or cash equivalents,
>
> (ii) clear or settle securities, futures, options or derivatives transactions, or
>
> (iii) act as a depository for securities;

(c) a repurchase, reverse repurchase or buy-sellback agreement with respect to securities or commodities;

(d) a margin loan in so far as it is in respect of a securities account or futures account maintained by a financial intermediary;

(e) any combination of agreements referred to in any of paragraphs (a) to (d);

(f) a master agreement in so far as it is in respect of an agreement referred to in any of paragraphs (a) to (e);

(g) a master agreement in so far as it is in respect of a master agreement referred to in paragraph (f);

(h) a guarantee of, or an indemnity or reimbursement obligation with respect to, the liabilities under an agreement referred to in any of paragraphs (a) to (g); and

(i) an agreement relating to financial collateral, including any form of security or security interest in collateral and a title transfer credit support agreement, with respect to an agreement referred to in any of paragraphs (a) to (h).

(emphasis added)

[11] "Derivatives agreements" are also defined in s 1 of the *Regulation*:

derivatives agreement means a financial agreement whose obligations are derived from, referenced to, or based on, one or more underlying reference items such as interest rates, indices, currencies, commodities, securities or other ownership interests, credit or guarantee obligations, debt securities, climatic variables, bandwidth, freight rates, emission rights, real property indices and inflation or other macroeconomic data and includes

(a) a contract for differences or a swap, including a total return swap, price return swap, default swap or basis swap;

(b) a futures agreement;

(c) a cap, collar, floor or spread;

(d) an option; and

(e) a spot or forward. (contrat dérivé)

The Decision sought to be appealed

[12] The *CCAA* judge concluded that the Contract was not subject to disclaimer because it qualified as an eligible financial contract under s 2(a)(ii) of the *Regulation*. Specifically, the Contract satisfied the requirement that it be: (1) a financial agreement; 2) a derivatives agreement; and 3) subject to recurrent dealings in the over-the-counter commodities market.

[13] The *CCAA* judge considered various portions of the documents comprising the Contract. While not determinative, the Contract explicitly stated it was intended to be exempt from *CCAA* proceedings as an eligible financial contract. The Contract allowed for prompt set-off or netting based on a determined liquidation amount. Section 34(8) of the *CCAA* expressly permits eligible financial contracts to net or set-off compensation of obligations, and the *CCAA* judge stated that the "ability to set-off or net under a contract is one indicia pointing to (eligible financial contract) status", citing *Blue Range Resource Corp, Re*, 2000 ABCA 239. The *CCAA* judge held there was no need for a contract to contain a fixed price for it to qualify as an eligible financial contract, as was the case in *Calpine Canada Energy Ltd, Re*, 2006 ABQB 153, albeit under the previous wording of the legislation.

[14] The *CCAA* judge concluded the Contract is:

1. a "financial agreement because it serves an important financial purpose" as it enabled the applicant "to achieve price diversification" (paras 127-140);

2. a "derivatives agreement" because it was "a tool which assists in managing financial risk," and there was no requirement for it to involve a "fixed price" (paras 141-160);

3. "the subject of recurrent dealings in the … over-the-counter … commodities market" because "(t)hough not without some doubt …derivatives agreements can be (eligible financial contracts) if the underlying commodity is the subject of recurrent dealings" (para 170).

Grounds for Leave

[15] The applicant seeks leave to appeal the *CCAA* judge's decision pursuant to s 13 of the *CCAA* on two grounds: (1) the *CCAA* judge erred in his interpretation of the term "financial agreement" and in finding the Contract to be a "derivatives agreement"; and (2) the *CCAA* judge erred in his interpretation of the requirement that the Contract be subject to "recurrent dealings in the over-the-counter commodities market" to qualify as an "eligible financial contract".

Test for Leave

[16] The test for leave to appeal in *CCAA* proceedings requires "serious and arguable grounds that are of real and significant interest to the parties", which can be assessed by considering the following four factors (*Liberty Oil & Gas Ltd (Re)*, 2003 ABCA 158 at paras 15-16):

> (1) Whether the point on appeal is of significance to the practice;
> (2) Whether the point raised is of significance to the action itself;
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
> (4) Whether the appeal will unduly hinder the progress of the action.

[17] "An appellate court should exercise its power sparingly, when asked to intervene in *CCAA* proceedings": *Duke Energy Marketing Limited Partnership v Blue Range Resource Corporation*, 1999 ABCA 255 at para 3 (*Blue Range 1999*).

Positions of the parties

[18] The applicant submits that the grounds raised involve questions of law, reviewable on a correctness standard. It argues that the *CCAA* judge misinterpreted the definition of "derivatives agreement" by failing to give appropriate weight to the requirement that it be a "financial agreement". There was no consideration of whether the Contract served an "important financial purpose" for the respondent. He further erred in holding that the definition of "derivatives agreement" applied to contracts that do not stipulate a fixed price, and in not finding that the solvent party entered into other transactions to meet the requirement that there be "recurrent dealings".

[19] The respondent submits that the proposed grounds of appeal involve findings of mixed fact and law that are entitled to deference on appeal. In any event, the *CCAA* judge correctly interpreted the *Regulations*.

Analysis

1) Significance to the practice

[20] The proposed grounds of appeal raise questions about the requirements for contracts to qualify as eligible financial contracts that are exempt from disclaimer under the *CCAA*. At issue is the interpretation and application of the phrases "financial agreement", "derivatives agreement" and "the subject of recurrent dealings in the over-the-counter commodities market".

[21] All of this language was introduced in 2007 when the *CCAA* was amended and the *Regulations* passed. There has been no appellate consideration of these provisions since that time.

The previous appellate decisions that considered the meaning of "eligible financial contract" did so in the context of prior legislation, which contained different language and referred to "forward commodity contracts": see *Blue Range Resource Corp (Re)*, 2000 ABCA 239*; Re Androscoggin Energy LLC* (2005), 195 OAC 51. The *Calpine* decision that was considered by the *CCAA* judge also predated the 2007 amendments.

[22] Unresolved issues of statutory interpretation are relevant when considering this factor: *Re Kerr Interior Systems Ltd*, 2008 ABCA 291 at para 9; *Blue Range 1999* at para 5.

[23] The disclaimer of contracts can have a significant impact on *CCAA* proceedings and is a significant issue in insolvency practice generally. I note that an identical definition of "eligible financial contracts" appears in the *Bankruptcy and Insolvency Act* and the *Winding-Up and Restructuring Act*, as well as the *CCAA*.

[24] The lack of appellate authority on the interpretation of the provisions introduced in 2007 that identify when contracts may be exempt from disclaimer in *CCAA* proceedings supports granting leave.

2) Significance to the action

[25] This factor involves consideration of whether the appeal is significant both to the parties raising the issue and to the *CCAA* proceedings as a whole: *Gauntlet Energy Corporation (Re)*, 2004 ABCA 20, 49 C.B.R. (4th) 225 at para 11.

[26] The value or cost of the disclaimer, depending upon which party's perspective this is viewed from, is estimated at $14.5 million. This represents approximately 10% of the applicant's annualized revenue. Disclaiming the Contract would reduce the applicant's projected annualized loss by 50%. This could affect the options for compromise or arrangement that are available in the *CCAA* proceeding.

[27] The determination of whether the Contract is an eligible financial contract that can be disclaimed is, accordingly, significant to the *CCAA* proceedings.

3) Merits of the appeal

[28] The applicant must demonstrate that the appeal is sufficiently meritorious "to justify delaying the ultimate disposition of the issue under review": *Mudrick Capital Management LP v Lightstream Resources Ltd.*, 2016 ABCA 401 at para 51. The standard is not onerous; the appeal must be arguable and not frivolous.

[29] I am satisfied that the applicant has met this threshold.

4) Will the appeal unduly hinder progress of the action?

[30] This aspect of the test involves consideration of whether "the delay involved in prosecuting, hearing and deciding the appeal will be of such length so as to unduly impede the ultimate resolution of the matter by a vote or court sanction", as described in *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149 at para 41. The court went on to state at para 42:

> [42] This element has at its root the purpose of the *CCAA*; the role of the supervising judge; the need for a timely and orderly resolution of the matter; and the effect on the interests of all parties pending a decision on appeal. The comments of McFarlane, J.A. in ***Re Pacific National Lease Holding Corp.*** (1992) 1992 CanLII 427 (BC CA), 15 C.B.R. (3d) 265 (B.C.C.A.) are particularly apt where he stated as follows at p.272:
>
> > Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this Court on discreet questions of law. But I am of the view that this Court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial Court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
> >
> > A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory or proceedings for which he has no further responsibility.
> >
> > Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an

> important consideration in deciding whether leave ought to be granted.

[31] In this proceeding, it is the applicant that is seeking leave to appeal. The applicant indicated that an appeal would not delay the proceedings or the ongoing investment and transaction solicitation process. No party to the *CCAA* proceedings is expressing concern about the impact of an appeal other than the respondent, whose focus, not surprisingly, relates to its interests rather than the impact on the *CCAA* proceedings more generally.

[32] I am satisfied that granting leave to appeal will not unduly hinder the *CCAA* process.

Leave Determination

[33] Having considered all of the factors collectively, I am satisfied that it is appropriate for leave to appeal to be granted.

Security

[34] Leave to appeal a decision made under the *CCAA* may be granted "on such terms as to security and in other respects as the judge or court directs" (*CCAA*, s 13).

[35] The respondent requested that if leave was granted the applicant should be required to post security of its "mark-to-market damages" plus costs, or that the applicant be required to "perform" the Contract pending the appeal.

[36] The applicant opposed security being posted because it lacks the cash. It submitted that the respondent would be protected as no monies would be distributed or assets transferred without the supervision of the court. The applicant characterized the respondent's request for security as an attempt to modify the priorities that would otherwise apply.

[37] Both the applicant and the monitor submitted that the court below, which is managing the *CCAA* proceedings, is in a better position to address how the respondent's position and that of the other parties to the *CCAA* proceedings can best be protected pending appeal.

[38] An appeal does not operate as an automatic stay. Although no stay of the Decision has been sought, the applicant has not performed under the Contract since the disclaimer notice was given, and did not resume performance after the Decision was issued. The implications of an applicant, post-*CCAA* filing, failing to perform a contract that a court has held cannot be disclaimed (and which finding could be upheld on appeal) are beyond the scope of this leave application.

[39] While protection of the interests of the respondent (who succeeded below and is the respondent on the appeal) may be appropriate pending the appeal, the evidentiary record before me is not sufficient to address how this could best be accomplished. There are many complexities,

such as set-off and cash-flow considerations, priorities issues, and the interests of other creditors, that are better considered in the *CCAA* proceedings. That is the appropriate venue to address how the interests of the respondent and other parties in the proceeding can appropriately be protected pending the appeal. This matter is directed to be determined by the *CCAA* judge who granted the Decision or otherwise in the *CCAA* proceedings below.

Conclusion

[40] The applicant is granted leave to appeal the Decision.

[41] The parties are directed to contact the case management officer forthwith to arrange for the hearing of the appeal to be heard on an expedited basis and to schedule deadlines.

[42] The determination of how the interests of the respondent and other parties to the *CCAA* proceedings can best be protected pending the hearing of the appeal is to be determined by the *CCAA* judge who granted the Decision or otherwise in the *CCAA* proceedings below.

Application heard on April 22, 2020

Reasons filed at Calgary, Alberta
this 1st day of May, 2020

Strekaf J.A.

Appearances:

J. Rosenthal
R.J. Chadwick
C. Fox
for the Applicant (via Webex)

H.A. Gorman, Q.C.
G. Benediktsson
for the Respondent (via Webex)

J. Kruger
for the Interested Party (Monitor) (via Webex)

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^o^ 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.

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.

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.

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*.

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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.

[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] 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).

[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] 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.

[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] 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

[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*.

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] 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.

[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. Issues

2. Questions en litige

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

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

(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*?

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

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

(3) 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*:

[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* :

> 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]

> [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]

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,

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 procédèrent 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.

[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] 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.

[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] 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

[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:

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.

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 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.

(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] 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:

[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) . . . [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.

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] 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

[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.

[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]

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] 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.

(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.

Appeal allowed with costs, ABELLA J. *dissenting.*

Pourvoi accueilli avec dépens, la juge ABELLA *est dissidente.*

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Procureurs de l'appelante : Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Procureur de l'intimé : Procureur général du Canada, Vancouver.

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings v Third Eye Capital Corp, PricewaterhouseCoopers, 2021 ABCA 33

Date: 20210129
Docket: 2001-0241AC
Registry: Calgary

Between:

DGDP-BC Holdings Ltd.

Applicant

- and -

Third Eye Capital Corporation

Respondent

- and -

PricewaterhouseCoopers Inc.

Respondent

And Between:

Third Eye Capital Corporation

Applicant

- and -

DGDP-BC Holdings Ltd.

Respondent

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

Application for Permission to Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 04th day of December, 2020
Filed on the 04th day of December, 2020
(Docket: 2001-06776)

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

I. Introduction

[1] DGDP-BC Holdings Ltd. seeks leave under section 193(e) of the *Bankruptcy and Insolvency Act*[1] to appeal paragraph 4 of a sale approval and vesting order pronounced on December 4, 2020 that extinguished the applicant's security interest in the assets, property and undertakings of Accel Energy Canada Limited, an insolvent corporation.[2]

[2] In the event that this Court grants DGDP leave to appeal under section 193(3) of the *Bankruptcy and Insolvency Act*, Third Eye Capital Corporation seeks an order under section 195

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

[2] This is a brief background overview. Accel Energy Canada Limited and Accel Canada Holdings Limited are private Canadian companies engaged in oil and natural gas production and development. On October 21, 2019 the two companies were insolvent and filed notices of intention to make proposals to their creditors under the *Bankruptcy and Insolvency Act*. On November 27, 2019 the *Bankruptcy and Insolvency Act* proceedings were continued under the *Companies' Creditors Arrangement Act*. The Court of Queen's Bench appointed PricewaterhouseCoopers Inc. as the monitor of Accel Energy and Accel Canada Holdings. On November 27, 2019 the Court of Queen's Bench granted an amended and restated initial order. A term of this order allowed Accel Energy and Accel Canada Holdings to enter into debtor-in possession financing and to continue to operate during the *Companies' Creditors Arrangement Act* proceedings. Third Eye Capital Corporation was the administrative and collateral agent under the court-approved debtor-in possession financing term sheet. A court-ordered priority charge secured the interim lenders' charge. On December 13, 2019 the Court of Queen's Bench authorized Accel Energy and Accel Canada Holdings to conduct a sales and solicitation process. On May 29, 2020 the Court of Queen's Bench approved Third Eye Capital's bid for substantially all the assets of Accel Energy and Accel Canada Holdings. During the *Companies' Creditors Arrangement Act* proceedings, Accel Energy borrowed $14,126,159.33 and Accel Canada Holdings borrowed $21,885,840.67 under the debtor-in-possession loan. On June 10, 2020 DGDP acquired an interest in the debtor-in-possession loan. On June 12, 2020 the Court of Queen's Bench appointed PricewaterhouseCoopers as the receiver over all the assets, properties and undertakings of Accel Energy and Accel Canada Holdings. The receiver needed to borrow more funds to continue the operation of Accel Energy and Accel Canada Holdings. DGDP declined an invitation to participate in this loan. Third Eye Capital agreed to provide the additional funds and requested a receiver's borrowings charge to secure its funding, ranking in priority to other charges, including the interim lenders' charge. Over the objection of DGDP, the Court granted the order Third Eye Capital requested. DGDP sought leave to appeal the order that granted priority to the receiver's borrowing charge over the interim lenders' charge. On December 2, 2020 Justice McDonald granted leave to appeal. 2020 ABCA 442. On October 30, 2020 Third Eye Capital informed the Court of Queen's Bench that Third Eye Capital and the receiver would close the Third Eye Capital en bloc bid in two stages. The first sale would be the assets of Accel Energy. The assets of Accel Canada Holdings would be sold in the second stage. On December 4, 2020 the Court of Queen's Bench approved the purchase and sale agreement relating to the assets of Accel Energy between the purchaser Conifer Energy Inc. and the receiver. DGDP objected on the basis that the interim lenders' charge should remain on the Accel Energy assets until the amount Accel Canada Holdings borrowed was repaid in full. On December 14, 2020 DGDP applied for leave to appeal paragraph 4 of the December 4, 2020 order.

of the *Bankruptcy and Insolvency Act*[3] vacating the stay of proceedings associated with a successful leave to appeal application. DGDP takes no position on this application.

II. Questions Presented

A. Leave To Appeal Application

[3] Should this Court grant the DGDP leave to appeal?

[4] To answer this general question, more specific questions must be posed.[4]

[5] Is the question the applicant seeks permission to appeal of significance to those who practice at the insolvency bar?

[6] Is the question of significance to the parties to the appeal?

[7] There is a merit-based component to the test. It makes no sense to grant an applicant permission to appeal if the likelihood of success is extremely low or hopeless. But is the standard more onerous? Must the prospects of success exceed fifty percent? If this is too high a standard, what is the appropriate standard?

[8] Will the appeal unduly hinder the progress of the insolvency proceedings?

B. Stay Application

[9] Should this Court exercise its authority under section 195 of the *Bankruptcy and Insolvency Act* and cancel the stay of proceedings created by section 195?[5]

[10] Has Third Eye Capital demonstrated that there is a serious issue to be tried?

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[3] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 195 ("Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper").

[4] See *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48, ¶ 41; 57 C.B.R. 6th 272 (chambers) & *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd.*, 1997 ABCA 273, ¶ 12; 206 A.R. 295, 299 (chambers). See also *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401, ¶¶ 48-63; 43 C.B.R. 6th 175, 201-09 (chambers).

[5] See *Harper v. Canada*, 2000 SCC 57, ¶ 4; [2000] 2 S.C.R. 764, 768; *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, 334; *Quebec v. 143471 Canada Inc.*, [1994] 2 S.C.R. 339, 376 & *Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 128-29.

[11] Will it suffer irreparable harm if a stay is not granted?

[12] Will the harm Third Eye Capital suffers, if a stay is not granted, exceed the harm DGDP will suffer if a stay is granted?

III. Brief Answers

A. Leave To Appeal Is Granted

[13] I grant DGDP leave to appeal against paragraph 4 of the December 4, 2020 order.

1. The Question Is of Significance to the Insolvency Bar

[14] In its memorandum of argument DGDP identified the question it wished to present to the Court of Appeal this way:[6]

> The question of whether an interim lender, with a standard, Court-ordered, super-priority Interim Lenders' Charge and Court-ordered status as an unaffected creditor in any CCAA plan of arrangement or compromise, can have those protections and "certainties" stripped from it when the CCAA proceeding is converted into a receivership proceeding, and, if so, under what conditions … .

[15] This question must be of significance to the insolvency practice. Interim lenders advance funds relying on the protection prescribed by the super-priority interim lenders' charge. In doing so, they are not unlike the professionals and directors who derive a benefit from the provisions in the initial order under the *Companies' Creditors Arrangement Act*[7] proceedings.

[16] Those who rely on protection provided in the "Validity and Priority of Charges" parts of an initial order must know if their reliance is misplaced.

[17] Mr. Aversa, co-counsel for DGDP, argued that "[n]o lender would risk participating in such a loan if the Court-ordered priority was subject to variation later in the process".[8] This strikes me as a sound observation. The form of security a lender has is a vital consideration when assessing the merits of a loan. Justice Brown, as he then was, forcefully reinforced this proposition in *Re First Leaside Wealth Management Inc.*:[9]

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[6] Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., ¶ 17.

[7] R.S.C. 1985, c. C-36, s. 9.

[8] Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., ¶ 14.

[9] 2012 ONSC 1299, ¶ 51.

> [A]bsent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges.

2. The Question Is of Significance to The Parties

[18] Christopher Morris, DGDP's president, expressed the opinion in his November 30, 2020 affidavit, that DGDP's position would be "significantly" prejudiced if the only collateral for its outstanding loan was the assets of Accel Canada Holdings.[10] He relies on two telephone conversations with the chief executive officer of Third Eye Capital[11] to the effect that "TEC intended to offer only equity to the Interim Lenders in satisfaction of the obligations TEC allocated to ... [Accel Canada Holdings Limited] under the DIP facility".[12]

[19] I note that others have expressed the opinion that DGDP will be paid in full.

[20] Taking everything into account, I am satisfied that paragraph 4 of the contested order may adversely affect the interests of DGDP. As such, the question is of significance to DGDP.

3. The Proposed Appeal Passes the Merit-Based Component of the Test

[21] The parties could not agree on the level of scrutiny required in the merit-based component of the test.

[22] Ms. Cameron, counsel for PricewaterhouseCoopers Inc., argued that the leave-to-appeal applicant must convince the adjudicator-gatekeeper that its appeal was more likely to succeed than fail.

[23] I do not agree.

[24] The merit-based component of the test requires the applicant to satisfy the adjudicator-gatekeeper that its appeal is not frivolous. In a comparable context, I opined that "[a] position is

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[10] Affidavit of Christopher Morris sworn November 30, 2020, ¶ 3.

[11] Id. ¶¶ 48 & 59.

[12] Id. ¶ 59.

frivolous if … the likelihood it will succeed is extremely low. It makes no sense to ask an appeal court to hear appeals that are frivolous".[13]

[25] The more onerous standard that Ms. Cameron favored places unrealistic demands on the adjudicator-gatekeeper. Asking an adjudicator-gatekeeper to decide if the applicant's appeal is more likely to succeed than fail without the assistance of facta and full oral argument in a compressed time period is unreasonable.[14]

[26] In my opinion, the DGDP's prospects of succeeding on appeal meet the low merit-based standard I have adopted.

4. The Proposed Appeal Will Not Unduly Hinder the Insolvency Proceedings

[27] The fourth component of the leave-to-appeal test focuses on the effect granting leave to appeal will have on the insolvency process. Will an appeal unduly hinder the progress of the insolvency proceedings?

[28] It will not.

[29] The applicant has not asked PricewaterhouseCoopers Inc., in its capacity as the Court-appointed receiver and manager of Accel Canada Holdings and Accel Energy, to refrain from closing the transaction involving the sale of substantially all the assets of Accel Energy to Conifer Energy Inc.[15] In addition, the applicant takes no position on the application by Third Eye Capital to lift the stay of proceedings, in effect, as a result of section 195 of the *Bankruptcy and Insolvency Act*.

[30] Ms. Cameron informed me that PricewaterhouseCoopers and Conifer Energy Inc. will close the Accel Energy-Conifer Energy Inc. transaction if I grant DGDB's application for permission to appeal and Third Eye Capital's stay application.[16]

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[13] *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401, ¶ 51; 43 C.B.R. 6th 175, 202-03 (chambers).

[14] I have adopted the onerous standard in bail-pending appeal applications. In that context counsel are usually in a position to provide sufficient argument that the adjudicator is comfortable assessing the merits of an appeal using a more demanding measure. *The Queen v. Fuhr*, 2017 ABCA 266, ¶ 49; 58 Alta. L.R. 6th 1, 19-20, (chambers). This position is consistent with the principles that the English Court of Appeal, the High Court of Australia, and the American federal law apply in bail-pending-appeal applications.

[15] Affidavit of Damian Lu sworn January 25, 2021, ¶ 3.

[16] See Affidavit of Rhonda Lastockin sworn January 24, 2021, exhibit E (January 21, 2021 letter from Borden Ladner Gervais LLP to Aird & Berlis LLP) ("Should either i) DGDP's application for leave be dismissed, or ii) its application for leave be granted, but the Court of Appeal grants TEC/Conifer's application to lift the automatic stay of

[31] The argument that an appeal will distract PricewaterhouseCoopers and impair its ability as the Court-appointed receiver is of minimal force.

[32] I am satisfied that the proposed appeal will not unduly hinder the insolvency proceedings.

B. The Stay Is Vacated

[33] Third Eye Capital has met the stay standard and I cancel the stay of proceedings in effect as a result of section 195 of the *Bankruptcy and Insolvency Act*. As a result, the Accel Energy-Conifer Energy Inc. transaction can close on February 1, 2021 as planned.

[34] This Court will hear an appeal involving these parties on May 3, 2021.[17] If possible, this appeal should be heard at the same time.

[35] Counsel's written and oral submission were excellent and I thank them for their very able assistance. They did a lot of work in a very short time.

Applications heard on January 27, 2021

Reasons filed at Calgary, Alberta
this 29th day of January, 2021

Wakeling J.A.

proceedings, we confirm that the Receiver is ready, willing and able to close the Energy Transaction on February 1, 2021. We also understand that Conifer is ready to close the Energy Transaction at that time").

[17] *DGDB-BC Holdings Ltd. v. Third Eye Capital Corp.*, 2020 ABCA 442.

Appearances:

Terry Czechowskyj, Q.C.
Counsel for the Applicant

Ian Aversa & Sam Babe
Co-Counsel for the Applicant

Chris Simard
Counsel for the Respondent, Third Eye Capital Corporation

Jessica Cameron
Counsel for the Respondent, PricewaterhouseCoopers Inc.

COURT OF APPEAL FOR ONTARIO

CITATION: Ernst & Young Inc. v. Aquino, 2022 ONCA 202
DATE: 20220310
DOCKET: C69263, C69264, C69278, C69305, C69306, C69318 & C69321

Lauwers, Coroza and Sossin JJ.A.

DOCKET: C69263

BETWEEN

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)

DOCKET: C69264

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellants)

DOCKET: C69278

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellant)

DOCKET: C69305

AND BETWEEN

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)

DOCKET: C69306

AND BETWEEN

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)

DOCKET: C69318

AND BETWEEN

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellants)

DOCKET: C69321

AND BETWEEN

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)

Michael Citak and Chris Junior, for the appellants John Aquino and 2304288 Ontario Inc.

George Corsianos, for the appellant Marco Caruso

Terry Corsianos, for the appellants Giuseppe Anastasio and Lucia Coccia-Canderle

Brian Belmont, for the appellant 2104664 Ontario Inc.

Alan Merskey, Evan Cobb and Stephen Taylor, for the respondent Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Jeremy Opolsky and Craig Gilchrist, for the respondent KSV Restructuring Inc. in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited

Heard: September 1 & 2, 2021 by video conference

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated September 15, 2020 (C69306 & C69318) and the judgments of Justice Dietrich, dated March 19, 2021, with reasons reported at 2021 ONSC 527, 88 C.B.R. (6th) 60 (C69263, C69264, C69278, C69305, C69306, C69318 & C69321).

Lauwers J.A.:

A. OVERVIEW

[1] John Aquino was the directing mind of Bondfield Construction Company Limited and its affiliate Forma-Con Construction. He and his associates carried out a false invoicing scheme over a number of years by which they siphoned off tens of millions of dollars from both companies.

[2] The monitor and the trustee challenged the false invoicing scheme and sought to recover some of the money under s. 96 of the *BIA*[1] and s. 36.1 of the *CCAA*.[2] They asserted that the false invoicing schemes were implemented by

[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").
[2] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

means of "transfers at undervalue"[3] by which John Aquino "intended to defraud, defeat or delay a creditor".

[3] John Aquino and most of the other participants, as the application judge noted, "have conceded that no value was provided" to Bondfield and Forma-Con for the fraudulent transfers. However, they boldly assert that at the time they took the money, both companies were financially strong and healthy enough to sustain the frauds. They say this establishes that they did not intend to defeat any actual creditors. They also argue that John Aquino's intent cannot be imputed to either Bondfield or Forma-Con so that s. 96(1)(b)(ii)(B) of the *BIA* cannot be used to require them to repay what they took.

[4] The application judge required John Aquino and the other participants to repay the money they took through the false invoicing scheme and held them jointly and severally liable.[4]

[5] I would dismiss the appeals for the reasons that follow. I begin with the basic facts, next set out the issues, and then carry out the analysis.

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[3] Defined in s. 2 of the *BIA* as: "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor."

[4] The application judge also found that transactions relating to an alleged fund cycling scheme were not captured under s. 96, but that scheme is not at issue in this appeal.

B. THE FACTS

[6] Bondfield was a construction company that operated in the Greater Toronto Area and elsewhere. Its affiliate, 1033803 Ontario Inc., commonly known as Forma-Con, was in the concrete forming business. Bondfield and Forma-Con were part of the Bondfield Group,[5] a full-service group of construction companies that carried on business in the Greater Toronto Area and Southern Ontario starting in the mid-1980s.

[7] Before its insolvency, the Bondfield Group was run by the Aquino family. Ralph Aquino founded the enterprise. He was joined by his son, John Aquino, in 1994 and by his son, Steven Aquino, in 2000.

[8] By 2018, the Bondfield Group was in financial trouble. Bondfield's bonding company, Zurich Insurance Company Ltd., engaged Ernst & Young Inc. to review the financial situation of the Bondfield Group. This eventually led Bondfield to start proceedings under the *CCAA* on April 3, 2019. The court appointed Ernst & Young Inc. as the monitor of Bondfield and some of its affiliates. On December 19, 2019, the court appointed KSV Restructuring Inc. as the trustee in bankruptcy of Forma-Con.

[5] I use "Bondfield" to denote Bondfield Construction Company Limited, as distinct from the Bondfield Group. The application judge referred to Bondfield Construction Company Limited as "BCCL".

[9] The monitor and the trustee discovered that Bondfield and Forma-Con had illegitimately paid out tens of millions of dollars to John Aquino and several of the other appellants under a false invoicing scheme, which is described in detail by the application judge. Both the monitor and the trustee brought applications for various forms of declaratory relief, the monitor under a combination of s. 36.1 of the *CCAA* and s. 96 of the *BIA* and the trustee under the latter only.

(1) The Bondfield Application

[10] The monitor learned that between April 3, 2014 and April 3, 2019, which was the five-year statutory review period under the *BIA*, John Aquino and his associates took $21,807,693 from Bondfield by means of a false invoicing scheme.[6]

[11] In cross-examination, Mario Caruso, Giuseppe Anastasio, and Lucia Coccia-Canderle – individuals who were involved in operating the Bondfield supplier parties – conceded that the suppliers who falsely invoiced Bondfield provided no value for the transfers. John Aquino made the same admissions. However, these participants denied an intent to defraud, defeat, or delay Bondfield's actual creditors because the company was not then insolvent or in danger of insolvency. The Solano Estate insisted that it had no knowledge of the

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[6] The suppliers involved in this scheme were 2483251 Ontario Corp. a.k.a. Clearway Haulage ("Clearway"), 2420595 Ontario Ltd. a.k.a. Strada Haulage ("Strada"), 2466601 Ontario Inc. a.k.a. MMC Contracting ("MMC"), 2420570 Ontario Ltd. a.k.a. MTEC Construction ("MTEC"), Time Passion, Inc. ("Time Passion"), and RCO General Contracting Inc. ("RCO").

impugned Bondfield transactions, while Anthony Siracusa and Time Passion did not respond.

[12] The application judge granted the declarations the monitor sought concerning the Bondfield false invoicing scheme and required the Bondfield parties to repay $21,807,693 on a joint and several liability basis (other than Coccia-Canderle, whose liability was limited to $88,008).

(2) The Forma-Con Application

[13] The trustee discovered that between 2011 and 2017, Forma-Con had paid more than $34 million to certain suppliers under the false invoicing scheme. Between December 19, 2014 and December 19, 2019, which was the five-year review period under the *BIA*, Forma-Con paid over $11 million to certain purported suppliers.[7]

[14] As in the Bondfield application, under cross-examination, John Aquino, Caruso, Anastasio, and Coccia-Canderle conceded that suppliers that falsely invoiced Forma-Con provided no value for the transfers (not including 230[8]), but maintained that they had no intent to defraud, defeat, or delay Forma-Con's actual creditors.

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[7] The Forma-Con suppliers were Clearway, MMC, MTEC, Strada, 2304288 Ontario Inc. ("230"), which was John Aquino's personal holding company, and 2104664 Ontario Inc. ("664 Ontario").
[8] Despite the individual Forma-Con parties' exclusion of 230 from their concessions, the application judge found that 230 was involved in the false invoicing scheme: *Ernst & Young Inc. v. Aquino*, 2021 ONSC 527, 88 C.B.R. (6th) 60 ("Decision Below"), at paras. 120, 242.

[15] 664 Ontario contended that it had provided value in the form of consulting services to Forma-Con regarding a hospital project in Hawkesbury. The Solano Estate asserted that it had no knowledge of the impugned Forma-Con transactions.

[16] The application judge granted the declarations the trustee sought concerning the Forma-Con false invoicing scheme, and required the Forma-Con parties to repay $11,366,890 on a joint and several liability basis (other than 664 Ontario, whose liability was limited to $90,400, and Coccia-Canderle, whose liability was limited to the value of the cheques paid to her by the Forma-Con suppliers).

C. THE ISSUES

[17] There are four issues, which I address in turn:

1. Did the application judge err in finding that s. 96 of the *BIA* could be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

2. Are the defences of legal and equitable set-off available to John Aquino and the other appellants who claim them?

3. Did the application judge err in finding 664 Ontario to be part of the false invoicing scheme?

4. Should the application judge have converted the applications into an action, or, if not, have required a trial on the financial position of Bondfield and Forma-Con?

D. ANALYSIS

(1) Can s. 96 of the *BIA* be used by the monitor and the trustee to recover the money John Aquino and his associates took from Bondfield and Forma-Con?

[18] The interpreter's task in statutory interpretation is to discern the legislature's intention in order to give effect to it.[9] The interpreter must attend to text, context, and purpose.[10] After discussing the text, purpose, and legislative history of s. 96, I attend to the governing principles and to their application to the facts in this case.

(a) The text and purpose of s. 96 of the *BIA*

[19] Section 96 of the *BIA* permits trustees to seek a court order voiding a transfer by the debtor to another party at "undervalue", which is an improvident transaction from the debtor's perspective. Section 96 provides, in part:

> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against… the trustee — or order that a party to the transfer or any other person who is privy to the transfer[11], or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if
>
> …
>
> (b) the party was not dealing at arm's length with the debtor and

[9] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, at para. 121.
[10] *Vavilov*, at paras. 117-24.
[11] Section 96(3) of the *BIA* defines a "privy" as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person."

> (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
>
> (B) the debtor intended to defraud, defeat or delay a creditor. [Emphasis added.]

[20] Textually speaking, the contrast between paras. (A) and (B) makes it clear that there are circumstances in which s. 96 will apply even though the "transfer at undervalue" occurs at a time that the debtor, in this case Bondfield or Forma-Con, is not insolvent. This scenario gives rise to a problem about the meaning to be given to "creditor" in para. (B). Section 2 of the Act defines "creditor' as "mean[ing] a person having a claim provable as a claim under this Act". The reasonable interpretation is that there must be a person to whom the debtor owes money at the moment the fraudulent transaction occurs who would be a creditor with a provable claim if the debtor were immediately insolvent.[12] There is an inescapable contingency to the test. There is also a prospectivity, which comes from the

[12] Section 121(1) of the *BIA* concerns what constitutes a provable claim: "All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act".

contrast between para. (A) ("was insolvent") and para. (B), which lacks that language and therefore implies that the debtor is not yet insolvent.

[21] Next, I would interpret the words "a creditor" in para. (B) as denoting any such creditor, not a target creditor or one necessarily known to the fraudulent debtor. It is reasonable to infer that any large enterprise in financial difficulty will have many such creditors, many of whom would not be actively known by the fraudster.

[22] I understand s. 96 to be remedial in nature.[13] The Supreme Court has said with respect to provincial legislation governing fraudulent conveyances and preferences: "All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors."[14] This remedial purpose led the court to conclude that the legislation "should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects".[15] In my view this approach applies equally to the interpretation of s. 96 of the *BIA*.

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[13] This court has held that, in general, the "*BIA* is remedial legislation and should be given a liberal interpretation to facilitate its objectives": *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43.
[14] *Royal Bank of Canada v. North American Life Assurance Co*., [1996] 1 S.C.R. 325, at para. 59.
[15] *Royal Bank of Canada*, at para. 59, citing the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12.

[23] Section 96 was included in the 2009 amendments to the *BIA*. The section "combines and simplifies the principles that were established pursuant to sections 91 and 100 in the pre-2009 amendments addressing settlements and reviewable transactions, respectively", as Robyn Gurofsky explains.[16] In her view: "Section 96, like section 95, is intended to create a framework for challenging transactions that have the effect of diminishing the value of the bankrupt's estate and limiting the ability of creditors to recover all or a portion of their debt from the estate."[17]

[24] Michael Myers explains the genesis of s. 96: "The law has long recognized the need to protect creditors from insolvent debtors who give away assets to third parties instead of using those assets to repay their debts."[18] This is an historic concern: "[L]egislation prohibiting debtors from fraudulently dissipating their assets when heavily indebted was first enacted in England during the reign of Queen Elizabeth I in the 1500s and has been embodied into the *Fraudulent Conveyances Act* of Ontario since the late 1800s."[19] Gurofsky and Myers both point out that the

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[16] Robyn Gurofsky, "Fraudulent Preferences and Transfers at Undervalue: A Review of the Legal Developments under the *Bankruptcy and Insolvency Act*", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*, 2011 (Toronto: Thomson Reuters, 2012) 567, at p. 584.
[17] Gurofsky, at p. 584 (footnote omitted).
[18] Michael S. Myers, "Transfers at Undervalue Under Section 96 of the Bankruptcy and Insolvency Act – A Primer", prepared for the Law Society of Ontario's Six-Minute Debtor-Creditor and Insolvency Lawyer Seminar (October 17, 2018), at p. 2, online: Papazian Heisey Myers, Barristers & Solicitors <www.phmlaw.com/site_files/content/pdf/published_works/michael_myers/2018_lso_seminar_6_minute_debtor-creditor_and_insolvency_law.pdf>. Myers' analysis of s. 96 has been cited in M.A. Springman *et al.*, *Frauds on Creditors: Fraudulent Conveyances and Preferences*, loose-leaf (2022-Rel. 1) (Toronto: Thomson Reuters, 2021).
[19] Myers, at pp. 2-3 (footnote omitted).

idea was to prevent the dissipation of assets, especially to related recipients. They both cite Lord Hatherley L.C.'s statement from *Freeman v. Pope* that "persons must be just before they are generous and that debts must be paid before gifts can be made."[20] The policy of the *BIA* goes beyond this modest origin.

(b) The governing principles and their application

[25] In *Urbancorp Toronto Management Inc. (Re)*, van Rensburg J.A. noted that "s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met."[21] She added: "The interpretation of the section must be considered in relation to the remedy that is sought." This echoed her earlier comments that even though s. 96 is a "tool to address 'asset stripping' by a debtor", a "bankruptcy trustee or *CCAA* monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the… specific words used" in the section.[22]

[26] In order to require John Aquino and the other beneficiaries of the false invoicing scheme to repay the money they took under s. 96(1)(b)(ii)(B) of the *BIA*, the monitor and the trustee had to prove two elements: first, John Aquino and the other participants were not dealing with Bondfield and Forma-Con at arm's length; and second, at the time they took the money (during the statutory review period),

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[20] *Freeman v. Pope* (1870), L.R. 5 Ch. App 538, at p. 540.
[21] *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, 74 C.B.R. (6th) 23, at para. 48.
[22] *Urbancorp*, at para. 40.

they “intended to defraud, defeat or delay a creditor” of Bondfield or Forma-Con. The first element is amply established by the evidence. This case turns on the second element.

[27] The obvious gap in the second element concerns the reach of the fraudsters’ intention. No doubt John Aquino and the other participants intended to defraud Bondfield and Forma-Con, but this does not immediately lead to the conclusion that they also intended at that time to defraud the creditors of Bondfield and Forma-Con. The application judge bridged the gap by imputing John Aquino’s fraudulent intention to the debtors, Bondfield and Forma-Con, and on that basis found that it could be said that “the debtor intended to defraud, defeat or delay a creditor.”

[28] Several aspects of the legal analysis are no longer in active dispute. John Aquino and his associates in the false invoicing scheme do not seriously contest their non-arm’s length status, that the transfers at issue were at undervalue, or their active intent to defraud the debtors, Bondfield and Forma-Con. Nor is there any doubt, as the application judge noted, that the transactions bristled with “badges of fraud”, including the value of the transactions being nil, the non-arm’s length status of the participants, the secrecy, and the unusual haste with which the transactions were completed.[23]

[23] Decision Below, at paras. 156-60.

[29] John Aquino and his associates nonetheless dispute liability under s. 96 on two grounds. The first is that their fraudulent acts were not carried out at a time when Bondfield and Forma-Con were financially precarious. The second is that the fraudulent intentions of John Aquino cannot be imputed to Bondfield and Forma-Con. These are the two deep issues to be addressed in this appeal.

(i) The timing of the fraudulent transfers

[30] Recall the bold assertion made by John Aquino and his associates that at the time they took the money, both Bondfield and Forma-Con were sufficiently financially healthy to sustain the losses, which establishes that they did not intend to "defraud, defeat or delay" any actual creditors. The focus is on the fraudster's intent to defraud a creditor of these companies.

[31] The court must not indulge the temptation to engage in hindsight bias. In *Montor Business Corp. (Trustee of) v. Goldfinger*, Brown J. (as he then was) stated the principle on which the appellants rely:

> When inquiring into the intention of a debtor for the purposes of *BIA* s. 96(1)(a)(iii) – and the provincial preferences statutes for that matter – a court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time. A court must resist the temptation to inject back into the circumstances surrounding the impugned transaction knowledge about how events unfolded after that time. The focus must remain on the belief and intention of the

> debtor at the time, as well as the reasonableness of that belief in light of the circumstances then existing.[24]

[32] Brown J. added a caution about the parties' beliefs as to the value of certain properties in that case: "In hindsight one might question the reasonableness of [their] belief, but the evidence given… about the parties' thinking at the time indicated a genuine belief in the value of the properties."[25] This he found to be evidence on which he placed "significant weight".

(a) The application judge's reasons on the timing of the transfers

[33] The application judge instructed herself correctly on the applicable legal principles by reference to the appropriate cases whose reach was also argued before us. She heard and recited the arguments made by John Aquino and his associates, who said that when they took the money, Bondfield and Forma-Con were financially strong.[26] This strength, they claim, was evidenced by the Deloitte audited financial statements[27] and by the report of Ross Hamilton of Cohen Hamilton Steger & Co. Inc., the forensic and investigative accounting experts retained by John Aquino (the "CHS report").[28] John Aquino argued that the amounts they took were relatively small, so that inferentially the thefts did not

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[24] *Montor Business Corp. (Trustee of) v. Goldfinger*, 2013 ONSC 6635, 8 C.B.R. (6th) 200, at para. 272 (emphasis added), aff'd 2016 ONCA 406, 351 O.A.C. 241, leave to appeal refused, and [2016] S.C.C.A. No. 361 and rev'd in part on other grounds, 2016 ONCA 407, 398 D.L.R. (4th) 266, leave to appeal refused, [2016] S.C.C.A. No. 360.
[25] *Montor*, at para. 274.
[26] Decision Below, at paras. 48, 144 and 163.
[27] Decision Below, at paras. 98, 165, and 167.
[28] Decision Below, at paras. 102-3, 165-66.

impact the companies' financial condition.[29] He cast the blame for the companies' collapse on the actions of Zurich as well as on the National Bank's having denied Bondfield Group an increase in its credit facility.[30]

[34] The application judge did not accept the CHS report as a reliable indicator of the companies' financial health because it was based on unreliable information received from the companies.[31] She took a similarly skeptical view of the reliability of Deloitte's financial statements, which are now the subject of litigation.[32]

[35] In the application judge's opinion, a debtor's financial health is relevant but not determinative regarding the debtor's intent to defraud, defeat or delay creditors, particularly where, as here, there is evidence of a number of badges of fraud. These "provide a strong evidentiary basis on which to find that each of BCCL and Forma-Con, through the actions of its president John Aquino, intended to defraud, defeat or delay its creditors."[33]

[36] The application judge concluded that the presence of badges of fraud "creates a rebuttable presumption of the intention to defraud, defeat or delay creditors" that has the effect of shifting the evidentiary burden "to those defending

[29] Decision Below, at para. 181.
[30] Decision Below, at paras. 96-97.
[31] Decision Below, at paras. 169, 176-77 and 193.
[32] Decision Below, at paras. 99, 165 and 193.
[33] Decision Below, at para. 145.

the fraud to adduce evidence to show the absence of fraudulent intent".[34] She found that John Aquino and his associates had "not rebutted the presumption of fraudulent intent".[35]

[37] The application judge noted that there is "a divergence of opinion between the parties on the financial condition of the Bondfield Group during the Bondfield review period and the Forma-Con review period."[36] She concluded her lengthy analysis: "The true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court."[37] The appellants referenced this statement in argument to attempt to undermine the certainty of the application judge's factual findings and her conclusions. However, doing so mischaracterizes the meaning of her observation.

[38] The application judge mustered a phalanx of facts in support of her conclusions:

> The transferors, being the corporate debtors, also had actual and potential liabilities, or were about to enter risky undertakings. According to the reports of the Monitor and the Trustee, both BCCL and Forma-Con had significant long-term and off-balance sheet liabilities during the relevant review periods and were guarantors on BCCL's credit facility in respect of which there were contingent obligations in the tens of millions of dollars at the end of fiscal years 2014, 2015 and 2016. Ralph, Steven and

[34] Decision Below, at para. 161, citing *Purcaru v. Seliverstova*, 2015 ONSC 6679, 69 R.F.L. (7th) 388, aff'd 2016 ONCA 610, 80 R.F.L. (7th) 28.
[35] Decision Below, at para. 164.
[36] Decision Below, at para. 165.
[37] Decision Below, at para. 193.

> John Aquino's sister Maria Bot, were all creditors of BCCL with substantial shareholder loan accounts. The Bondfield Group was facing actual and potential liabilities, and by John Aquino's own admission was embarking on a significant expansion in its construction activities at a time when its lender, National Bank, was not prepared to increase its lending. During the relevant period, John Aquino and Ralph were temporarily transferring funds to BCCL for the sole purpose of misleading BCCL's stakeholders, including its lenders, into believing that BCCL was in a stronger financial position than it was.[38]

[39] The application judge noted there were a number of unusual accounting practices at Bondfield and Forma-Con:

> According to the Monitor's reports, just as accounts payable were understated in BCCL's records, accounts receivable were overstated in a problematic fashion. While BCCL's contract revenues were going up, the collectability of those revenues was going down. Throughout the Bondfield review period, BCCL's accounts receivable collection was in continual decline.
>
> …
>
> These [unusual accounting practices] include John Aquino's admission that, during the Bondfield review period, he and Ralph routinely injected capital into BCCL to mislead BCCL's stakeholders into thinking that the Bondfield Group was financially stronger than it was; the fact that suppliers' cheques were withheld to give BCCL an opportunity to extend the time it could use the funds owing to suppliers; the fact that BCCL was entering a date later than the date shown on the supplier invoice into its accounting system, which allowed its payables to remain outstanding longer; the fact that significant

[38] Decision Below, at para. 158.

> adjusting journal entries had to be made regarding BCCL's revenue and profit once the Monitor was appointed; and the fact that a claim has been brought against Deloitte with respect to its audit of Bondfield Group financial statements (which it is defending). In light of these concerns, it is reasonable to infer that the financial records provided to Deloitte and to Mr. Hamilton were likely not reliable.[39]

[40] Even though getting an absolutely accurate picture of the financial condition of Bondfield and Forma-Con was not possible, such precision was unnecessary. The application judge accepted the description of the state of affairs discovered in the monitor's investigation. She listed the findings:

> a) BCCL's financial records, prepared under the supervision of John Aquino, vastly overstated the revenues and profitability of its projects in the relevant period, causing BCCL to have to book significant adjusting journal entries under the supervision of the Monitor; b) Zurich had encountered stated losses of over $300,000,000 to date in paying sub-trades and completing BCCL projects, which losses arose from projects and project activities started many years before the *CCAA* filing; c) BCCL's loan was placed in "special loans" by its prior lender, The National Bank, no later than the start of 2017; d) BCCL faced persistent liquidity challenges as evidenced in part by John Aquino's steps to inject cash into BCCL temporarily at the beginning of 2014 through 2017 in order to improve the appearance of BCCL's liquidity for the purposes of its bonding and lending arrangements; and e) the Bondfield Group's auditors, Deloitte, are the subject of litigation by both BCCL and Zurich with respect to the accuracy of the

[39] Decision Below, at paras. 170, 193.

> financial statements that the defending Bondfield Respondents and Forma-Con Respondents rely upon.[40]

[41] The application judge added context, emphasizing that John Aquino "signed a number of the cheques associated with the impugned transactions [and that in] cross-examination he stated that he would have been familiar with 100 percent of the suppliers and subtrades."[41] Meanwhile, "[a]t the same time as he was authorizing payments on false invoices, [John Aquino] was injecting capital into BCCL from time to time in an attempt to disguise the true financial condition of BCCL."[42] In her view: "It is reasonable to infer that John Aquino took these actions to avoid BCCL's and Forma-Con's obligations and defeat their creditors."[43] She added that he had not "given evidence of an alternative explanation."

[42] The application judge also addressed the question of the relatively small value of the amounts paid out on the false invoices as compared to Bondfield's gross revenue or net profit. She was not persuaded that this ratio "absolves John Aquino of an intent to defeat creditors."[44] She put the transfers in context, adding: "The amounts, whatever the quantum, were paid out at a time when John Aquino was taking deliberate steps to mislead the stakeholders of BCCL with respect to its financial position and these payments bore a number of badges of fraud", and

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[40] Decision Below, at para. 168.
[41] Decision Below, at para. 190.
[42] Decision Below, at para. 191.
[43] Decision Below, at para. 192.
[44] Decision Below, at para. 182.

"[e]ach of these payments reduced the funds available to pay long-term creditors and increased bank indebtedness".[45]

[43] The evidence led the application judge to conclude: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con."[46] This conclusion built on her earlier finding:

> The totality of the evidence, in my view, provides a firm basis for finding that John Aquino, as principal and directing mind of BCCL and Forma-Con, had fraudulent intent – an intent to defraud, defeat or delay creditors. It was in no way reasonable for him to believe that, throughout the period of the impugned transactions, BCCL and Forma-Con did not have long-term creditors, like lenders, including Ralph, who would not be defeated or delayed by the draining of tens of millions of dollars from BCCL and Forma-Con through the false invoicing schemes.[47]

[44] The requirement noted in *Montor* is that the "court must ascertain the intention at the time of the transfer or transaction in light of the information known at that time."[48] In particular, a court must not rely on hindsight by injecting into the circumstances surrounding the impugned transactions knowledge about how

[45] Decision Below, at para. 182.
[46] Decision Below, at para. 197.
[47] Decision Below, at para. 160.
[48] *Montor*, at para. 272.

events unfolded after that time. Contrary to the appellants' submissions, this is not what the application judge did.

[45] At the time of the fraudulent transactions under the false invoicing scheme, the interests of creditors were imperilled by the transfers because Bondfield and Forma-Con were already experiencing mounting financial difficulties. As noted above, the application judge determined that it would have been entirely unreasonable for John Aquino to believe that, during that time, the interests of the companies' creditors would not be endangered by this fraudulent scheme.[49] He and his associates continued on nonetheless. The application judge found that because the companies had outstanding debts at the time of the transfers, including a substantial loan from its primary lender, "there was a creditor or creditors toward whom BCCL's and Forma-Con's intent to defraud, defeat or delay could be directed", even though the companies were then "paying off current liabilities".[50] In other words, the fact that current liabilities were being paid did not mean that "the fraudulent transfers were never intended to defeat then-current creditors."

[46] In short, the application judge took a pragmatic view on the totality of the evidence. She found that during the review periods both Bondfield and Forma-Con

[49] Decision Below, at para. 160.
[50] Decision Below, at para. 204.

were experiencing increasing financial difficulties, to the knowledge of John Aquino, who carried on with the false invoicing scheme. She inferred that he did this with the intent to defeat the companies' creditors. This court owes deference to the application judge's findings of fact and findings of mixed fact and law. The appellants have not established any palpable and overriding errors nor legal errors with these findings.

[47] The application judge also accepted that the false invoicing scheme might not have been solely motivated by an intention to defeat creditors. However, she noted that the monitor and trustee only had to demonstrate that one of the motives or intentions was to defraud, defeat, or delay a creditor.[51] As Wilton-Siegel J. explained:

> [T]he relevant wording in s. 96 is to the effect that "the debtor intended to defraud, defeat or delay a creditor." Of significance, it is not that "the intention of the debtor was to defraud, defeat or delay a creditor." If it were the latter, I think an applicant would be required to establish that the principal intention of the debtor was to defeat his or her creditors. However, the wording of s. 96 does not require such a determination. Instead, I think it requires only that an applicant establish that one of the debtor's motives or intentions was to defraud, defeat or delay a creditor.[52]

[48] Finally, as discussed, John Aquino was aware that the interests of the companies' creditors were potentially imperilled by the false invoicing scheme.

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[51] Decision Below, at para. 189.
[52] *Juhasz Estate v. Cordiero*, 2015 ONSC 1781, 24 C.B.R. (6th) 69, at para. 54 (emphasis added).

Although the application judge did not make findings with respect to recklessness, it is clear that at a minimum, John Aquino was reckless as to whether the scheme would defraud, defeat, or delay creditors. In the criminal context, the Supreme Court has held that fraud can be established on the basis of recklessness as to the consequences of a fraudulent act. As McLachlin J. put it:

> I have spoken of knowledge of the consequences of the fraudulent act. There appears to be no reason, however, why recklessness as to consequences might not also attract criminal responsibility. Recklessness presupposes knowledge of the likelihood of the prohibited consequences. It is established when it is shown that the accused, with such knowledge, commits acts which may bring about these prohibited consequences, while being reckless as to whether or not they ensue.[53]

[49] I see no reason why John Aquino's recklessness as to the consequences of the fraudulent transfers with respect to the interests of the companies' creditors would not be similarly sufficient for establishing the requisite intent under s. 96 of the *BIA*.[54]

(ii) The imputation of John Aquino's fraudulent intent to Bondfield and Forma-Con

[50] For the purpose of construing the words, "the debtor intended to defraud, defeat or delay a creditor" in s. 96(1)(b)(ii)(B), the debtors are Bondfield and

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[53] *R. v. Théroux*, [1993] 2 S.C.R. 5, [1993] S.C.J. No. 42, at para. 26.
[54] Recklessness is also generally sufficient in cognate areas such as knowing assistance or fraudulent misrepresentation.

Forma-Con. The application judge imputed the fraudulent intention of John Aquino in the false invoicing scheme to Bondfield and Forma-Con, and found that the trustee and the monitor could pursue the repayment of the funds taken from the fraudsters under the *BIA*.

[51] The appellants argue that the application judge erred legally because John Aquino's fraudulent intent cannot be imputed to Bondfield or Forma-Con as a matter of law, even though he was one of their directing minds. They assert that the binding principles of the common law doctrine of corporate attribution set out in *Canadian Dredge & Dock Co. v. The Queen*,[55] do not permit the imputation of his intention to either defrauded company. Accordingly, s. 96(1)(b)(ii)(B) of the *BIA* cannot be used to require John Aquino, or his associates as "privies" to the impugned transactions, to repay the money they took.

[52] This argument raises a thorny question about the interplay between the provisions of the *BIA* and common law doctrine. When can common law doctrine be engaged by the court in construing and applying the *BIA*? I begin by setting out the application judge's reasons. I next address this legal question and then turn to its implications for the application of the corporate attribution doctrine in this appeal.

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[55] *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662.

(a) The application judge's reasons on corporate attribution

[53] The application judge reviewed and considered the law concerning corporate attribution. She agreed that "the actions of John Aquino were not intended to benefit BCCL and Forma-Con and they did not do so."[56] In her view, if the *Canadian Dredge* test "were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations."[57]

[54] However, the application judge took a different tack and concluded: "[T]he corporate attribution doctrine as set out in *Canadian Dredge* ought not to apply in these applications made pursuant to s. 96 of the *BIA*, and John Aquino's intent to defeat creditors ought to be attributed" to Bondfield and Forma-Con.[58] She founded this result on several interrelated considerations:

- The incompatibility of the *Canadian Dredge* formulation "with the very purpose of s. 96 of the *BIA*, which is aimed at restoring value for the benefit of the debtor's creditors;[59]
- The policy factors in *Canadian Dredge*, particularly the "social purpose" of holding a corporation responsible for the acts of its employees and the view that the doctrine's application should only be by "judicial necessity" where it would "advantage society by advancing law and order";[60]

[56] Decision Below, at para. 217.
[57] Decision Below, at para. 217.
[58] Decision Below, at para. 230.
[59] Decision Below, at para. 218.
[60] Decision Below, at para. 219.

- The remedial purpose of s. 96, which is "directed towards recovering funds for creditors";[61] and

- The principles of statutory interpretation, particularly the purposive approach, "[g]iven that the *BIA* is concerned with providing proper redress to creditors".[62]

[55] In *DBDC Spadina Ltd. v. Walton*, van Rensburg J.A. took a strict approach to the application of the *Canadian Dredge* test, which the Supreme Court expressly approved on appeal.[63] However, based on the reasoning set out above, the application judge expressed "hesitancy about whether [van Rensburg J.A.'s reasoning in *Walton*] ought to apply in the context of s. 96."[64]

[56] As I will explain, the application judge did not err in her approach and in her judgment. I review several points of intersection between common law doctrine and the *BIA* before turning to the specific application of the corporate attribution doctrine.

(b) Intersections between common law doctrine and the *BIA*

[57] There are several examples of situations in which common law doctrines have been used to interpret, apply, or supplement the *BIA*, apart from the corporate

[61] Decision Below, at para. 224.
[62] Decision Below, at paras. 226-29.
[63] *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, 419 D.L.R. (4th) 409 ("*Walton*"), *per* van Rensburg J.A., in a dissenting opinion adopted by the Supreme Court as its reasons on appeal in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30, [2019] 2 S.C.R. 530 ("*Dejong*").
[64] Decision Below, at para. 224.

attribution doctrine.[65] I pick out four but could extend the list: the common law principles around the priority of secured claims; the doctrine of good faith; the anti-deprivation rule; and unjust enrichment.

[58] The Supreme Court has held that "Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously".[66] This frames the legal context.

[59] First, regarding the priority of secured claims, Houlden, Morawetz, and Sarra note: "If no statutory provisions are applicable, then common law and equitable principles will be applied."[67] For example, the common law rule of "first in time" will *prima facie* be followed.

[60] Second, various provisions of the *BIA* engage principles of "good faith", including the duties of receivers under s. 247, as well as the recent addition of the s. 4.2 good faith provision. These provisions engage the common law doctrine of good faith, which also exists in the civil law. But "good faith" is not a codified concept. For example, in *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, Mah J. considered the meaning of "good faith" in the *BIA* context and applied the

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[65] In this context, for terminological clarity, I treat the two somewhat distinct spheres of common law and equity as together comprising "common law".
[66] *Chandos Construction Ltd. v. Deloitte Restructuring Inc*., 2020 SCC 25, 449 D.L.R. (4th) 293, at para. 29.
[67] Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada,* 4th ed., loose-leaf, (Toronto: Thomson Reuters, 2009), at para. 6-163. See *Bulut v. Brampton (City)*, 48 O.R. (3d) 108 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 259.

principles of good faith derived from *Bhasin v. Hrynew*[68] and *C.M. Callow Inc. v. Zollinger*[69] to give content to s. 4.2, while being cognizant of the policy objectives of the *BIA*.[70]

[61] The third example is the doctrine of "fraud on the bankruptcy law" and the associated anti-deprivation rule. These are common law doctrines applicable in commercial bankruptcies, as I noted in *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*:

> Professor Wood explains that the anti-deprivation rule invalidates contractual provisions that remove assets otherwise available to creditors in the event of insolvency. He discusses the fraud on the bankruptcy law doctrine in *Bankruptcy and Insolvency Law* at p. 88:
>
> > Canadian courts have recognized that a contractual provision that is designed to remove value from the reach of an insolvent person's creditors is void on the basis that it violates the public policy of equitable and fair distribution on bankruptcy. This is referred to as the "fraud on the bankruptcy law principle." The principle can be usefully broken down into two distinct components: the anti-deprivation rule and the *pari passu* rule. The anti-deprivation rule operates by invalidating provisions that withdraw an asset that would otherwise be available to

[68] *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494.
[69] *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, 452 D.L.R. (4th) 44.
[70] *CWB Maxium Financial Inc v. 2026998 Alberta Ltd*, 2021 ABQB 137, 25 Alta. L.R. (7th) 3, at paras. 41, 58. See also Houlden, Morawetz, and Sarra, at paras. 1-68 and 4-82 for further discussion on good faith in the *BIA* and Ari Y. Sorek and Charlotte Dion, "Good Faith in Insolvency and Restructuring: At the Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?" in Jill Corraini and the Honourable Blair Nixon, eds., *Annual Review of Insolvency Law*, 2020 (Toronto: Thomson Reuters, 2021) 34, 2020 CanLIIDocs 3598.

> satisfy the claims of creditors upon the insolvency of the party or the commencement of insolvency proceedings. [Internal citations omitted.]
>
> The common law anti-deprivation rule applies in commercial bankruptcies, including Greenview Power's bankruptcy.[71]

[62] The Supreme Court affirmed this understanding of the law in *Chandos*. The majority held "that the rule has existed in Canadian common law and has not been eliminated by either this Court or Parliament" and noted that "[t]he anti-deprivation rule renders void contractual provisions that would prevent property from passing to the trustee and thus frustrate s. 71 and the scheme of the *BIA*."[72] The common law anti-deprivation rule thus "maximizes the assets that are available for the trustee to pass to creditors."[73]

[63] The fourth example of the active engagement of common law doctrine in supplementing the *BIA* is in the area of unjust enrichment and restitution. Professor Wood points to situations in which a trustee can avoid a transaction in which an innocent recipient of the bankrupt's assets has paid some consideration to the debtor or added value. He notes that "[u]njust enrichment law may be relevant in respect of the recovery of these gains."[74] He continues: "These are not matters

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[71] *Hutchingame Growth Capital Corporation v. Independent Electricity System Operator*, 2020 ONCA 430, at paras. 41-42 (emphasis added; citations omitted), leave to appeal refused, [2020] S.C.C.A. No. 312.
[72] *Chandos*, at paras. 25, 30.
[73] *Chandos*, at para. 30.
[74] Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at p. 195.

that are governed by the statutes dealing with impeachable transactions, and therefore the issue may be properly resolved through the application of principles of unjust enrichment." The common law doctrine of unjust enrichment can be used to supplement the *BIA* in circumstances where the statute itself does not fully govern the transactions at issue.

[64] I would draw several principles from this discussion of the active engagement of common law doctrine in the application of the *BIA*. Common law doctrine can be enlisted by a court to interpret and supplement the *BIA* where necessary to better achieve its purposes, one of which is to protect the interests of the bankrupt's creditors. The common law can add content to the terms of the *BIA* not otherwise defined. In particular, the common law doctrine known as the anti-deprivation rule and its purpose of preventing a fraud on the bankruptcy is especially pertinent in this case. The use of common law doctrine must respect the policy of the *BIA*. But these principles do not license a court to do whatever it likes; the common law doctrines impose their own discipline.

[65] I turn now to the common law doctrine of corporate attribution.

(c) The common law doctrine of corporate attribution in the bankruptcy context

[66] Corporations are not natural persons. In view of separate corporate personality, it is no small thing to impute to a corporation the intention of its "directing mind". On the other hand, there is the spectre that corporations might

commit criminal acts and civil delicts with impunity because these engage mental elements relevant to intentions. The corporate attribution doctrine creates a bridge between the corporation and the natural person whose "directing mind" caused the corporation to act as it did. The doctrine attributes the intent of the corporation's directing mind to the corporation itself, whose conduct is then evaluated against the legal standard that applies to the implicated criminal or civil area of law.

[67] The Supreme Court's current substantive teaching on the doctrine of corporate attribution is found in *Deloitte & Touche v. Livent Inc. (Receiver of*),[75] which contextualizes *Canadian Dredge*. In *Livent*, the court restated the *Canadian Dredge* test:

> To attribute the fraudulent acts of an employee to its corporate employer, two conditions must be met: (1) the wrongdoer must be the directing mind of the corporation; and (2) the wrongful actions of the directing mind must have been done within the scope of his or her authority; that is, his or her actions must be performed within the sector of corporate operation assigned to him. For the purposes of this analysis, an individual will cease to be a directing mind unless the action (1) was not totally in fraud of the corporation; and (2) was by design or result partly for the benefit of the corporation.[76]

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[75] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 S.C.R. 855, at paras. 100-4.
[76] *Livent*, at para. 100 (citations omitted).

[68] In the result, the court did not allow the doctrine to be used by the auditor Deloitte to defend against Livent's claim for negligence based on the fraudulent activities of its directing minds.

[69] The Supreme Court in *Dejong* clarified that *Livent* invited a flexible application of the *Canadian Dredge* test, but only to make clear that courts retain discretion not to apply the test in circumstances where attributing the actions of a directing mind to a corporation would not be in the public interest. Courts must take seriously the elements of the corporate attribution test in *Canadian Dredge*.

(d) The corporate attribution doctrine and the *BIA*

[70] Thus far, the corporate attribution doctrine has been applied in the fields of criminal and civil liability. Courts have yet to consider the doctrine in the bankruptcy and insolvency context under s. 96 of the *BIA*, making this a case of first impression.

[71] I would extract three principles from *Livent* and *Canadian Dredge* to guide the application of this doctrine in this setting. First, the court is sensitive to the context established by the field of law in which an imputation of intent to a corporation is sought to be made.

[72] Second, the court recognizes that the attribution exercise is grounded in public policy.[77] I would generalize the point made by the *Livent* court about *Canadian Dredge* by paraphrasing: In the legal field of inquiry – civil, criminal, or bankruptcy – the underlying question is "who should bear the responsibility for the [impugned] actions of the corporation's directing mind?"[78] The policy factors that weigh in favour of imputing to a corporation the wrongdoing intent of its directing mind flow from the "social purpose" of holding the corporation responsible. In *Livent*, the court stated: "[A]s Estey J. himself recognized [in *Canadian Dredge*], the doctrine is only one of 'judicial necessity' and where its application 'would not provide protection of any interest in the community' or 'would not advantage society by advancing law and order', the rationale for its application 'fades away'".[79]

[73] Third, these principles "provide a *sufficient* basis to find that the actions of a directing mind be attributed to a corporation, not a *necessary* one".[80] Accordingly, "[a]s a principle that is grounded in policy, and which only serves as a means to hold a corporation criminally responsible or to deny civil liability, courts retain the discretion to refrain from applying it where, in the circumstances of the case, it would not be in the public interest to do so."[81]

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[77] *Livent*, at para. 104.
[78] *Livent*, at para. 102.
[79] *Livent*, at para. 103 (citations omitted).
[80] *Livent*, at para. 104 (emphasis in original).
[81] *Livent*, at para. 104.

[74] While this court must take the elements of the corporate attribution doctrine seriously, the genius of the common law is in its robust circumstantial adaptability.

[75] The circumstances in which the corporate attribution doctrine has traditionally been applied – the criminal and civil contexts – are quite different from the bankruptcy context. In the criminal context, the issue is whether it would be just to visit criminal liability on a corporation. As *Canadian Dredge* instructs, if the corporation benefited from the directing mind's criminal activity, imposing criminal liability might be justified. But if the criminal activities do not, by design or in result, benefit the corporation, then it is not criminally liable.

[76] The rule in the civil context seeks to determine whether it is just to visit civil liability on a corporation. Where a corporation benefits from the improper activities of the directing mind, that intent might be attributed to the corporation. But if it does not get a benefit, there is no attribution and no liability.

[77] The application of these principles is not clear in the bankruptcy arena, where the policy currents flow rather differently. In particular, attributing the intent of a company's directing mind to the company itself can hardly be said to unjustly prejudice the company in the bankruptcy context, when the company is no longer anything more than a bundle of assets to be liquidated with the proceeds distributed to creditors. An approach that would favour the interests of fraudsters over those of creditors seems counterintuitive and should not be quickly adopted.

[78] In light of these considerations, I would reframe the test for imputing the intent of a directing mind to a corporation in the bankruptcy context this way: The underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority – the fraudsters or the creditors?

[79] Permitting the fraudsters to get a benefit at the expense of creditors would be perverse. The way to avoid that perverse outcome is to attach the fraudulent intentions of John Aquino to Bondfield and Forma-Com in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of s. 96 of the *BIA*. The application judge did not err in finding that the "intention of the debtor" under s. 96 can include "the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself."[82]

(2) Are the defences of legal and equitable set-off available to John Aquino and the others claiming them?

[80] I deal with the set-off claims of Anastasio and John Aquino separately.

(a) Anastasio's claim to set-off

[81] The application judge found Anastasio to be an active participant in the false invoicing scheme.[83] The companies associated with Anastasio – MMC and RCO

[82] Decision Below, at para. 229.
[83] Decision Below, at paras. 24, 136.

– received more than $4 million through the scheme.[84] Anastasio takes the same position as John Aquino on the merits of this appeal. He concedes that the transactions were at undervalue, essentially nil.[85] He also concedes that the transactions were not at arm's length.[86]

[82] Anastasio asserts that he is owed US$3.75 million as his fee for introducing the Bondfield Group to Deutsche Bank, who considered providing the Group a credit facility of US$150 million.[87] The application judge rejected this claim. She set out the factual background to this assertion:

> Prior to Zurich's *CCAA* application, in 2016, National Bank denied the Bondfield Group an increase in its credit facility from $60,000,000 to $120,000,000. Then, the Bondfield Group entered into an $80,000,000 loan facility with Bridging for one year at an interest rate of 13.5 percent calculated daily. In late 2017, the Bondfield Group negotiated long-term financing with Deutsche Bank, but it required an insurance policy for the construction holdbacks in which it would have priority. The insurance policy was obtained. However, a disagreement between Zurich and Deutsche Bank regarding the loan facility in relation to Zurich's bonds could not be resolved and the Deutsche Bank facility did not proceed.[88]

[84] Decision Below, at paras. 72-73.
[85] Decision Below, at paras. 35, 119 and 157.
[86] Decision Below, at para. 138.
[87] Decision Below, at para. 106.
[88] Decision Below, at para. 97.

[83] Anastasio argues that his US$3.75 million fee remains unpaid.[89] He claims a set-off for that amount against any order for repayment of the proceeds of the false invoicing scheme. However, the application judge noted that he "provided no documentary or corroborating evidence in support of his alleged claim against the Bondfield Group in this amount."[90] She added that while John Aquino agreed that Anastasio introduced Bondfield to Deutsche Bank, he made "no mention of any fee owing to Anastasio for his services." The application judge concluded that Anastasio did not establish an entitlement to any legal or equitable set-off.

[84] These are essentially factual findings to which this court owes deference. Anastasio has not pointed to any palpable and overriding error, nor error of law, with respect to these findings. I would not give effect to this ground of appeal.

(b) John Aquino's claims to set-off

[85] The statutory basis for a claim to set-off is s. 97(3) of the *BIA*, which provides:

> The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act

[89] Decision Below, at para. 106.
[90] Decision Below, at para. 284.

> respecting frauds or fraudulent preferences. [Emphasis added.]

[86] Houlden, Morawetz, and Sarra comment on the operation of the exception under s. 97(3): "It may be that the purpose of the concluding words of s. 97(3) is to make it clear that a creditor who has to return property to the trustee as a result of the setting aside of a fraudulent preference has no right to assert a set-off."[91] This is because the effect of according a set-off would be to give a preference to that creditor over other creditors. Houlden, Morawetz, and Sarra note that "the effect of the set-off is to prefer one creditor over the general body of creditors", which "has the effect of securing the claim of the party entitled to it."[92] Doing so would give a fraudster priority over other creditors for the amount set off, which is contrary to the *pari passu* principle of bankruptcy law.

[87] John Aquino asserts that his liability for any s. 96 repayments should be reduced by a total of $19,009,987. He claims set-offs in the amounts of: (1) $11,922,811, which is the alleged amount of his shareholder's loan to Bondfield[93]; (2) $3,270,631 on behalf of his holding company, 230, which is the difference between the inflows and outflows of cash between 230 and Bondfield during the review period ($17.3 million cash injections against repayment of

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[91] Houlden, Morawetz, and Sarra, at para. 5-547.
[92] Houlden, Morawetz, and Sarra, at para. 5-543, discussing *King Insurance Finance (Wines) Inc. v. 1557359 Ontario Inc. (Willowdale Autobody Inc.)*, 2012 ONSC 4263, 99 C.B.R. (5th) 227.
[93] Decision Below, at para. 93.

$14,029,369)[94]; and (3) $3,816,545, which is the amount he argues would account for Harmonized Sales Tax input credits on the sums found to be transfers at undervalue.

[88] Although the application judge recited the evidence about the first claim, she rejected it perfunctorily on the basis that John Aquino "has not provided evidence to establish an entitlement to legal or equitable set off in the context of these insolvency and bankruptcy proceedings."[95] An insight into her reasoning would have been helpful, but I would not hesitate to come to the same conclusion.

[89] The logic of the language of s. 97(3), particularly the underlined words quoted above, as explained by Houlden, Morawetz, and Sarra, is determinative. Giving effect to John Aquino's argument would perversely reward him for his fraud. This is sufficient to dispose of John Aquino's set-off claims. Neither legal nor equitable set-off is available to John Aquino. In support of the refusal to grant equitable set-off, I would paraphrase a hoary old equitable maxim: The one who comes to Equity must come with clean hands. John Aquino's hands are not clean.

[90] Concerning the second set-off claim on behalf of 230, the application judge noted that the monitor did not dispute that: "Within the Bondfield review period, accounting for all ins and outs, 230 is in a net positive position at the end of the

[94] Decision Below, at para. 255.
[95] Decision Below, at para. 283.

period and appears to be owed $3,270,631."[96] The monitor took the position that the cash flows were part of an illicit "fund cycling scheme" that were also transfers at undervalue. However, the application judge found that the monitor had not proven that claim.[97]

[91] But the application judge's findings do not reinforce 230's claim to set-off. That claim suffers from the same fundamental deficiency as John Aquino's claims, and I would dismiss this ground of appeal on that basis.

[92] The third claim, that the application judge did not take into account HST credits, is correct. The HST issue was not addressed in her reasons. The reason the monitor gives is that this issue was not raised before her but is a new issue raised for the first time on appeal. I agree with the monitor that it is not an issue this court should consider.

(3) Did the application judge err in finding that 664 Ontario was part of the false invoicing scheme?

[93] The application judge noted that unlike most of the other participants in the false invoicing scheme, 664 Ontario denied involvement and asserted that it provided value for the payment by Forma-Con of an invoice in the amount of $90,400.[98]

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[96] Decision Below, at para. 255.
[97] Decision Below, at paras. 269, 278.
[98] Decision Below, at paras. 36, 108.

[94] The application judge analyzed 664 Ontario's claim in a number of paragraphs in her decision and concluded: "Because the evidence indicates that 664 Ontario was not involved in the false invoicing scheme during the Forma-Con review period to the same degree as the other Forma-Con Supplier Respondents, and it has not benefited to the same extent, its liability is limited to the benefit it derived from its involvement, which I find to be $90,400."[99]

[95] In reaching this conclusion, the application judge said: "I am left with serious doubt about the legitimacy of 664 Ontario's explanation of the payment to it. On a balance of probabilities, in light of the pattern of the false invoicing scheme, I find that 664 Ontario's invoice, like many others produced as part of the false invoicing schemes, was a transaction in which no service was given for the value received."[100]

[96] This conclusion was well-supported. Although 664 Ontario said that the work related to consulting services on the Hawkesbury hospital project: "The Trustee has not been able to find, and 664 Ontario has not produced, any internal records to corroborate the work or the agreement."[101] The application judge noted that the consulting service 664 Ontario asserts that it provided required a "high degree of structural engineering experience", which 664 Ontario did not possess as a matter

[99] Decision Below, at para. 282.
[100] Decision Below, at para. 128.
[101] Decision Below, at para. 123.

of fact. She pointed out that 664 Ontario failed to provide relevant documents and correspondence regarding the involvement of a sub-consultant, refused to produce original documents, and refused to answer a number of questions in cross-examination.[102] The invoice at issue was solicited by Solano, who had no responsibility in the area in which 664 Ontario was operating. The method of invoicing was consistent with the other false invoices, including Solano's shady role.

[97] Finally, the application judge found that 664 Ontario was not acting at arm's length with Forma-Con, largely based on her finding that no consulting services were actually supplied.[103]

[98] However, because 664 Ontario's participation was limited, she did not make the company jointly and severally liable, but instead only made it liable for the payment actually received from Forma-Con.

[99] I would dismiss 664 Ontario's appeal on the basis that it failed to discharge its evidentiary burden of answering the case put forward by the trustee. It was open to the application judge to draw the adverse inferences she did. I do not discern any palpable and overriding error or error of law.

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[102] Decision Below, at paras. 124-25.
[103] Decision Below, at para. 140.

(4) Did the application judge err in permitting the matter to proceed as an application?

[100] John Aquino brought a motion to the application judge at the outset of the hearing to convert the combined applications of the monitor and trustee into an action, which Hainey J. had earlier refused to do. The application judge's endorsement on the motion noted that the *BIA* permitted an application as the "default procedural rule". She was aware that the *Rules of Civil Procedure*[104] gave her discretion to convert the application into an action or to order the trial of an issue. She instructed herself on the jurisprudence and declined to do so, concluding:

> I find that Mr. Aquino has not produced sufficient evidence to persuade me that there are material facts in dispute or credibility issues that cannot be resolved without the benefit of a trial. At the heart of the application is the question of whether the impugned transactions were carried out with intent to defraud, defeat or delay creditors. The facts relevant to this fundamental question remain much the same as they were at the time Justice Hainey heard the moving parties' motion. If anything, the application has become less complex because the Respondents have now admitted that the transfers (other than the transfers relating to 230) occurred at undervalue, and they do not dispute any of the details or the operation of the false invoices scheme. Accordingly, the motion is dismissed.[105]

[104] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 38.10(b).
[105] Endorsement of Dietrich J., dated September 15, 2020, at para. 18.

[101] John Aquino identifies as the first issue in the appeal "whether the applications should have been converted into an action, and if not, whether there should have been a trial of an issue on the financial position of BCCL and Forma-Con and its application to the issues thereon".

[102] John Aquino advances several grounds. First, he argues that he was not the only "directing mind" at Bondfield and Forma-Con and believes that his father Ralph and brother Steven should also have been embroiled, noting: "The machinery of a trial was necessary in order for the Court to test the credibility of these material players, most fundamentally on whether the Bondfield Group had an intention to defeat creditors, and whether Ralph and Steven were privy to the impugned transactions." I agree with the application judge that this internecine fight is not relevant to the applications the monitor and the trustee brought. The application judge pointed out that it was open to John Aquino to pursue his father and sibling elsewhere. She found, quite rightly, that the participation of all three directing minds was not necessary to trigger s. 96 liability on the part of one of them.[106]

[103] Second, John Aquino asserts, as noted earlier, that Bondfield and Forma-Con were in strong financial shape and had no creditors at the time that he and his associates were looting them. He claims that expert evidence and cross-

[106] Decision Below, at para. 196.

examination about the "true financial condition" of each company "at the time of each impugned transaction" was therefore required. I noted above that the application judge acknowledged that there was "a divergence of opinion" on the financial condition of the companies and that the "true financial condition of each of BCCL and Forma-Con at the time of each impugned transaction cannot be determined on the record before the court."[107] But as described earlier, there was enough evidence to support the application judge's conclusion: "The totality of the evidence demonstrates a pattern of an intent by John Aquino, on behalf of each of BCCL and Forma-Con to defraud, defeat or delay the creditors of BCCL and Forma-Con."[108]

[104] The application judge's discretionary decision not to convert the consolidated applications into an action or to order the trial of an issue is entitled to appellate deference, in the absence of a legal error, an error in principle, or a palpable and overriding factual error. The appellants have not identified any. I would dismiss this ground of appeal.

[107] Decision Below, at paras. 165, 193.
[108] Decision Below, at para. 197.

E. DISPOSITION

[105] I would dismiss the appeals by all of the appellants with costs. With respect to the appellants other than 664 Ontario, costs in the agreed upon amount of $75,000 all-inclusive are awarded to the respondents.

[106] If 664 Ontario and the respondents are unable to agree on costs, then the respondents may file a written submission no more than three pages in length within ten days of the date of the release of these reasons and 664 Ontario may file a written submission no more than three pages in length within ten days of the date the respondents' submission is due.

Released: March 10, 2022 "P.L."

"P. Lauwers J.A."
"I agree. Coroza J.A."
"I agree. Sossin J.A."

CITATION: Laurentian University of Sudbury, 2021 ONSC 3272
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-07

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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 LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the Firm Capital Corporation, the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for Laurentian University Faculty Association (LUFA)

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union (LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan, Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory Authority

Sarah Godwin, for the Canadian Association of University Teachers

David Salter and Peter J. Osborne, for the Board of Governors

Rachel Moses, for Royal Trust

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Michelle Pottruff, for the Ministry of Colleges and Universities

Charlotte Servant-L'Heureux, for the Assemblée de la francophonie de l'Ontario

Linda Chen, for the Information and Privacy Commissioner of Ontario

HEARD: April 29, 2021

DECISION RELEASED: May 2, 2021

REASONS: May 7, 2021

ENDORSEMENT

[1] On Sunday, May 2, 2021, the following endorsement was released:

> [1] Thorneloe University ("Thorneloe") brings this motion under section 32(2) of the *Companies' Creditors Arrangement Act* ("CCAA") for an order that the following two agreements in the Notice of Disclaimer of Laurentian University of Sudbury ("Laurentian") dated April 1, 2021 are not to be disclaimed or resiliated:
>
> > (a) the Federation Agreement between Laurentian and Thorneloe, dated 1962 (the "Federation Agreement"); and,
> >
> > (b) the Financial Distribution Notice between Laurentian and Thorneloe dated May 1, 2019, amending the Proposed Grant Distribution and Services agreement between Laurentian, the University of Sudbury, Thorneloe University, and Huntington University dated November 10, 1993 (the "Financial Distribution Notice") (collectively, the "Agreements");
>
> and, for an order amending the Loan Amendment Agreement dated April 20, 2021 (the "DIP Amendment Agreement"), to delete the following condition:
>
> > 4. The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington

> University, Thorneloe University and the University of Sudbury (collectively, the "Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021 (the "New Disclaimer Term").

[2] This motion was heard via Zoom on April 29, 2021.

[3] The University of Sudbury also brought a motion pursuant to section 32(2) of the CCAA with respect to a Federation Agreement between Laurentian and the University of Sudbury. This motion was heard via Zoom on April 30, 2021 by Gilmore J.

[4] This endorsement is being released concurrently with the endorsement of Gilmore J.

[5] For reasons to follow, Thorneloe's motion is dismissed.

[2] These are my reasons.

BACKGROUND

[3] In 1960, Thorneloe, Huntington University ("Huntington"), and the University of Sudbury ("U Sudbury") (collectively, the "Federated Universities"), were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding. The Province of Ontario passed an *Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established. On September 10, 1960, U Sudbury and Huntington entered into Federation Agreements with Laurentian and in 1962, Thorneloe entered into a Federation Agreement with Laurentian (collectively, the "Federation Agreements").

[4] The Federated Universities agreed to suspend degree-granting authority (other than Theology, in the case of Thorneloe and Huntington) and effectively operate as a single university. The Federated Universities would teach courses to students for credit at Laurentian. Funding from the provincial government was provided to the Federated Universities, through Laurentian.

[5] The arrangement among the Federated Universities to distribute government grants is set out in the Proposed Grant Distribution and Services Fees Agreement dated November 10, 1993.

[6] The funding arrangement was changed commencing in the 2019 – 2020 academic year, per the Financial Distribution Notice.

[7] Laurentian wants to disclaim the Federation Agreements and the Financial Distribution Notice with respect to Thorneloe and U Sudbury.

[8] As referenced in the Third Report of the Monitor, the Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology

at Huntington and Thorneloe). All Federated University programs and courses are offered through Laurentian, and all students apply for admission to Laurentian. Students who enroll in a program at Laurentian may take elective courses at any or all of the Federated Universities as well as Laurentian. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of Laurentian, and these courses are credited towards a degree from Laurentian. Laurentian provides certain services to the Federated Universities, however, each of the Federated Universities is separately governed and manages its finances separately from Laurentian and each other.

[9] The Monitor also reported that as all students are students of Laurentian regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition. Laurentian manages admission. Students are billed tuition by Laurentian. Students then choose courses from a Laurentian course catalogue which includes courses offered through the Federated Universities.

[10] While Laurentian does not receive grant revenue or tuition revenue that is directly intended for the benefit of the Federated Universities, Laurentian and the Federated Universities have certain financial agreements in place pursuant to which Laurentian receives, allocates and distributes a portion of Laurentian's revenue to the Federated Universities in accordance with the funding formula (the "Federated Funding Formula"). Through this Federated Funding Formula, Laurentian compensates the Federated Universities for delivering programs and services to Laurentian students. The key terms of the Federated Funding Formula include the following:

(a) A portion of provincial grants received by Laurentian are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;

(b) A portion of tuition fees received by Laurentian are distributed to the Federated Universities based upon student enrolment and courses offered through the Federated Universities; and

(c) An offsetting charge for service fees charged by Laurentian to the Federated Universities in exchange for Laurentian providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities).

[11] As of the fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs through the three Federated Universities (271 full-time equivalents). This includes 91 full-time and part-time students of Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at U Sudbury (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents). The remaining students are enrolled in programs jointly offered by the Federated Universities.

[12] Students who enrolled at Laurentian have had the ability to take elective courses at any or all of the Federated Universities, as well as at Laurentian. The main activity of both U Sudbury

and Thorneloe is to offer elective courses through the Faculty of Arts for students enrolled in the Applicant's programs.

[13] Each of the Federation Agreements contains an aspirational statement which addresses the Federated relationship:

> [B]oth Laurentian University and [the Federated University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one… [a]nd to build a great institution of learning which shall forever be bilingual and nondenominational in its character.

[14] Laurentian has Indenture Agreements with each of the Federated Universities, pursuant to which the Federated Universities lease land owned by Laurentian and on which they have constructed their own buildings. Each indenture provides for lease terms of 99 years, with the possibility of further renewal.

[15] The indentures contain termination provisions which allow for the termination of the indenture if the relevant Federated University withdraws from the Federation with the Applicant. No notice of disclaimer was issued by Laurentian in respect of any of the indentures and the indentures are not the subject matter of this motion.

[16] Laurentian takes the position that the main activity of the Federated Universities is offering elective courses that are administered for Laurentian's students. Each time a Laurentian student takes an elective course through the Federated Universities, rather than an elective through Laurentian, that represents lost tuition revenue to Laurentian.

[17] Laurentian takes the position that in fiscal year 2020, as a result of Laurentian students' enrolment in programs and courses through the Federated Universities, Laurentian transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the administrative services fee of approximately $1.4 million, for a net transfer from Laurentian to the Federated Universities of approximately $7.7 million in fiscal year 2020.

[18] Laurentian has approximately 9,300 undergraduate and graduate students. Laurentian asserts that its Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for Laurentian to lose revenue because its students take elective courses offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities can otherwise be accommodated and enrolled in programs offered by Laurentian, Laurentian asserts that a substantial portion of the grant revenue represents lost revenue for Laurentian. Laurentian and the Monitor concede that Laurentian will not be able to accommodate 100% of the displaced students but anticipate that it will be able to accommodate most of them.

[19] Laurentian also asserts that approximately 70% of its revenues in 2019-2020 is comprised of tuition and grant funding, and, due to the freeze of tuition fees, Laurentian cannot increase

revenue through tuition fees. Thus, the only opportunity for Laurentian to fully utilize the revenue it receives in respect of its students is for them to be enrolled in programs and courses at Laurentian.

[20] Thorneloe presents the facts from its viewpoint. It considers that the funds flow through Laurentian to Thorneloe pursuant to the Financial Distribution Notice. The funds do not belong to Laurentian and the funds do not represent a subsidy. As set out in the Financial Distribution Notice, Laurentian charges Thorneloe an additional 15% of Thorneloe's earned government grants and tuitions.

[21] Thorneloe also points out that it is a small component of the Laurentian Federation, employing a total workforce of 28, including seven full-time faculty members, 12 sessional faculty members, six staff and three casual staff.

[22] Notwithstanding its small size, Thorneloe contends that it has a big impact. In 2019-2020, Thorneloe taught 2861 Laurentian students, representing 297 full-time equivalents ("FTEs"). In 2020-2021, Thorneloe taught slightly fewer (2477) Laurentian students, after it made the decision to close underperforming programs.

[23] Thorneloe also contends that the financial problems of Laurentian are not attributable to Thorneloe or the Federation model.

CCAA PROCEEDINGS

[24] Laurentian obtained an initial stay of proceedings under the CCAA on February 1, 2021. The objective of the CCAA filing was the subject of comment in the affidavit of Dr. Robert Haché, sworn January 30, 2021, filed in support of the initial application. Section VIII covers the "Proposed Restructuring of Laurentian", the "Evaluation of the Federated Universities Model" and the "Restructuring of Program Offerings".

[25] Paragraph 295 of the affidavit reads as follows:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) **Restructuring the Academic Model** by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and terminating the agreements and relationship with the Federated Universities; and
>
> (b) **Restructuring the Business Model** by updating business operations, restructuring existing obligations through a compromise in the CCAA and ultimately balancing the budget.

[26] Paragraph 298 reads, in part, as follows:

> [298] More particularly, during this CCAA proceeding, LU ("Laurentian") intends to:
>
> …
>
> (b) re-evaluate the Federated Universities model in such a way that the historic significance of the Federated Universities can be preserved while ensuring that the relationships reflect the current realities of each organization;

[27] Paragraphs 299 – 301 read as follows:

> [299] In 2019, LU provided notice of a change in the funding agreement between LU and each of the Federated Universities. While this amendment was necessary to make the funding arrangements consistent with metrics in respect of tuition and grants from the Province, further work is required. LU estimates that the Federated Universities model costs LU approximately $5 million each year.
>
> [300] Currently, the Federated Universities have duplicate organizational infrastructure, functions and services. Although LU respects the autonomy of the Federated Universities, the Federated Universities also have financial challenges. One successful outcome of this CCAA proceeding may be the remolding of the Federated Universities model in such a way that creates economies of efficiency for LU and the Federated Universities while maintaining the historical significance and identities of the Federated Universities.
>
> [301] This Court-supervised proceeding will assist LU in focusing its discussions and negotiations with leadership of the Federated Universities to arrive at a compromise and solution that is acceptable and, more importantly, ensures the long-term sustainability of LU. If necessary, LU may utilize the proposed mediation to address and resolve the Federated Universities model.

[28] The Honourable Justice Sean Dunphy conducted a judicial mediation to address a number of issues facing Laurentian. Although the contents of any discussions have not been made public, it is apparent that the issues as between Laurentian and the Federated Universities were discussed but were not resolved.

[29] On April 1, 2021, Laurentian gave Notice to Disclaim or Resiliate an Agreement with Thorneloe and with U Sudbury. The notice covered both the Federation Agreements and the Financial Distribution Notice.

[30] The Monitor approved the Notices of Disclaimer.

[31] On April 15, 2021, Thorneloe delivered a Motion Record opposing the Notice of Disclaimer issued to Thorneloe.

[32] U Sudbury also delivered a Motion Record opposing the Notice of Disclaimer. The motion was the subject of a bilingual hearing before Gilmore J.

ISSUE

[33] Thorneloe submits there is one issue to be determined on this motion: should the court prohibit the disclaimer?

ANALYSIS

[34] Section 32 of the CCAA addresses the disclaimer or resiliation of agreements.

[35] The debtor company may, on notice to the other parties to an agreement and the monitor, disclaim or resiliate an agreement to which the company is a party at the commencement of the CCAA proceedings: s. 32(1). The monitor must approve the proposed disclaimer or resiliation. Otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed or resiliated: ss. 32(1) and (3). The counterparty has 15 days to make an application to the court opposing the disclaimer or resiliation: s. 32(2). In deciding whether to make the order, the court is to consider, among other things, the factors set out in s. 32(4), which read as follows:

> **Factors to be considered**
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[36] Thorneloe makes the following arguments in opposition to the disclaimer:

(a) Thorneloe did not cause Laurentian's financial problem;

(b) The disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make an insolvency filing pursuant to the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

(c) Thorneloe is immaterial to Laurentian's financial situation and therefore, the disclaimer would not result in a material improvement to Laurentian's restructuring;

(d) The relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply; and

(e) Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA.

[37] The Monitor approved the disclaimer for reasons set out in the Third Report as follows:

> 169. … [I]t is the Monitor's view that the Notices of Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant. In fact, it is the Monitor's view that without the Notices of Disclaimer, the Applicant is unlikely to be able to complete a viable plan of compromise or arrangement.
>
> …
>
> 172. While the net estimated savings achieved to date is significant and addresses the Applicant's operational deficit, it is unlikely to be sufficient to cover among other items: (a) the repayment of the DIP Facility (even if refinanced over time) and (b) payment of distributions to creditors pursuant to a plan of compromise or arrangement in connection with the compromise of their claims.
>
> 173. As a not-for-profit, LU is unable to issue equity to creditors. It has no or limited ability to service additional debt beyond the refinancing of the DIP. As set out above, LU has limited opportunity to drive increased revenue. Therefore, LU must, through its restructuring, generate sufficient savings to provide for the ability to make payments over time to its creditors in partial satisfaction of their claims. The savings generated to date through the LUFA Term Sheet, LUSU Term Sheet and non-union employee savings represent a significant component of the required savings, but not the entirety.
>
> 174. The Federated Universities model represents a significant cost to LU. In Fiscal 2020, LU transferred approximately $7.7 million to the Federated Universities as a result of LU students taking programs and courses offered through the Federated Universities. This included the transfer of approximately $3.5 million of grants received by LU, $5.3 million in net tuition collected from LU students and $0.3 million in material fees in respect of Federated Universities courses all offset by a 15% service fee of approximately $1.4 million. …
>
> 175. The Monitor understands that the majority of the funds transferred to the Federated Universities relates to the delivery by the Federated Universities of

elective courses taken by students enrolled in LU programs as opposed to students enrolled in programs offered through the Federated Universities.

176. In conducting its review of its academic offerings and operational restructuring model, LU determined that it has the ability and capacity to offer a comprehensive list of programs and courses to LU students from the suite of programs and courses delivered by LU faculty in the absence of continuing the Federated Universities relationship. As a result, LU determined that it could retain the vast majority of the funds transferred to the Federated Universities and continue to support students without incurring those incremental costs.

177. As a result, LU is of the view that savings estimated in the range of $7.1 to $7.3 million annually can be generated through the disclaimer of the Federated Universities as part of this restructuring.

178. The Monitor recognizes the potential financial hardship that the Notices of Disclaimer may have for the Federated Universities. However, given the additional savings required for LU to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring, the Monitor is of the view that the disclaimer of the Federated Universities agreements is necessary.

[38] To counter the submissions of Laurentian and the views and recommendations expressed by the Monitor, Thorneloe filed a Report on Financial Impact of Termination of Federated Agreement and Financial Distribution Agreement on Thorneloe University. The Report was prepared by Mr. Allan Nackan, a partner with A. Farber & Partners Inc. Mr. Nackan has been identified as an expert for the purposes of providing his opinion. I am satisfied that Mr. Nackan is an expert in the area of insolvency and restructuring. However, Mr. Nackan acknowledged in cross-examination that he is not an expert in terms of government funding of universities and that he has no prior experience in determining university funding. His lack of industry-specific experience has to be taken into account when considering his report and conclusions.

[39] It is also necessary to acknowledge the expertise of Ernst & Young Inc., the court-appointed Monitor. The Monitor is an officer of the court, with a duty to be neutral and objective: *Bell Canada International Inc. (Re)*, [2003] CarswellOnt No. 4537 (S.C.). The principals of Ernst & Young Inc., including Sharon Hamilton, who signed the Monitor's Third Report, are widely acknowledged as being experts in the field of insolvency and restructuring. Moreover, the Monitor has been involved since the proceedings began and has extensive knowledge of the Applicant's operations and restructuring efforts.

[40] Farber was retained to provide an opinion on whether the termination of the Federated Agreement and the Financial Distribution Notice would result in significant financial hardships to Thorneloe, and whether or not the termination would enhance Laurentian's prospects of a viable compromise or arrangement.

[41] Farber concludes the termination of the Federated Agreement will cause serious financial hardship to Thorneloe as a consequence of which Thorneloe will have to resort to a formal insolvency process.

[42] Farber also concludes that the termination of the Federated Agreement will have an immaterial impact on overall costs reduction in Laurentian's restructuring process and is unlikely to enhance prospects of Laurentian making a viable plan.

[43] In a supplementary report, Farber concludes that:

- Laurentian is not facing an immediate liquidity crisis on May 1, 2021;
- there is no compelling reason that would necessitate termination of the federated arrangement with Thorneloe on May 1, 2021;
- from a financial perspective, Laurentian and the DIP Lender have not provided information to support the need for a Disclaimer Deadline of May 1, 2021.

[44] A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[45] In my view, the considerations in the Third Report of the Monitor reflect a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe. The Third Report discusses the financial challenges facing Laurentian and proposes solutions that could enhance the prospects of a viable plan of compromise or arrangement, while acknowledging the potential financial hardship on the Federated Universities. The Farber Report and the Supplementary Farber Report focuses of the impact of the disclaimer on Thorneloe and the short term DIP Financing requirements. In narrowing its focus, the Farber Report does not take into account that in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups. For this reason, I have concluded that the Third Report of the Monitor has to be given greater weight than the Farber Report and the Supplementary Farber Report.

[46] Laurentian submits that the Courts have identified guiding principles for the analysis:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings (see *Nortel Network Corp. Re*, 2018 ONSC 6257 at para. 27; *Aralez*

Pharmaceuticals Inc., Re, 2018 ONSC 6980 at para. 36; and *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f);

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial (see *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 ("*Timminco*"); see also *Homberg Invest Inc.*, 2011 QCCS 6376 at para. 103);

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer (see *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26);

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty (see *Timminco* at para. 60); and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA (see *Timminco* at para. 62).

[47] There is no doubt that Laurentian has significant financial challenges. There is also no doubt that, if a successful restructuring is to be achieved, it must be done on an expedited basis. If Laurentian is to successfully restructure its affairs, it is essential that it maintain continuity of operations. The spring term commences May 3, 2021 and extends until the latter part of July 2021. The fall term commences at the beginning of September 2021. If the restructuring is to succeed, Laurentian must be in a position to provide assurances to both its students and faculty that it has a viable plan that will ensure continued operations for both the spring term, the fall term and beyond.

[48] Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These include a downsizing of the number of programs being offered by Laurentian and also the necessity to arrive at new, sustainable collective agreements with LUFA and LUSU. These requirements and accommodations are set out in the motion to extend the stay of proceedings.

[49] Laurentian also identified, at the outset of the CCAA proceedings, that it would be necessary to have a fundamental readjustment or realignment with the Federated Universities.

[50] Although Thorneloe is of the view that its relationship with Laurentian has only a minor impact on the financial position of Laurentian, it seems to me that this view is far too narrow in scope. Laurentian has identified that if the disclaimers involving Thorneloe and U Sudbury are upheld, together with the revised agreement with Huntington, this will result in $7.7 million of additional funds remaining with Laurentian on an annual basis. This calculation has been identified by the Monitor and, in my view, represents a real source of annual financial relief for Laurentian.

[51] Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive

and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a "most favoured nation" clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.

[52] The Notices of Disclaimer are, in my view, central to the Applicant's restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor's Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[53] The Applicant contends that it simply cannot afford to continue its relationship with the Federated Universities. In order to right-size the University, Laurentian cannot continue paying for programs and courses supplied by the Federated Universities that it does not require and are revenue negative for Laurentian.

[54] The Applicant submits that it cannot simply "balance its budget" in order to achieve financial sustainability. It submits that it must generate positive cash flow from operations on an annual basis, prior to the funding of expenses, to achieve financial sustainability. In my view, this submission is consistent with the objective and necessity of achieving long-term sustainability.

[55] Laurentian has also submitted that the savings to be realized from the disclaimer are necessary for the purposes of submitting a viable plan. The Monitor is in agreement with this submission.

[56] Although the savings realized from the disclaimer do not, in isolation, represent a significant amount, in my view, that is not the end of the inquiry. In order to enhance the prospects of a viable plan of reorganization being put forward, it is necessary to assess the totality of what Laurentian is attempting to achieve in this restructuring.

[57] Laurentian suggests that savings have to be realized from a number of sources, including the Federated Universities. Without the total amount of savings being realized, Laurentian submits that it will been unable to put forward the basis of a plan that will be acceptable to its various constituents.

[58] It is necessary to take into account another factor, namely that there is evidence that Laurentian has achieved other milestones in its attempt to put forward a viable plan of reorganization. These include the revised relationships with LUFA and LUSU, the reduction in the number of courses, and the reduction in the number of staff. None of these milestones were realized without significant compromise and hardship being experienced by faculty, students and

the greater Sudbury community. Without such compromises, Laurentian will not be able to survive.

[59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.

[60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a "loan to own strategy". These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re)*, Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual

relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

[67] Thorneloe also raises the concern that the Disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make insolvency filings pursuant to the CCAA or the *Bankruptcy and Insolvency Act*.

[68] There is no doubt that this is a legitimate point being raised by Thorneloe. The impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form. However, Thorneloe was offered alternatives. The form of the Huntington Transition Agreement was offered to Thorneloe but was not accepted. More importantly, it is also necessary to take into account that if Laurentian's restructuring does not succeed and it ceases operations, Thorneloe, as conceded by its counsel, will also be unable to continue operations.

[69] Thorneloe also contests the disclaimers on the basis that the relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply. In my view there is no merit to this submission. The CCAA proceedings were commenced on February 1, 2021. The Initial Order declares that Laurentian is insolvent and is a company to which the CCAA applies. The disclaimer provisions in s. 32 are available to a debtor company. The exceptions set out in s. 32(9) have no application in the circumstances. Laurentian is entitled to utilize the disclaimer provisions in accordance with s. 32.

[70] Thorneloe also takes the position that Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA which provides:

> **Good faith**
>
> **18.6** (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith – powers of court**
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[71] In support of this argument, Thorneloe points to Laurentian's attempt to terminate its relationship with Thorneloe, knowing that the disclaimer will result in Thorneloe's insolvency, and to Laurentian's persistence in the face of evidence that termination will not materially assist its restructuring. Thorneloe also submits that Laurentian has consistently and continually wanted to terminate its relationship with Thorneloe and thereby failed to engage in good faith negotiations.

[72] I do not accept that Laurentian has acted in bad faith. Restructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not

necessarily mean that the other party has not been acting in good faith. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.

[73] Section 11.02(3) of the CCAA addresses the burden of proof on an application for an extension of the stay of proceedings other than the initial application. This includes a requirement that the applicant satisfy the court that it has acted, and is acting, in good faith and with due diligence. By supporting the application for the extension and upholding the disclaimer, it can be inferred that the Monitor does not support the argument of Thorneloe to the effect that Laurentian has been acting in bad faith.

[74] My summary of the factors set out in s. 32(4) of the CCAA is as follows:

(a) the Monitor approved the proposed disclaimer;

(b) the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Laurentian;

(c) the Notice of Disclaimer will have financial consequences to Thorneloe, but this is not a sufficient reason to disallow the Notice of Disclaimer. Thorneloe was offered an alternative, similar to Huntington, which was not accepted.

[75] In addition, it seems to me that, in the circumstances of this case, it is necessary to consider the broader implication of disallowing the Notice of Disclaimer – namely the potential demise of Laurentian.

[76] The dilemma facing the court is clear. If Thorneloe's motion succeeds, with the result that the Disclaimer is not effective, it could lead to an unraveling of Laurentian's restructuring plan and the collapse of Laurentian. This in turn would have significant impact on all faculty, students and the greater Sudbury community. It would also result in the financial collapse of Thorneloe. Obviously, this is not a desirable outcome.

[77] If the Notices of Disclaimer are upheld, I acknowledge that this could lead to the cessation of operations of Thorneloe. I do not lightly discount the impact on faculty, employees and students at Thorneloe, but the impact is significantly less than if Laurentian and Thorneloe are both forced to suspend or cease operations.

[78] Given these two undesirable options, the better choice or to put it another way, the least undesirable choice, is to uphold the Notices of Disclaimer.

DISPOSITION

[79] In the result, the motion brought by Thorneloe to invalidate the Notice of Disclaimer is dismissed.

Chief Justice G.B. Morawetz

Date: May 7, 2021

CITATION: Laurentian University of Sudbury, 2021 ONSC 659
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-01

SUPERIOR COURT OF JUSTICE - ONTARIO

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 LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan* and *Derek Harland*, for the Applicant

Ashley John Taylor and *Elizabeth Pillon*, for the Monitor

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel to the Applicant

Pamela L.J. Huff and *Aryo Shalviri*, for Royal Bank of Canada

Stuart Brotman and *Dylan Chochla*, for Toronto Dominion Bank

Martin R. Kaplan and *Vern W. DaRe*, for Firm Capital Mortgage Fund Inc., DIP Lender

Michael Kennedy, Labour Counsel for the Applicant

George Benchetrit, for Bank of Montreal

HEARD: February 1, 2021

ENDORSEMENT

Introduction

[1] Laurentian University of Sudbury ("LU" or the "Applicant") seeks certain relief pursuant to an order (the "Initial Order") under the *Companies' Creditors Arrangement Act* (the "CCAA").[1]

[2] LU is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

[3] As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU's recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

[4] LU submits that it requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all its stakeholders.

[5] The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021, filed in support of this application (the "Haché Affidavit").[2]

[6] For the following reasons, the Interim Order is granted.

Overview of the Applicant

[7] LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury,* S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154 (the "LU Act") and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[8] The governance structure of LU is bicameral. The Board of Governors (the "Board"), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the "Senate") is responsible for the academic policy of LU.

[9] LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer

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[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

[2] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.

programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.

[10] LU also has a graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.

[11] LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. The Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.

[12] LU is one of the largest employers in the Greater Sudbury area. As at December 30, 2020, LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately $134 million of $201 million in total expenses during fiscal year 2019-20).

[13] Approximately 612 LU employees are represented by the Laurentian University Faculty Association ("LUFA"). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union ("LUSU").

[14] LUFA and the Board of LU are parties to a Collective Agreement (the "LUFA CA"), with a three-year term that expired on June 30, 2020.

[15] Since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement.

[16] On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the "LUSU CA").

Assets and Liabilities

[17] LU does not prepare interim financial statements. The most recent audited statements for the year ended April 30, 2020, are attached to the Haché Affidavit.

[18] As at April 30, 2020, LU had assets with a book value totaling approximately $358 million, of which approximately $33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU's segregated endowment fund ($53 million) and capital assets ($272 million), comprising LU's land and buildings.

[19] As at April 30, 2020, LU had liabilities with a book value totaling approximately $322 million, comprised of: (i) approximately $43 million of current liabilities; (ii) approximately $168 million of deferred contributions; and (iii) approximately $110 million in long-term liabilities.

LU's Liquidity Crisis and Insolvency

[20] LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU of approximately $20 million at the end of 2019-20 fiscal year. In the current 2020-21 fiscal year, LU projects a further operational deficit of $5.6 million.

[21] LU takes the position that it is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

[22] LU advises that it has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

(a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA;

(b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed; and

(c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately $2,000 per student, per year.

[23] LU submits that the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

Objective of CCAA Filing

[24] As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:

(a) A review of the breadth of academic programs offered at LU and their enrollment levels;

(b) A re-evaluation of the Federated Universities model;

(c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;

(d) Identification of opportunities for future revenue generation;

(e) Refinement of the student experience at LU to continue providing a top-notch education; and

(f) Consideration of options for addressing current and long-term indebtedness.

Law and Analysis

[25] The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*, as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[3]

[26] The CCAA defines "company" to include, among other things, a company incorporated by or under an Act of the legislature of a province.[4]

[27] The Applicant is incorporated under an act of the legislature of the Province of Ontario, the LU Act, and therefore is a "company" for the purposes of the CCAA.[5] Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the *Corporations Act* (Ontario).[6]

[28] There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*[7] and *The Land Conservancy of British Columbia*.[8]

[29] I am satisfied that the Applicant's status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant.

Insolvency

[30] The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.[9] The BIA defines "insolvent person" as follows:[10]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,

[3] R.S.C. 1985, c. B-3 ("BIA").
[4] CCAA, s. 2(1).
[5] S.O. 1960, c. 151, as amended by S.O. 1961-62, c. 154.
[6] R.S.O. 1990, c. C.38.
[7] *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (S.C.).
[8] *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.
[9] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C.) at paras. 21-22 [*Stelco*].
[10] BIA, s. 2.

(ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[31] The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[11]

[32] In addition to the foregoing tests, in *Stelco*, Farley J. held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[12]

[33] Based on the evidence set out in the Haché Affidavit and as summarized in the Report of Ernst & Young Inc., the Proposed Monitor, I find that the Applicant is plainly insolvent and faces a severe liquidity crisis.

[34] I also find that the Applicant is a "debtor company" to which the CCAA applies.

Stay of Proceedings

[35] Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

[36] The Applicant submits that it is just and appropriate to grant a stay of proceedings. The Applicant submits that it requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario.

[37] The Proposed Initial Order provides for a stay of proceedings in favour of the Applicant's current and future directors and officers who may subsequently be appointed. The Applicant submits that the stay in favour of the current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. I accept this submission.

[38] The Applicant also seeks a limited stay in respect of the Laurentian University Students General Association (the "Non-Applicant Stay Party" or "the SGA"). The stay in respect of the

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[11] *Stelco*, *supra* note 9 at para. 28.
[12] *Stelco*, *supra* note 9 at para. 26.

Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

[39] CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.[13] The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[14]

[40] In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.[15]

[41] In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.

[42] In my view, it is desirable to avoid disruption to the Non-Applicant Stay Party which is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any disruption to students resulting from the commencement of this proceeding. In furtherance of this objective, the Non-Applicant Stay Party will be essential to ensuring students are given all of the information and resources they need to stay informed. The Non-Applicant Stay Party will play a crucial role in maintaining an open dialogue between the Applicant and the interests/concerns of all students.

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[13] For example, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063; *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184 (S.C.) [*Canwest*]; *Cinram International Inc (Re*), 2012 ONSC 3767 [*Cinram*].
[14] *Cinram, ibid* at paras. 61-65.
[15] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21; *Cinram, ibid* at paras. 61-65.

[43] I am satisfied that extending a limited stay of proceedings to the Non-Applicant Stay Party will allow it to continue fulfilling its intended role and providing the myriad of other key services it provides to the Applicant's students.

Pre-Filing and Post-Filing Payments

[44] The Proposed Initial Order allows the Applicant to continue to make certain pre-filing and post-filing payments, including express authorization to:

(a) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts owing in respect of rebates, refunds or other amounts that are owing or may be owed to students (directly, or to the student associations of the Applicant on behalf of students), in each case, subject to the policies and procedures of the Applicant; and

(b) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts payable to students in respect of student scholarship, bursary or grants.

[45] The Applicant intends on operating in the ordinary course during this CCAA proceeding and minimizing the disruption to students as much as possible. To facilitate this, the Applicant must be able to process certain rebates owing to students and continue to provide students with scholarship and bursary money that is critical to their ongoing studies. Some students must pay tuition prior to the receipt of funding from the Ontario Student Assistance Program (OSAP). Upon receipt of OSAP funding, the Applicant reimburses the students who receive such funding. In many instances, scholarship, bursary and grant money has been committed and is critical to students in need of financial aid to fund their education.

[46] If the Applicant is unable to continue to process such payments, vulnerable students may be irreparably harmed. Many of these students are younger than 19 years of age, and therefore particularly vulnerable. In addition, a change to the manner in which these financial aspects are addressed by the Applicant with their students could create immediate emergencies and disruption to their ability to continue their studies.

[47] The proposed Monitor supports the inclusion of this provision and I am satisfied that it is reasonable in the circumstances.

The Administration Charge

[48] The Applicant requests that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Proposed Monitor, counsel to the Proposed Monitor, the Applicant's counsel and advisors, and independent counsel to the Board. At the initial hearing the Administration Charge was requested in the amount of $400,000, and the Applicant will seek to increase it to $1.25 million pursuant to a proposed Amended and Restated Initial Order on the Comeback Hearing. Section 11.52 of the CCAA provides the Court with statutory jurisdiction to grant the Administration Charge.

[49] In *Canwest Publishing*, Pepall, J. (as she then was) considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[16]

[50] The Applicant submits that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge and the Directors' Charge; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

[51] Further, the Applicant has limited the quantum of the Administration Charge that it seeks approval of to what is reasonably necessary for the first ten days of the CCAA proceedings.

[52] The proposed Monitor supports the requested relief.

[53] I am satisfied that the Administrative Charge is reasonable in the circumstances.

The Directors' Charge

[54] The Applicant requests that this Court also grant a priority charge in favour of the Applicant's current and future directors and officers in the amount of $2 million (the "Directors' Charge"). The Applicant will seek to increase the Directors' Charge at the comeback hearing to

[16] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para. 58.

$5 million, $3 million of which will rank subordinate to the DIP Charge. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

[55] The Applicant has certain insurance policies in place (as defined in the Haché Affidavit); however, the Applicant is concerned that the directors and officers may be unwilling to continue in their roles with the Applicant absent the Court granting the Directors' Charge. The Directors' Charge will only be available to the extent that any claim or liability is not covered by any applicable D&O insurance and in the event that the Applicant's D&O insurance does not respond to claims against the directors and officers.

[56] Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[17]

[57] In approving a similar charge in *Canwest*, Pepall J. applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[18]

[58] The proposed Monitor supports the relief requested.

[59] I am satisfied that the Directors' Charge is reasonable in the circumstances because: (i) the Applicant will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring, (ii) the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicant does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities, (iii) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct, and (iv) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

[17] CCAA, section 11.51.
[18] *Canwest*, *supra* note 17 at paras. 46 and 48.

Sealing Provision

[60] Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."[19]

[61] In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. set out that a sealing order should only be granted when:

> (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[20]

[62] The Applicant requests that, in the Initial Order, this Court seal Confidential Exhibits "FFF" and "GGG" to the Haché Affidavit. These documents relate to correspondence between the Applicant and the Ministry of Colleges and Universities (the "Ministry"). The documents contain information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding, which could jeopardize the Applicant's efforts to restructure.

[63] If the Confidential Exhibits are not sealed, the Applicant submits that stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring. As such, the salutary effects of the sealing order, which provides the Applicant with the best possible chance to effect a restructuring, far outweigh the deleterious effects of not disclosing the correspondence between the Applicant and the Ministry.

[64] I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

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[19] *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras. 28 – 30.

[20] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 at para. 53.

The Requested Relief Sought is Reasonably Necessary

[65] Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.[21]

[66] The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[22]

[67] For the purposes of relief sought on this initial hearing, I accept the facts as stated in the Haché affidavit.

[68] The financial information required pursuant to s. 10(2) of the CCAA has been provided.

[69] I am satisfied the Ernst & Young Inc. is qualified to act as Monitor.

Disposition

[70] The requested relief complies with s. 11.001 of the CCAA in that it is limited to relief that is reasonably necessary for the continued operation of the applicant in the ordinary course of business. The Initial Order is granted in the form presented and it has been signed by me.

[71] The comeback hearing is to be held by Zoom on Wednesday, February 10, 2021 at 9:00 a.m.

Court-Appointed Mediator

[72] Finally, LU is also seeking an Order for the appointment of a mediator by the Court (the "Court-Appointed Mediator") to oversee negotiations with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[73] If appointed, the Applicant expects the Court-Appointed Mediator to assist with (i) negotiations related to the review and restructuring of the academic programs and (ii) the collective agreement between the Applicant and LUFA.

[74] The Applicant is of the view that the need for the appointment of a mediator by the court is urgent and a high priority item.

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[21] CCAA, s. 11.001, 11.02(1) and (3).
[22] *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26.

[75] The proposed Monitor is of the view that the appointment of a Court-Appointed Mediator is critical to ensure that LU, LUFA and the other negotiating parties have the best possible opportunity to succeed.

[76] It is the Proposed Monitor's view that it is necessary that the Court-Appointed Mediator be someone who is independent and objective, has experience in both insolvency matters as well as collective agreements and labour negotiations, someone who will appreciate the urgency with which the mediation must be conducted and have the time available to dedicate to it. Finally, in the Proposed Monitor's view, a sitting or recently retired judge meeting these characteristics would be preferable. The Proposed Monitor asks that the appointment be made by the court on an urgent basis.

[77] I appreciate and acknowledge the points put forth by counsel to both the Applicant and the Proposed Monitor. However, prior to determining this issue, in my view it is necessary to provide LUFA with an opportunity to make submissions.

[78] In recognition of the compressed timeline in these proceedings, it is desirable to determine this issue at the earliest opportunity and, in any event, not later than the comeback hearing on February 10, 2021.

[79] If LU, LUFA and the Proposed Monitor wish to address this matter prior to February 10, 2021, a case conference can be scheduled with me through the Commercial List Office.

CHIEF JUSTICE G.B. MORAWETZ

Date: February 1, 2021

CITATION: LoyaltyOne, Co. (Re), 2024 ONSC 3866
COURT FILE NO.: CV-23-00696017366651-00CL
DATE: 20240710

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 LOYALTYONE, CO.

BEFORE: Conway J.

COUNSEL: *Timothy Pinos, Alan Merskey and Kiyan Jamal*, for LoyaltyOne, Co.

Peter Ruby, Kirby Cohen and Meghan De Snoo, for KSV Restructuring Inc.

Robert W. Staley and Dylan Yegendorf, for the Ad Hoc Group of Term B Lenders

Markus Kremer and Alex Moser, for Bank of America, N.A. as administrative agent and Term Loan A Lenders

Eliot Kolers, Maria Konyukhova, Lesley Mercer and RJ Reid, for Bread Financial Holdings, Inc.

Edward Park, CRA, Department of Justice Canada

HEARD: June 13 and 14, 2024

REASONS FOR DECISION
(RE: TAX MATTERS AGREEMENT)

[1] LoyaltyOne, Co. ("**LoyaltyOne**") operated the AIR MILES loyalty rewards business for three decades. In March 2023, it sought protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**"). In June 2023, Bank of Montreal ("**BMO**") bought the assets of the AIR MILES business as a going concern in the CCAA proceedings.

[2] LoyaltyOne's largest remaining asset is a claim against the Canada Revenue Agency ("**CRA**") for a refund of $96 million with respect to taxes LoyaltyOne paid in 2013 (the "**Tax Refund**"). The trial over the Tax Refund is scheduled to commence in September 2024.

[3] Until November 2021, LoyaltyOne was a subsidiary of Alliance Data Systems Corporation ("**ADS**"). At that time, ADS divested itself of the AIR MILES business through a "spin transaction", explained below. One of the documents signed in the spin transaction is a tax matters agreement dated November 3, 2021 (the "**TMA**").

[4] The issue on the motions before me is who is entitled to the Tax Refund – ADS or LoyaltyOne.

[5] LoyaltyOne and KSV Restructuring Inc. (the "**Monitor**"), supported by the ad hoc group of Term B loan lenders (the "**Lenders**"), say that LoyaltyOne and its creditors are entitled to the Tax Refund. Their motion seeks a declaration that the TMA is not binding on LoyaltyOne or alternatively that it is void as a transfer at undervalue ("**TUV**").[1] LoyaltyOne has issued a notice of its intention to disclaim the TMA dated October 27, 2023 (the "**Disclaimer**"). LoyaltyOne and the Monitor say that in any event, Bread's claim to the Tax Refund is only a provable pre-filing unsecured claim.

[6] ADS (now Bread Financial Holdings, Inc. ("**Bread**")) says that it is entitled to the Tax Refund pursuant to the terms of the TMA. It has brought a cross-motion to set aside the Disclaimer. It says that it is entitled to the full amount of the Tax Refund.

[7] For the reasons that follow, I have determined that (i) LoyaltyOne is bound by the TMA; (ii) the TMA is not void as a TUV; (iii) the Disclaimer is not approved; and (iv) it is premature to determine the nature of Bread's rights with respect to the Tax Refund at this time.

Background

[8] The following facts are undisputed, unless otherwise noted.

Divestiture of the Loyalty Rewards Business

[9] Prior to 2019, ADS had three distinct business units: (a) credit card and banking services; (b) consumer loyalty reward program services; and (c) data-driven marketing services. In 2018, ADS decided to shift its focus to the card business. In 2019, ADS sold the marketing business.

[10] Charles Horn, a former executive of ADS, became the Executive Vice President and Senior Advisor to oversee the divestment of the loyalty rewards business. ADS first tried to sell the business. Then, in 2021, ADS decided to divest itself of the business through a spin transaction (the "**Spin Transaction**"). Mr. Horn had a team of six ADS executives (the "**Spin Team**") who assisted him on the Spin Transaction and took positions with the new company.[2]

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[1] LoyaltyOne confirmed that it was not pursuing its claims based on oppression or unconscionability.
[2] Cynthia Hageman, Jeffrey Fair, Jeffrey Tusa, Jack Taffe, Jeffrey Chesnut, and Laura Santillan. The first four individuals have consulting agreements with the "LVI trustee" (defined in footnote 5).

[11] The Spin Transaction was completed on November 5, 2021 (the "**Spin Date**"). The majority of shares of LoyaltyOne and another ADS subsidiary, BrandLoyalty Group B.V. ("**BrandLoyalty**"),[3] were transferred to a new Delaware public company, Loyalty Ventures Inc. ("**LVI**"). ADS retained a 19% interest in LVI. The remaining shares of LVI were distributed to the ADS shareholders. These steps were documented in several key agreements, including a Separation and Distribution Agreement dated November 3, 2021 (the "**Separation Agreement**").

[12] One of the key agreements was the TMA. As detailed below, it provides that ADS is responsible for all taxes payable prior to the Spin Date and LVI is responsible for all taxes payable thereafter. Section 8(a) states that ADS is entitled to all tax refunds received by any member of the Loyalty Ventures Group (which includes LoyaltyOne), including those set out in Schedule C. That schedule lists the Tax Refund at issue on this motion.

[13] As part of the Spin Transaction, LVI entered into a credit agreement dated November 3, 2021 (the "**Credit Agreement**"), pursuant to which US$675 million was advanced to LVI and its subsidiaries. LoyaltyOne and BrandLoyalty guaranteed the obligations of LVI under the Credit Agreement.[4] LVI used the funds from the Credit Agreement and a further US$100 million dividend from LoyaltyOne and BrandLoyalty to pay ADS, which in turn used these funds to pay down its long-term debt.

[14] The distribution of debt between ADS and LVI was supported by a report prepared by ADS' professional advisors, Ernst & Young LLP.

Post-Spin Events

[15] The financial position of LVI and LoyaltyOne deteriorated following the Spin Date. In March 2023, those companies filed for creditor protection in the United States and Canada, respectively. As noted, the assets of the LoyaltyOne business were sold to BMO in June 2023.

[16] There are several outstanding pieces of litigation over the Spin Transaction. LoyaltyOne brought a claim in Ontario against Joseph Motes III (the sole director of LoyaltyOne until the Spin Transaction) and Bread in October 2023, seeking US$775 million in damages for breach of fiduciary duty in connection with the Spin Transaction. The LVI trustee[5] has commenced two actions against Bread in the courts of Delaware and Texas, alleging fraudulent transfer and seeking recovery of US$750 million and the Tax Refund. There is a U.S. securities class action against Bread based on the allegations in the bankruptcy actions. A central allegation in the U.S.

[3] BrandLoyalty was based in the Netherlands and provided customer loyalty campaign services to retailers in Europe, Asia, and the Middle East.
[4] The wording of the Credit Agreement is that LoyaltyOne is a primary obligor and not a surety. BrandLoyalty is also a primary obligor and not a surety under the Credit Agreement.
[5] Pirinate Consulting Group, LLC in its capacity as trustee of the Loyalty Ventures Liquidating Trust in the U.S. Chapter 11 Proceedings of LVI.

proceedings is that ADS failed to disclose to its advisors and lenders that Sobeys had decided to terminate its relationship with the AIR MILES program.

The Tax Matters Agreement

[17] The preamble to the TMA recites that it is being entered into as part of the transactions set out in the Separation Agreement. The TMA is governed by Delaware law.

[18] The TMA states that it is entered into between ADS, on behalf of itself and the members of the ADS Group, and LVI, on behalf of itself and the members of the Loyalty Ventures Group. LoyaltyOne is a member of the Loyalty Ventures Group. The TMA was signed by Jeffrey Fair as authorized representative for LVI. He was LoyaltyOne's Vice President, Taxation at the time.

[19] The purpose of the TMA is set out in the recitals – to deal with the administration and allocation of taxes incurred in the periods prior to the Distribution Date (the Spin Date), taxes resulting from the Distribution (of LVI shares to ADS shareholders), and various other tax matters. In s. 3, the general allocation of taxes is to ADS for the periods prior to the Spin Date and to the LoyaltyOne Group for the periods thereafter.

[20] Section 8 addresses tax refunds. Section 8(a) states that, except as provided by s. 8(b), ADS is "entitled to all Tax Refunds received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C." That schedule explicitly describes the Tax Refund that LoyaltyOne is claiming from the CRA with respect to taxes paid in 2013.

[21] Pursuant to s. 8(c), LoyaltyOne is required to pay over the amount of the Tax Refund to ADS within 30 days of receipt, net of reasonable costs associated therewith.

[22] Section 11 deals with indemnities. Each of the parties indemnifies the other for any tax liability allocated to it under the TMA, any breach of the agreement, and any costs associated therewith. It is common ground that if LoyaltyOne is unsuccessful in recovering the Tax Refund, Bread will have to indemnify LoyaltyOne for further tax liabilities, potentially in excess of $30 million, that it might have to pay to CRA.

[23] Section 15 provides that LVI has the right to control its tax proceedings. However, in the case of a tax refund to which ADS is entitled under s. 8, LVI is required to keep ADS informed of material developments related to the proceeding and not settle any proceeding without the consent of ADS. Further, ADS has the right to participate in the proceeding at its expense and to assume control of the proceeding if LVI does not comply with its obligations to prosecute the proceeding.

The Sobeys Issue

[24] Prior to the Spin Date, Sobeys had been one of the two primary sponsors of the LoyaltyOne business. In June 2022, Sobeys gave formal notice to LoyaltyOne that it would be exiting the program in March 2023.

[25] LoyaltyOne submits that as at the Spin Date, ADS knew Sobeys would be exiting the program by the end of 2022. Alternatively, it submits that the Sobeys exit was reasonably foreseeable on the Spin Date. It submits that based on that fact, revenues from Sobeys should not have been included in projections for the LoyaltyOne business and that LoyaltyOne was insolvent on the Spin Date for purposes of the TUV analysis. The Lenders support LoyaltyOne's position on Sobeys and submit that Sobeys' intention to terminate was never disclosed to them.

[26] LoyaltyOne tendered two affidavits from Cynthia Hageman, former legal counsel at ADS, and conducted a Rule 39.03 examination of Blair Cameron, President and Chief Executive Officer of LoyaltyOne until April 2022. LoyaltyOne relies on documentary evidence from January and February 2021, including emails between Mr. Horn and Mr. Medline of Sobeys, and minutes of ADS board meetings. Those materials indicate that Sobeys had told ADS that it intended to leave the program but that its decision was not final and that ADS said that Sobeys' story kept changing. LoyaltyOne also relies on the amendment to the Sobeys sponsor agreement that provided for the contract to be terminated no earlier than July 1, 2022 and no later than February 1, 2023.

[27] Bread submits that the evidentiary record is insufficient to make the significant factual findings sought by LoyaltyOne. It notes that (i) neither Ms. Hageman nor Mr. Cameron were the individual that had direct dealings with Sobeys. That was Mr. Horn, who gave no evidence on this motion; (ii) there is no evidence from the members of the Spin Team who prepared the projections for the Spin Transaction that included revenue from Sobeys; and (iii) there is no evidence from the Lenders as to what they were told about sponsors of the business before they advanced funds under the Credit Agreement.

[28] Bread has tendered evidence from Mr. Motes. His evidence is that the Spin Transaction was a "pure play" strategy for all of its business units, that the transaction was intended to create two successful companies, and that it was undertaken with the benefit of numerous professional advisors. He says that at the time, people were optimistic about the future success of the spun-out loyalty rewards business.

[29] I accept Bread's submission with respect to the record. The evidence is insufficient to make any factual findings with respect to Sobeys. The allegations are serious, and the record leaves many questions unanswered. For example:

- Why did Mr. Horn purchase US$400,000 of LVI stock the month after the Spin Date if he knew Sobeys was leaving the program?

- Why did the Spin Team members prepare projections for the Spin Transaction that included Sobeys revenue? Why did LVI continue to include Sobeys' revenues in its projections after the Spin Date?

- Did the executives at ADS reasonably believe that Sobeys was simply posturing and trying to get more concessions and a better deal? Ms. Hageman admitted "[t]hat's what clients do". Mr. Cameron admitted that he continued to work with

Sobeys through 2021 and 2022 with different initiatives to address their concerns and entice them to stay in the program.

- Did the executives at ADS reasonably believe that Sobeys was coordinating with a prospective bidder in acquiring the LoyaltyOne business? Did they think that Sobeys was posturing and putting pressure on LoyaltyOne in order to assist that bidder? Mr. Cameron's email of January 28, 2021, to Todd Gulbransen at ADS, suggested that might be the case.

- Why did ADS retain a 19% interest in LVI if it thought a major sponsor was going to leave the program?

- Why did ADS not make any public disclosure about Sobeys before the Spin Date? Why did LVI not make any public disclosure about Sobeys until the formal notice was given in June 2022?

[30] The evidence before me is conflicting and does not provide sufficient context as to what was actually going on with Sobeys prior to the Spin Date. There are issues of credibility in making these determinations. The findings are critical and central to allegations made in the U.S. litigation. I simply cannot make these factual findings on the record before me. I have therefore not factored any findings with respect to Sobeys into my analysis of the issues.

Issues

[31] There are four issues on these motions:

a. Is LoyaltyOne bound by the TMA?

b. Is the TMA void as a TUV?

c. If LoyaltyOne is bound by the TMA and it is not void as a TUV, should the Disclaimer of the TMA be approved?

d. What are Bread's rights and remedies under the TMA?

Issue #1 – Is LoyaltyOne Bound by the TMA

[32] It is undisputed that LoyaltyOne was not a signatory to the TMA. LVI signed the TMA "on its own behalf and on behalf of the members of the Loyalty Ventures Group". LoyaltyOne is a member of the Loyalty Ventures Group. Jeffrey Fair signed the TMA as the authorized representative of LVI. As noted, he was also LoyaltyOne's Vice President, Taxation.

[33] Bread tendered expert evidence that under the law of the contract (Delaware), a parent is entitled to bind its subsidiary to a contract. LoyaltyOne submits that the law of the contract does not determine whether LoyaltyOne is bound by it. The law applicable to that issue can only be the

law of Nova Scotia (LoyaltyOne's jurisdiction of incorporation) or Ontario (where LoyaltyOne's head office was located). It submits that under Ontario or Nova Scotia law, a subsidiary is only bound by a contract it expressly signs, authorizes another entity to sign on its behalf, or ratifies, none of which occurred here.

[34] Even accepting LoyaltyOne's submission on the applicable law, I am satisfied that on the facts of this case, Mr. Fair's signature of the TMA bound LoyaltyOne to that agreement. He was LoyaltyOne's Vice President, Taxation, and Senior Vice President, Tax, at ADS and LVI. According to Mr. Motes, Mr. Fair was the executive who oversaw the structuring of the TMA and was the logical representative of both parties. On cross-examination, Mr. Fair confirmed that he understood that he was signing the TMA on behalf of all of LVI's subsidiaries. Mr. Motes was the sole director of LoyaltyOne at the time and clearly approved the entering into of the TMA as part of an overall transaction involving LVI and its wholly-owned subsidiaries. I note that in s. 27 of the TMA, LVI represents and warrants that it has the authorization to sign the agreement on behalf of each member of its group.

[35] Further, after the TMA was signed, LoyaltyOne conducted itself as though it was bound by it. According to Mr. Motes, LoyaltyOne and BrandLoyalty have been reimbursed by ADS for pre-separation tax obligations and ADS has received tax refunds and other receivables that arose from the pre-separation periods. In addition, Ms. Hageman requested indemnification from Bread for the costs of the tax litigation over the Tax Refund and provided the backup information Bread required in connection with that request.

[36] I therefore reject LoyaltyOne's submission that it is not bound by the TMA.

Issue #2 – Is the TMA Void as a TUV

[37] The Monitor seeks a declaration that the TMA was a TUV pursuant to s. 96(1)(b)(ii)(A) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), as incorporated by reference in s. 36.1(1) of the CCAA. Those sections state that the Monitor may declare that a TUV is void against the Monitor if:

> **(b)** the party was not dealing at arm's length with the debtor and
>
> …
>
> **(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> **(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it,

[38] The Monitor notes that the term "debtor" in the BIA is redefined as "debtor company" in the CCAA (s. 36.1(2)(c)) – in this case, LoyaltyOne.

[39] The TMA was entered into between ADS and LVI (on behalf of the members of the Loyalty Ventures Group, which included LoyaltyOne), who were not dealing at arm's length. The TMA was signed less than five years before LoyaltyOne's CCAA filing.

[40] In order to succeed on its TUV claim, the Monitor must establish that (i) LoyaltyOne was insolvent at the time the TMA was signed in November 2021; and (ii) the consideration received by LoyaltyOne under the TMA was less than the consideration given to Bread under that agreement.

[41] The Monitor has not established the first element of the test.

[42] First, LoyaltyOne's expert, Mr. Harrington, gave various ranges of the fair market value of LoyaltyOne as at the Spin Date. These values range from a low of $452 million (comparable companies approach) to $656 million (discounted cash flow approach). He then added the full amount of LoyaltyOne's $675 million liability under the Credit Agreement to conclude that the company was insolvent.

[43] Bread submits that I have been given no basis to attribute the full amount of the debt to LoyaltyOne. The debt was owed and reflected as a liability of LVI, which was solvent on the Spin Date. It was guaranteed by both of its subsidiaries (LoyaltyOne and BrandLoyalty), who were expected to contribute towards the debt. There is no analysis of how the debt was allocated among the three companies and whether the portion allocated to LoyaltyOne exceeded its fair market value.

[44] Second, the experts took different approaches with respect to Sobeys. Mr. Harrington was asked to assume that Sobeys' departure was reasonably foreseeable. He deducted 100% of the Sobeys revenue in his five-year cash flow calculations and concluded that LoyaltyOne was insolvent on that basis. He acknowledged on cross-examination that he did not know what the value would have been without this assumption.

[45] Mr. Davidson, Bread's expert, was not asked to make this assumption but nonetheless did the calculations based on various probabilities that Sobeys would exit the program. He concluded that LoyaltyOne was still solvent taking these probabilities into account. He attributed LoyaltyOne's subsequent decline to post-spin intervening factors and macroeconomic issues.

[46] As set out above, based on the record before me, I am not prepared to find that Sobeys' departure was reasonably foreseeable as at the Spin Date. I therefore prefer Mr. Davidson's analysis of the issue.

[47] I am not persuaded that LoyaltyOne was insolvent on the Spin Date. The Monitor has not established that the TMA is void as a TUV.

Issue #3 – Should the Disclaimer be Approved

[48] LoyaltyOne delivered the Disclaimer of the TMA pursuant to s. 32(1) of the CCAA. Bread applied to this court under s. 32(2) for an order that the TMA is not to be disclaimed or resiliated.

[49] The factors for the court to consider in upholding or setting aside a disclaimer are set out in s. 32(4):

> **(4)** In deciding whether to make the order, the court is to consider, among other things,
>
> **(a)** whether the monitor approved the proposed disclaimer or resiliation;
>
> **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] The list of factors in s. 32(4) of the CCAA is not exhaustive and courts have added the requirement that the disclaimer be fair, appropriate, and reasonable in all circumstances: *Re Laurentian University of Sudbury*, 2021 ONSC 3272, 89 C.B.R. (6th) 183, at para 44.

[51] The first element of the test is met. The Monitor approved the Disclaimer. It states in its Fifth Report dated November 23, 2023, "the Tax Appeal is a significant remaining source of potential recovery for LoyaltyOne's creditors."

[52] Bread submits that the second element is not met because the business of LoyaltyOne has already been sold to BMO and there is no plan to be filed. I accept this submission.

[53] There are no timing requirements for issuing disclaimers under the CCAA. However, the court's focus is on whether the disclaimer of the contract will enhance the prospects of the debtor making a viable compromise or arrangement. It is clear from the cases that the purpose of the disclaimer is to relieve the debtor from the burden of performing a contract where it would prevent or delay a successful restructuring (*Laurentian*), a sale of the business (*Timminco Ltd. (Re)*, 2012 ONSC 4471, 93 C.B.R. (5th) 326), or an orderly winddown and distribution of assets to creditors (*Target Canada Co. (Re)*, 2015 ONSC 1028, 23 C.B.R. (6th) 303).

[54] Here, the Disclaimer of the TMA will accomplish none of those objectives. There is no restructuring in process. The business has been sold. LoyaltyOne is no longer an operating business. There is no suggestion of a plan to be put to creditors. There is no basis to find that LoyaltyOne's prosecution of the tax proceeding and payment of the Tax Refund to Bread under the TMA will impair or delay a restructuring, sale, or orderly distribution to creditors. Rather, in my view, the Disclaimer by LoyaltyOne is an attempt to secure funds for itself that it was never entitled to retain pursuant to the Spin Transaction.

[55] With respect to the third element, Bread's evidence is very limited. Mr. Motes says that Bread has already suffered losses as a result of the LoyaltyOne insolvency. He says that the disclaimer of the TMA will result in further financial hardship to Bread because it divested the loyalty rewards businesses on the basis that the transaction would be effected as set out in the transaction documents, including the TMA. Mr. Motes did not provide evidence as to the impact that failing to receive the Tax Refund will have on Bread's overall financial position.

[56] Apart from the enumerated factors in s. 32(4), the question is whether it is fair, appropriate, or reasonable for the Disclaimer to be approved: see *Laurentian*. Bread says that the Disclaimer is an attempt of the Lenders to shift the value of the Tax Refund from Bread to themselves since the Lenders represent approximately 90% of the unsecured claims of LoyaltyOne.[6] Bread submits that the unfairness is even greater because the Lenders knew about the TMA, required that it be signed as a condition of the Credit Agreement, and excluded the Tax Refund from their security.

[57] I agree. The Lenders constitute the vast majority of LoyaltyOne's creditors and are the creditors that will benefit the most from the Disclaimer. Indeed, they filed their own factum and made submissions in support of this motion.

[58] The Lenders accepted the terms of the TMA when they advanced funds to LVI in the Spin Transaction. It was a condition of the Credit Agreement that the TMA be entered into. The TMA explicitly states that the Tax Refund was payable to Bread. The Tax Refund was specifically excluded from the Lenders' security in the Credit Agreement.

[59] It would be entirely unfair, inappropriate, and unreasonable for LoyaltyOne to disclaim the TMA. The effect of the Disclaimer would be to reverse the bargain that LoyaltyOne made when it entered into the Spin Transaction and that the Lenders made when they entered into the Credit Agreement as part of the transaction. This is even more unfair when I consider that LoyaltyOne has already paid tax refunds to ADS under the provisions of the TMA and has sought indemnity for its costs of pursuing the Tax Refund.

[60] I find that the Disclaimer is being used to get out of the deal that was made in the Spin Transaction, secure the funds for LoyaltyOne that it was never entitled to retain, and assist the Lenders in recovering the losses that they sustained on the transaction. That is not the intended purpose of a disclaimer under s. 32(4) of the CCAA.

[61] I therefore grant Bread's motion and disallow the Disclaimer of the TMA. The TMA will remain in full force and effect.

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[6] The Lenders accounted for 96% of the unsecured creditors as at March 2023.

Bread's Rights and Remedies under the TMA

[62] The parties disagree on the nature of Bread's rights under the TMA. The Monitor and LoyaltyOne say that even if the Disclaimer is not approved, Bread's only entitlement to the Tax Refund is a pre-filing unsecured claim.

[63] Bread disagrees. It submits that it is entitled to the entire amount of the Tax Refund through the remedy of a constructive trust or an order that LoyaltyOne comply with its obligations under the TMA.

[64] In my view, it is premature to make any of the orders sought by the parties. The TMA remains in effect. LoyaltyOne remains subject to its obligations thereunder. Under the terms of that agreement, LoyaltyOne is required to pursue the tax proceeding and remit the Tax Refund to Bread if and when received. There is no need to consider the consequences of any prospective breach of those obligations should that occur.

[65] If LoyaltyOne fails to perform its obligations under the TMA, Bread can seek a remedy from this court and those issues can be considered at that time.

Decision

[66] The joint motion of LoyaltyOne and the Monitor is dismissed. Bread's motion is granted.

[67] If the parties are unable to agree on the costs of these motions, they shall arrange a scheduling appointment before me to address the process for costs submissions.

Conway J.

Date: July 10, 2024

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation et al.

Ontario Reports

Court of Appeal for Ontario,

Simmons, Gillese and Rouleau JJ.A.

October 13, 2015

127 O.R. (3d) 641 | 2015 ONCA 681

[Indexed as: Nortel Networks Corp. (Re)]

Case Summary

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Interest — Bondholders with contractual claim to continuing accrual of interest until payment filing claims in Companies' Creditors Arrangement Act ("CCAA") proceedings — "Interest stops" rule applying in CCAA proceedings — CCAA judge not erring in holding that bondholders were not legally entitled to claim or receive any amounts above and beyond outstanding principal debt and pre-petition interest — CCAA judge's use of word "receive" not precluding bondholders from receiving post-filing interest under future plan of compromise or arrangement — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

N Corp. was subject to a proceeding under the *Companies' Creditors Arrangement Act*. The appellants held unsecured bonds either issued or guaranteed by certain N Corp. entities. The relevant indentures provided for the continuing accrual of interest until payment, at contractually specified interest rates. N Corp.'s other creditors were mostly pensioners with no contractual right to post-filing interest. The *CCAA* judge found that the appellants were not legally entitled to claim or receive any amounts above and beyond the outstanding principal debt and pre-petition interest. The appellants appealed.

Held, the appeal should be dismissed.

The *CCAA* judge correctly held that the common law "interest stops" rule applies in *CCAA* proceedings. The "interest stops" rule is a fundamental tenet of insolvency law. It has been consistently applied in proceedings under bankruptcy and winding-up legislation. The same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings -- namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate -- apply with equal force to *CCAA* proceedings. There are sound reasons for adopting an interest stops rule in the *CCAA* context. First, the *CCAA* is part of an integrated insolvency regime, which also includes the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible. Second, if the interest stops rule were not to apply to *CCAA* proceedings, the

creditors who do not have a contractual right to post-filing interest would have skewed incentives against reorganizing under the *CCAA* and would be more likely to proceed under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors. Third, 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. If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining an interest-bearing judgment, the status quo has not been preserved. Fourth, if the interest stops rule were not to apply to *CCAA* proceedings, the key objective of that statute -- [page642] to facilitate the restructuring of corporations through flexibility and creativity -- may be undermined. Fifth, the principle of fairness supports the application of the interest stops rule.

The *CCAA* judge's ruling that the appellants were not legally entitled to "receive" any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest did not preclude the payment of post-filing interest under a future plan of compromise or arrangement.

Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182, varg (2004), 69 O.R. (3d) 1, [2004] O.J. No. 141, 235 D.L.R. (4th) 618, 183 O.A.C. 201, 3 C.B.R. (5th) 207, 128 A.C.W.S. (3d) 869 (C.A.), varg [2002] O.J. No. 1775, [2002] O.T.C. 310, 33 C.B.R. (4th) 184, 5 P.P.S.A.C. (3d) 272, 113 A.C.W.S. (3d) 938 (S.C.J.); *Stelco Inc. (Re)*, [2007] O.J. No. 2533, 2007 ONCA 483, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174, 158 A.C.W.S. (3d) 877, varg [2006] O.J. No. 3219, 20 B.L.R. (4th) 286, 24 C.B.R. (5th) 59, [2006] O.T.C. 748, 150 A.C.W.S. (3d) 538 (S.C.J.), **consd**

Other cases referred to

Canada (Attorney General) v. Confederation Life Insurance Co., [2001] O.J. No. 2610, [2001] O.T.C. 486, 106 A.C.W.S. (3d) 245 (S.C.J.); *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186, 196 A.C.W.S. (3d) 27; *In re Humber Ironworks and Shipbuilding Co*. (1869), L.R. 4 Ch. App. 643; *Nortel Networks Corp. (Re)*, [2015] O.J. No. 2440, 2015 ONSC 2987, 27 C.B.R. (6th) 175, 254 A.C.W.S. (3d) 522 (S.C.J.); *R. v. Henry*, [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, 2005 SCC 76, 260 D.L.R. (4th) 411, 342 N.R. 259, [2006] 4 W.W.R. 605, J.E. 2006-62, 376 A.R. 1, 219 B.C.A.C. 1, 49 B.C.L.R. (4th) 1, 202 C.C.C. (3d) 449, 33 C.R. (6th) 215, 136 C.R.R. (2d) 121, EYB 2005-98899, 67 W.C.B. (2d) 809; *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E.

2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 2 C.C.P.B. (2d) 1, 223 A.C.W.S. (3d) 1049

Statutes referred to

Aeronautics Act, R.S.C. 1985, c. A-2 [as am.]

Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 [as am.], s. 9 [as am.], (1)

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [as am.], ss. 121 [as am.], 122 [as am.]

Civil Air Navigation Services Commercialization Act, S.C. 1996, c. 20 [as am.], ss. 55, 56

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

United States Bankruptcy Code, 11 U.S.C., c. 11

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 [as am.]

Authorities referred to

Mokal, Rizwaan Jameel, "Priority as Pathology: The *Pari Passu* Myth" (2001), 60:3 Cambridge L.J. 581

Wood, Roderick J., *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009) [page643]

APPEAL from the order of Newbould J. (2014), 121 O.R. (3d) 228, [2014] O.J. No. 3843, 2014 ONSC 4777 (S.C.J.) in the *Companies' Creditors Arrangement Act* proceedings.

Richard B. Swan, *S. Richard Orzy* and *Gavin H. Finlayson*, for appellant *ad hoc* group of bondholders.

Andrew Kent and *Brett Harrison*, for respondent Bank of New York Mellon.

Edmond Lamek, for respondent Law Debenture Trust Company of New York.

Benjamin Zarnett and *Graham D. Smith*, monitor and respondent Canadian debtors.

Kenneth D. Kraft and *John J. Salmas*, for respondent Wilmington Trust, National Association.

Kenneth T. Rosenberg and *Ari N. Kaplan*, for respondent Canadian Creditors' Committee.

Tracy Wynne, for joint administrators (EMEA).

Scott A. Bomhof and *Adam M. Slavens*, for Nortel Networks Inc./U.S. debtors.

The judgment of the court was delivered by
ROULEAU J.A.: —

A. *Overview*

[1] This appeal represents another chapter in the Nortel proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), which has been ongoing since January 2009. A parallel proceeding under Chapter 11 of the *United States Bankruptcy Code* has also been ongoing in Delaware since that time.

[2] The *ad hoc* group of bondholders (the "appellant") brings this appeal with leave. The group represents substantial holders of "crossover bonds", which are unsecured bonds either issued or guaranteed by certain of the Canadian Nortel entities. The relevant indentures provide for the continuing accrual of interest until payment, at contractually specified interest rates, as well as other post-filing payment obligations, such a make-whole provisions and trustee fees.

[3] In contrast, the claims of other claimants, such as Nortel pensioners and former employees, do not have a provision for interest on amounts owing to them.

[4] Holders of the crossover bonds have filed claims for principal and pre-filing interest in the amount of US$4.092 billion against each of the Canadian and U.S. Nortel estates. They also [page644] claim they are entitled to post-filing interest and related claims under the terms of the crossover bonds. As of December 31, 2013, the amount of this claim was approximately US$1.6 billion. The total of these two amounts represents a significant portion of the proceeds generated from the worldwide sale of Nortel's business lines and other Nortel assets, totalling approximately $7.3 billion. This latter amount is apparently not growing at any appreciable rate because of the conservative nature of the investments made with it pending the outcome of the insolvency proceedings.

[5] In the context of a joint allocation trial, the *CCAA* judge directed that two issues be argued [at para. 5]:

> (a) whether the holders of the crossover bond claims are legally entitled . . . to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and
>
> (b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The *CCAA* judge answered the first question in the negative and so he did not need to answer the second question. In reaching that conclusion, he accepted that the common law "interest stops rule", which has been held to be a fundamental tenet of insolvency law, applies in the *CCAA* context. He disagreed with the appellant's submission that the Supreme Court of Canada's decision in *Canada 3000 Inc., Re*; *Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, and this court's subsequent decision in *Stelco*

Inc. (Re), [2007] O.J. No. 2533, 2007 ONCA 483, 35 C.B.R. (5th) 174, are binding authority that the interest stops rule does not apply in the *CCAA* context.

[7] On appeal, the appellant raises two related issues -- whether the *CCAA* judge erred in concluding that an interest stops rule applies in *CCAA* proceedings and, if not, whether he erred in concluding that the holders of crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest.

[8] I would dismiss the appeal. As I will explain, there are sound legal and policy reasons for applying the interest stops rule in the *CCAA* context, and as I read *Stelco* and *Canada 3000,* they do not preclude such a result. Nor do I see a basis for varying the order that he made. [page645]

B. *Background*

[9] In the *CCAA* court's initial order of January 14, 2009, the Canadian debtors[1] were directed, subject to certain exceptions, to make no payments of principal or interest on account of amounts owing by the Canadian debtors to any of their creditors as of the filing date, unless approved by the monitor. Further, all proceedings and enforcement processes, and all rights and remedies of any person against the Canadian debtors, were stayed absent consent of the Canadian debtors and the monitor, or leave of the court.

[10] In accordance with a claims procedure order dated July 30, 2009, claims against the Canadian debtors were required to be filed by a claims bar date. Under a subsequent claims resolution order dated September 16, 2010, a disputed claim could be brought before the *CCAA* court for final determination.

[11] As previously noted, holders of the crossover bonds filed proofs of claim that included not only the principal amount of the debt and interest accrued to the date of insolvency but also contractual claims for interest and other amounts post-filing.

[12] In May 2014, a joint allocation trial, conducted by way of video-link by the *CCAA* judge in Ontario and Judge Gross in Delaware, commenced on the issue of the allocation of the sale proceeds among the debtor estates, including the Canadian and U.S. estates. In his 2015 decision, the *CCAA* judge, citing the "fundamental tenet of insolvency law that all debts shall be paid *pari passu*" and that "all unsecured creditors receive equal treatment" held that the $7.3 billion in funds generated from the Nortel liquidation should be allocated on a *pro rata* basis as among the estates: *Nortel Networks Corp. (Re)*, [2015] O.J. No. 2440, 2015 ONSC 2987, 27 C.B.R. (6th) 175 (S.C.J.), at para. 209. He ordered, at para. 258, that the funds be allocated among the debtor estates in accordance with a number of principles, including the principle that each debtor estate "is to be allocated that percentage of the [liquidation proceeds] that the total allowed claims against that Estate bear to the total allowed claims against all Debtor Estates". A number of parties have sought leave to appeal that decision. [page646]

[13] It was on June 24, 2014, while the joint allocation trial was proceeding, that the *CCAA* judge directed that the two issues set out above be decided.

C. *Decision Below*

[14] The *CCAA* judge began his analysis with a review of cases applying the interest stops rule in the bankruptcy and winding-up context. He noted the relationship between the interest stops rule and the *pari passu* principle, which he described [at para. 12] as "a fundamental tenet of insolvency law" that requires equal treatment of unsecured creditors. He found [at para. 18] there was "no reason to not apply the [common law] interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application". The issue was "whether the rule should apply to this CCAA proceeding".

[15] He went on to conclude that "[t]here is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the *CCAA*, let alone under a liquidating *CCAA* process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest." In reaching this conclusion, he distinguished *Stelco* and *Canada 3000* and found that the application of the interest stops rule was supported by the more recent decisions in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60 and *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6.

[16] The *CCAA* judge thus ordered [at para. 5] that "holders of Crossover Bond Claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion)".

D. *Issues on Appeal*

[17] The appellant raises two related issues:

(1) Did the *CCAA* judge err in concluding that an interest stops rule applies in *CCAA* proceedings?

(2) If the *CCAA* judge did not err in concluding that an interest stops rule applies in *CCAA* proceedings, did he err in holding that holders of crossover bonds claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest? [page647]

00,04,0E. *Analysis*

(1) *Did the CCAA judge err in concluding that an interest stops rule applies in CCAA proceedings?*

[18] The appellant, supported by the Bank of New York Mellon and the Law Debenture Trust Company of New York as indenture trustees, submits that the *CCAA* judge erred in concluding that the interest stops rule applies.

[19] First, the appellant submits he applied inapplicable case law and misinterpreted case law in concluding that the rule did and should apply. Among other things, the appellant criticizes the *CCAA* judge's application of the Supreme Court of Canada's decisions in *Century Services* and *Indalex*, which deal with the interplay between the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

[20] The appellant also submits that the application of the interest stops rule in the *CCAA* context is inconsistent with the *CCAA* and would have negative practical consequences.

[21] Finally, the appellant submits that *Canada 3000* and *Stelco* are binding authority that preclude the application of the interest stops rule in the *CCAA* context and that the *CCAA* judge violated the principle of *stare decisis* in refusing to follow them.

[22] I will deal with these submissions in turn, beginning with a discussion of the interest stops rule and the related *pari passu* principle.

(a) *Should the interest stops rule apply in CCAA proceedings?*

(i) *Origin and scope of the interest stops rule*

[23] It is well settled that the *pari passu* principle applies in insolvency proceedings. This principle, to the effect that "the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency" is said to be one of the "governing principles of insolvency law" in Canada: *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, [2001] O.T.C. 486 (S.C.J.), at para. 20, *per* Blair J.[2] In fact, [page648] the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world: Rizwaan J. Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001), 60:3 Cambridge L.J. 581, at p. 581. According to an article in the Cambridge Law Journal, "[c]ommentators claim to have found [the *pari passu*] principle entrenched in jurisdictions far removed . . . in geography and time": Mokal, at pp. 581-82.

[24] The *pari passu* principle is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets.

[25] As explained in *In re Humber Ironworks and Shipbuilding Co.* (1869), L.R. 4 Ch. App. 643, nearly 150 years ago, a necessary corollary of the *pari passu* principle is the interest stops rule. Absent the interest stops rule, the fairness and orderly distribution sought by the *pari passu* principle could not be achieved. Selwyn L.J. explained the rationale for the interest stops rule, at pp. 645-46 Ch. App.:

> In the present case we have to consider what are the positions of the creditors of the company, when, as here, there are some creditors who have a right to receive interest, and others having debts not bearing interest.
>
> . . . . .
>
> It is very difficult to conceive a case in which the assets of a company could be . . . immediately realized and divided; but suppose they had a simple account at a bank, which could be paid the next day, that would be the course of proceeding. Justice, I think, requires that that course of proceeding should be followed, and that no person should be prejudiced by the accidental delay which, in consequence of the necessary forms and proceedings of the Court, actually takes place in realizing the assets; but that, in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and

> rateably in payment of the debts as they existed at the date of the winding-up. I, therefore, think that nothing should be allowed for interest after that date.
>
> [26] Giffard L.J. similarly stated, at p. 647-48 Ch. App.:
> That rule . . . works with equality and fairness between the parties; and if we are to consider convenience, it is quite clear that, where an estate is insolvent, convenience is in favour of stopping all the computations at the date of the winding-up.
>
> . . . . .
>
> I may add another reason, that I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[27] Thus, the primary purpose behind the common law interest stops rule is fairness to creditors. Another purpose is to achieve the orderly administration of an insolvent debtor's estate. [page649]

[28] The common law interest stops rule has been consistently applied in proceedings under bankruptcy and winding-up legislation. In fact, as explained by Blair J. in *Confederation Life Insurance Co.,* at paras. 22-23, the rule has been applied even when the legislation might be read to the contrary:

> This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the *Winding-Up Act* and section 121 of the *BIA*, which might be read to the contrary, in my view. Yet, the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency "interest stops rule".

[29] I will now turn to the question of whether the interest stops rule should be applied in the *CCAA* context.

(ii) *Should the interest stops rule apply in CCAA proceedings?*

[30] The respondents[3] maintain that one would expect the interest stops rule to apply in *CCAA* proceedings given that *CCAA* proceedings are insolvency proceedings to which the common law *pari passu* principle applies. Consistent with the *pari passu* principle and the related interest stops rule, creditors in *CCAA* proceedings must surely expect to be treated fairly and not see creditors with interest entitlements have their claims grow, post-insolvency, disproportionately to those with no, or lesser, interest entitlements. In the respondents' submission, the same reasoning used by courts to conclude that the interest stops rule applies in winding-up and bankruptcy proceedings leads to the conclusion that the interest stops rule applies in *CCAA* proceedings.

[31] The appellant, on the other hand, submits that *CCAA* proceedings are different from other insolvency proceedings in that they do not immediately or permanently alter the rights of creditors. The filing is intended to give the debtor breathing space so that a plan of compromise or arrangement can be negotiated with creditors and the business can continue. The objective of

a *CCAA* proceeding is a consensual, statutory compromise in the form of a *CCAA* plan. Such a *CCAA* plan can provide for [page650] any kind of distribution, provided it is approved by the requisite majority of creditors and the court.

[32] In the appellant's submission, until a plan is negotiated or the proceeding is converted to bankruptcy or winding-up, the rights of creditors are not altered; rather, their rights to execute on them are simply stayed. In the appellant's view, therefore, unless and until this sought-after compromise of rights is negotiated, only the exercise of the rights is stayed. The *CCAA* filing does not affect the right to accrue interest; it only stays the collection of that interest.

[33] The appellant further argues that the *CCAA* judge's decision is contrary to the established *CCAA* practice and the reasonable expectations of the parties in this proceeding. In particular, the appellant notes that a *CCAA* plan may, and often does, provide for the recovery of post-filing interest. The appellant also submits that the application of the interest stops rule would allow debtors to obtain a permanent interest holiday simply by filing for *CCAA* protection, even if the filing were later withdrawn, causing a permanent prejudice to the creditors not contemplated by the *CCAA*. And, the appellant submits that an interest stops rule would create a disincentive for creditors to participate in *CCAA* proceedings since they would not be compensated for delays under the *CCAA* even if there were ultimately assets available to do so.

[34] I do not accept the appellant's submissions on this point. Admittedly, there are differences between the *CCAA* and other insolvency schemes, including that the *CCAA* does not provide for a fixed scheme of distribution. Further, assuming a plan of compromise or arrangement under the *CCAA* is negotiated it may or may not result in a distribution to creditors. Nevertheless, in my view, the same principles that underpin the conclusion that the interest stops rule is necessary in bankruptcy and winding-up proceedings -- namely, the fair treatment of creditors and the orderly administration of an insolvent debtor's estate -- apply with equal force to *CCAA* proceedings. I say so for several reasons.

[35] First, the *CCAA* is part of an integrated insolvency regime, which also includes the *BIA*. The Supreme Court of Canada in *Century Services* considered the *CCAA* regime and opined, at para. 24, that "[w]ith parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency 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". The court went on to explain, [page651] at para. 78, that the *CCAA* and *BIA* are related and "no aegap' exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy".

[36] Consistent with the notion of harmonization, because the common law interest stops rule applies upon bankruptcy under the *BIA*, it should follow that the common law rule also applies in a *CCAA* proceeding unless, of course, the rule is ousted by the *CCAA*. The *CCAA* does not address entitlement to claim post-filing interest let alone oust the common law rule with clear wording.

[37] Second, if the interest stops rule were not to apply in *CCAA* proceedings, the creditors who do not have a contractual right to post-filing interest would, as the Supreme Court explained in *Century Services*, at para. 47, have "skewed incentives against reorganizing under the *CCAA*" and this would "only undermine that statute's remedial objectives and risk inviting the

very social ills that it was enacted to avert". This concern over skewed incentives was confirmed in *Sun Indalex*, where the Supreme Court held, at para. 51, that "[i]n order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those they would receive under the *BIA*.

[38] Without an interest stops rule under the *CCAA*, the creditors with no claim to post-filing interest would have an incentive to proceed under the *BIA* or the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, where the interest stops rule operates to prevent creditors, such as the appellant, who have a contractual right to interest from improving their proportionate claim against the debtor at the expense of other creditors.

[39] Third, as recognized by the Supreme Court in *Century Services,* at para. 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". This is achieved through grouping all claims within a single proceeding and staying all actions against the debtor, thus putting creditors on an equal footing: *Century Services*, para. 22.

[40] As submitted by the Canadian Creditors' Committee, if post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights to sue the debtor and obtaining a judgment that bears interest, the status quo has not been preserved.

[41] Fourth, if the interest stops rule were not to apply in *CCAA* proceedings, the key objective of that statute -- to facilitate [page652] the restructuring of corporations through flexibility and creativity -- may be undermined. This is because of the asymmetrical entitlement to interest that would be created. Creditors with an entitlement to post-filing interest may be less motivated to compromise than those creditors without such an entitlement. Using the case under appeal as an example, if post-filing interest is allowed to accrue, the delay and failure to reach a compromise will see the appellant's proportionate claim against the assets of the debtors rise very significantly at the expense of other creditors. One could well understand that if the urgency for reaching a compromise and the incentive to compromise are significantly lower for one group of unsecured creditors than for the balance of the unsecured creditors, restructuring will be more difficult to achieve and the ability to reach creative solutions will be lessened.

[42] Furthermore, if the amount of an unsecured creditor's legal entitlement is constantly shifting as post-filing interest accrues, the ability to find a compromise that is acceptable to all creditors at any one point in time will pose a greater challenge than if the entitlements are fixed as of the date of filing.

[43] Fifth, the principle of fairness supports the application of the interest stops rule. Insolvency proceedings are intended to be fair processes for liquidating or restructuring insolvent corporations. How, one may ask, is it fair if the appellant, an unsecured creditor, sees its claim against the assets of the debtor balloon from $4.092 billion to $5.692 billion (as of December 31, 2013) because of contractual provisions when the claims of unsecured creditors, who have no such contractual provisions and who have been prevented for almost seven years by the *CCAA* stay from converting their claims into court judgments that would bear interest, have seen no increase at all? Delays in liquidating the Nortel assets have helped the monitor achieve the very significant recoveries made ($7.3 billion) and, in fairness, this achievement should be for the benefit of all creditors.

[44] Finally, I wish to respond to the appellant's concerns.

[45] As to past practice and the reasonable expectations of the parties, I do not view the existence of an interest stops rule as being contrary to established *CCAA* practice or as preventing a *CCAA* plan from providing for post-filing interest. Parties may negotiate for a plan that provides for payments of more or less than a creditor's legal entitlement in lieu of the foregone interest. Thus, I do not accept the appellant's submission that there would be a disincentive to participate in *CCAA* proceedings, [page653] which is based on the premise that post-filing interest may not be recovered under a *CCAA* plan.

[46] The appellant also raised the concern that a debtor company could obtain a permanent interest holiday, resulting in unfairness. The appellant says that if there are proceeds over and above the amounts needed to satisfy the pre-filing claims of creditors, those proceeds would be for the benefit of the shareholders of the debtor. This follows from the fact that the *CCAA* contains no provision for the payment of a "surplus" to creditors and the interest stops rule would prevent the unsecured creditors from recovering any post-filing interest. The debtor could therefore resort to the *CCAA* to stop interest from accruing and operate his business interest free.

[47] This hypothetical raises the same concern about the loss of post-filing interest but in a somewhat different way. The concern is that a debtor may seek *CCAA* protection to avoid the obligation to pay interest.

[48] There may well be exceptional situations where, at some point in a *CCAA* proceeding, the common law interest stops rule risks working an unfairness of some sort. I leave for another day what orders, if any, might be made by a *CCAA* judge in cases such as the hypothetical presented by the appellant where a debtor might be considered to benefit unfairly as a result of the common law interest stops rule. I note, however, that in order to achieve the remedial purpose of the *CCAA*, *CCAA* courts have been innovative in their interpretation of their stay power and in the exercise of their authority in the administration of *CCAA* proceedings. This approach has been specifically endorsed by the Supreme Court of Canada in *Century Services* and would no doubt guide the court should the need arise: see, for example, paras. 61 and 70.

[49] In conclusion, there are sound reasons for adopting an interest stops rule in the *CCAA* context. I now turn to the argument that *Canada 3000* and *Stelco* preclude the application of the rule.

(b) *Are Canada 3000 and Stelco binding authorities to the effect that the interest stops rule does not apply in CCAA proceedings?*

[50] The appellant vigorously maintains that the *CCAA* judge was bound by *Canada 3000* and *Stelco*, which both confirm that the interest stops rule does not apply in *CCAA* proceedings.

[51] I would not give effect to this submission. As I will explain, both of these decisions should be read narrowly and do not constitute a precedent with respect to the issue raised in this [page654] appeal -- whether the common law interest stops rule applies in *CCAA* proceedings.

(i)*Canada 3000*

Background and lower court decisions

[52] The decision in *Canada 3000* arose out of the collapse of three airlines -- Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"), and Inter-Canadian (1991) Inc. ("Inter-Canadian"). Canada 3000 filed for protection under the *CCAA* and, three days later, filed for bankruptcy. Inter-Canadian filed a *BIA* proposal but the proposal ultimately failed and so it too was placed into bankruptcy effective as of the date it filed its notice of intention to make a proposal.

[53] At the time the airlines collapsed, they owed significant amounts in unpaid airport and navigation charges. As a result, various airport authorities and NAV Canada sought remedies under the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 ("*Airports Act*") and the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("*CANSCA*"). In particular, they sought orders seizing and detaining aircraft leased by the bankrupt airlines. While the lessors of the planes retained legal title to the aircraft, the bankrupt airlines were the registered owner for the purposes of the *Aeronautics Act*, R.S.C. 1985, c. A-2.

[54] The airport authorities and NAV Canada brought proceedings in Ontario and Quebec.

[55] In Ontario, Ground J. dismissed motions for orders permitting the airport authorities and NAV Canada to seize and detain the aircraft leased by Canada 3000: *Canada 3000 Inc. (Re)*, [2002] O.J. No. 1775, 33 C.B.R. (4th) 184 (S.C.J.). On the question of interest, he concluded, at para. 73, that the airport authorities and NAV Canada were entitled to charge interest on the unpaid charges up to the date of payment or the posting of security for payment.

[56] On appeal from Ground J.'s decision, this court held that the interest question need not be determined since the airport authorities and NAV Canada did not have the right to detain the aircraft: *Canada 3000 Inc. (Re)* (2004), 69 O.R. (3d) 1, [2004] O.J. No. 141 (C.A.), at para. 197.

Supreme Court's decision

[57] On appeal to the Supreme Court of Canada, the court determined that the airport authorities and NAV Canada had the right to detain the aircraft leased and operated by the [page655] bankrupt airlines. The issue of post-filing interest was, therefore, an issue the court had to decide.

[58] In deciding that issue, Binnie J. made the following comment, at para. 96:

> *While a CCAA filing does not stop the accrual of interest*, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

(Emphasis added)

[59] The appellant submits that the underlined words are binding *ratio* and must be followed in this case.

[60] While I agree that Binnie J.'s comment about the *CCAA* is not *obiter*, I am not convinced that it should be read as broadly as the appellant contends. In *R. v. Henry*, [2005] 3 S.C.R. 609, [2005] S.C.J. No. 76, 2005 SCC 76, Binnie J. warned, at para. 57, against reading "each phrase in a judgment . . . as if enacted in a statute". Rather, the question to be asked is "what did the case decide?".

[61] To answer what *Canada 3000* decided about post-filing interest under the *CCAA*, it is important to consider the context in which Binnie J. made his comment, including the facts of the case, the issues before the court, the structure of his reasons, the wording he used, and what he said as well as what he did not say.

[62] At para. 40, Binnie J. defined the "two major questions raised by the appeals" as follows: (1) "are the *legal titleholders* liable for the debt incurred by the registered owners and operators of the failed airlines to the service providers?" and (2) "even if they are not so liable, are *the aircraft* to which they hold title subject on the facts of this case to judicially issued seizure and detention orders to answer for the unpaid user charges incurred by Canada 3000 and Inter-Canadian?" (emphasis in original). The answer to those two questions turned on the interpretation of the *Airports Act* and *CANSCA*. As Binnie J. noted, at para. 36, the case was "from first to last an exercise in statutory interpretation".

[63] After engaging in a lengthy exercise of statutory interpretation, he concluded that (1) under s. 55 of *CANSCA*, the legal titleholders were not jointly and severally liable for the charges due to NAV Canada; and (2) under s. 56 of *CANSCA* and s. 9 of the *Airports Act*, the airport authorities and NAV Canada were entitled to apply for an order detaining the aircraft operated by the failed airlines.

[64] Binnie J. then addressed eight additional arguments made by the parties and just before his last paragraph on [page656] disposition, he included a section simply entitled "Interest", starting at para. 93.

[65] He began his analysis of the interest issue by outlining the statutory authority for charging interest: s. 9(1) of the *Airports Act* expressly provided for the payment of interest, and while *CANSCA* did not explicitly provide for interest, a regulation under *CANSCA* imposed interest: para. 93.

[66] "The question then", said Binnie J., at para. 95, was "how long the interest can run". He addressed that question as follows, at paras. 95-96:

> The airport authorities and NAV Canada have possession of the aircraft until the charge or amount in respect of which the seizure was made is paid. It seems to me that this debt must be understood in real terms and must include the time value of money.
> Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. *While a CCAA filing does not stop the accrual of interest*, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

(Emphasis added)

[67] Significantly, Binnie J. made no mention in his reasons of the common law interest stops rule or the related *pari passu* principle. Nor did he cite any case law dealing with those issues. In

fact, even though it is well established that the interest stops rules applies under the *BIA*, he did not rely on the common law rule in support of his finding that interest stopped on bankruptcy. Instead, he relied on ss. 121 and 122 of the *BIA* in concluding that the interest payable under the *Airports Act* and the regulation under *CANSCA* did not accrue post-bankruptcy.

[68] Binnie J.'s analysis of the issue is rooted in the factual and statutory context of the case. In discussing the accrual of interest under the *CCAA*, he specified that the interest was on "unpaid charges", namely, charges under *CANSCA* and the *Airports Act*. Binnie J. was not answering an abstract legal question, but rather deciding how long interest ran in the particular factual and statutory context.

[69] In effect, I read Binnie J. as saying that a *CCAA* filing does not stop the accrual of interest under *CANSCA* or the *Airports Act* but the statutory provisions of the *BIA* ss. 121 and 122 do. [page657] He was not deciding whether, in the absence of the right to interest under *CANSCA* and the *Airports Act*, interest would have accrued or been stopped by the common law interest stops rule.

[70] Let me add that I agree with the *CCAA* judge's comment that Binnie J.'s statement in *Canada 3000* should "now be construed in light of *Century Services* and *Indalex*". In fact, one can well imagine that the court's interpretation of *CANSCA* and the *Airports Act* as allowing the accrual of interest in a *CCAA* proceeding but not in a *BIA* proceeding might have been different had it reached the Supreme Court after these two more recent cases. That question, however, is for another day. For now, I turn to this court's decision in *Stelco*.

(ii) *Stelco*

Background and motion judge's decision

[71] The post-filing interest issue in *Stelco* arose in "the final chapter of the financial restructuring of Stelco" under the *CCAA*: *Stelco (Re)*, [2006] O.J. No. 3219, 24 C.B.R. (5th) 59 (S.C.J.), at para. 1. The final chapter involved competing claims to a portion of the amount payable to the holders of subordinated notes (the "junior noteholders") pursuant to Stelco's plan of arrangement (the "plan"). The claim to these funds ("turnover proceeds") was made by the "senior debentureholders".

[72] The dispute over the turnover proceeds arose after Stelco's plan had been sanctioned and Stelco had emerged from restructuring with its debt reorganized. The senior debentureholders claimed the turnover proceeds on the basis of subordination provisions contained in the note indenture under which Stelco had issued convertible unsecured subordinated debentures to the junior noteholders.

[73] Under the terms of the note indenture, the junior noteholders expressly agreed that, in the event that the debtor became insolvent, they would subordinate their right of repayment until after repayment in full of "senior debt".

[74] The plan of arrangement that had been approved was a "no interest" plan, meaning that distribution from Stelco to the creditors did not include or account for post-filing interest. The plan, however, provided that the rights as between the senior debentureholders and the junior noteholders were preserved. The senior debentureholders, who had not received payment of post-filing interest from Stelco under the plan, demanded payment of it from the junior

noteholders pursuant to the terms of the note indenture. The junior noteholders argued, [page658] among other things, that the subordination provisions did not survive the plan's implementation and that the senior debentureholders were not entitled to claim post-filing interest from them.

[75] The motion judge, and on appeal, this court ruled in favour of the senior debentureholders. The courts found that the plan was expressly drafted to preserve the subordination provisions and that the *CCAA* does not purport to affect rights as between creditors to the extent that they do not directly involve the debtor.

How to read Stelco?

[76] The appellant and the respondents offer different readings of *Stelco*.

[77] The appellant argues that this court's decision is binding authority for the proposition that the interest stops rule does not apply in the *CCAA* context. The passages relied on by the appellant include, para. 67:

> [T]here is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in [*Canada 3000*] at para. 96, where he said:
>
> > While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the [*BIA*].

[78] The respondents, for their part, read the case more narrowly as a resolution of an inter-creditor dispute. They submit that the *ratio* of the case is that there was no rule that prohibited giving effect to the agreed upon inter-creditor postponement. To the extent that this court discussed the interest stops rule in the abstract, its comments are *obiter*.

[79] I agree with the respondents. In my view, the court in *Stelco* did not need to decide whether the interest stops rule applies in *CCAA* proceedings for it to decide the inter-creditor dispute before the court and so its statements about the rule's application are not binding.

[80] This court expressly noted, at para. 44, that it was dealing with an inter-creditor dispute. The junior noteholders had accepted the subordination terms in the note indenture. They had agreed not to be paid anything, in the event of insolvency, until those who held senior debt were paid principal and interest in full. The court affirmed, at para. 44, that the *CCAA* does not change the relationship among creditors where it does not directly involve the debtor. [page659]

[81] As noted, this was a "no interest" plan, meaning that the senior debentureholders received no post-filing interest from Stelco. Rather, they sought and eventually received payment of post-filing interest from the junior noteholders' share of the proceeds. The court found that the Stelco plan contemplated the continued accrual of interest to senior debentureholders for the purpose of their rights as against the junior noteholders after the *CCAA* filing date: paras. 59 and 70. It noted that *CCAA* plans can and sometimes do provide for payments in excess of claims filed in *CCAA* proceedings. There was no rule precluding the payment of post-filing interest to the senior debentureholders in accordance with the Stelco plan: para. 70.

[82] The court's conclusion that the junior noteholders could not rely on the interest stops rule is consistent with the traditional interest stops rule. The interest stops rule relates to claims by creditors against the debtor. It does not deal with arrangements as between creditors. In other words, whether or not the interest stops rule applies in *CCAA* proceedings did not need to be decided because the agreement between creditors fell outside the scope of that rule.

[83] The appellant makes two further submissions based on its interpretation of s. 6.2(1) of the note indenture. That paragraph reads as follows:

> 6.2 Distribution on Insolvency or Winding-up.
>
> . . . . .
>
> (1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest *due thereon*, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, *which may be payable or deliverable in any such event in respect of any of the Debentures*[.]

(Emphasis added)

[84] The first argument is that the senior debentureholders were only entitled to receive principal, premium and interest "which may be payable or deliverable in any such event", the event being insolvency or bankruptcy proceedings. Therefore, the court must have concluded, at least implicitly, that the senior debentureholders would have been entitled to maintain their claim for post-filing interest against Stelco.

[85] The second argument is that, by the terms of s. 6.2(1), the senior debentureholders were only entitled to interest "due thereon" and so they could not claim post-filing interest from the junior noteholders unless they could claim post-filing interest from Stelco. [page660]

[86] I would not give effect to either submission.

[87] In *Stelco*, the court did not address either argument and we do not have a copy of the entire agreement nor do we have the other agreements that form part of the factual matrix. Without that context, this court is not in the position to interpret s. 6.2(1).

[88] In my view, the key question for this court is not how to properly interpret s. 6.2(1) but, rather, how we should read the reasons in *Stelco*. What did the *Stelco* court decide and, specifically, should we read the panel as implicitly deciding that the senior debentureholders could not recover post-filing interest from the junior noteholders unless they could claim post-filing interest against Stelco?

[89] In discussing post-filing interest, the court's only mention of the senior debentureholders' claim as against Stelco is found at paras. 57-59, where the panel expressly rejected the argument that "any claim the Senior [Debentureholders] have for interest must be based on a aeclaim' [as defined in the plan] they have against Stelco for such interest" and that "[i] f the Senior Debt does not include post-filing interest, there can be no claim against the [Junior] Noteholders for such amounts": see paras. 58-59.

[90] Admittedly, the panel made this comment in discussing the effect of the Stelco plan as opposed to the effect of the interest stops rule. However, as I read the section on post-filing interest as a whole, the court is saying that the junior noteholders agreed to be bound by the deal they made. They had agreed to the subordination provisions that guaranteed full payment to the senior debentureholders in the event of insolvency, and the plan affirmed that the senior noteholders could claim the full amount that would have been owing had there been no *CCAA* filing. In this court's words, at para. 70, there is no interest stops rule "that precludes such a result". In my view, therefore, this court did not make an implicit finding that the senior debentureholders had to be able to claim post-filing interest from Stelco in order to claim post-filing interest from the junior noteholders.

[91] In conclusion, I consider the comment that there is no persuasive authority that supports an interest stops rule in *CCAA* proceedings to be *obiter*. *Stelco* dealt with the effect of an agreement as between creditors as to how, between them, they would share distributions. Whether or not interest stops upon a *CCAA* filing was of no import in answering that question. [page661]

> (2) *If the CCAA judge did not err in concluding that an interest stops rule applies in CCAA proceedings, did he err in holding that holders of crossover bonds claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest?*

[92] The appellant objects to the wording of the *CCAA* judge's order. It provides that [at para. 62] "holders of Crossover Bond Claims are not legally entitled to claim *or receive* any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). While the appellant asked the *CCAA* judge to amend his order to delete "or receive", he refused. The appellant submits that, to the extent this precludes the bondholders from receiving post-filing interest under a *CCAA* plan, the *CCAA* judge erred. The appellant notes that all the parties in this proceeding agree that a *CCAA* plan may provide for post-filing interest.

[93] As I explained above, the interest stops rule does not preclude the payment of post-filing interest under a plan of compromise or arrangement.

[94] As I read the *CCAA* judge's reasons and order, he did not decide otherwise. His decision confirms that the common law interest stops rule applies in *CCAA* proceedings. If a plan of compromise or arrangement is concluded, it should not, for example, be read as limiting any right to recover post-filing interest creditors may have as amongst themselves, as existed in *Stelco,* or from non-parties. Nor does it dictate what any creditor may seek in bargaining for a fair plan of compromise or arrangement. In that regard, I do not interpret the *CCAA* judge's use of the words "or receive" as preventing the appellant from seeking and obtaining such a result in a negotiated plan. In particular, I note the *CCAA* judge's comment, at para. 35 of his reasons, that "the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done".

[95] The appellant also seeks clarification as to the effect of the words [at para. 5] "*any amounts* under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest" (emphasis added). The appellant notes that, without clarification, the

wording of the order could potentially preclude the recovery of other contractual entitlements under the relevant indentures, such as costs and make-whole provisions, even though no arguments were advanced before [page662] the *CCAA* judge with respect to any amounts other than post-filing interest.

[96] The issue the *CCAA* judge [at para. 5] was directed to answer was "whether the holders of the crossover bond claims [were] legally entitled . . . to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest". As indicated in the appellant's factum, the only arguments advanced before the *CCAA* judge related to post-filing interest and not any other amounts under the indentures. The appellant does not appear to have made submissions to the *CCAA* judge with respect to the costs and make-whole fees it now raises in its factum. This court is in no position to deal with the new argument raised by the appellant. Further, beyond making the broad submission noted above, the appellant did not expand on that submission and direct the court to the specific claims or indenture provisions it relies on in support of its argument or explain why the claims should not be caught by the order.

[97] As I have already indicated, the *CCAA* judge's order confirms that the interest stops rule, and the limits imposed by the rule, apply in *CCAA* proceedings. To the extent that the appellant maintains that there are other contractual entitlements under the relevant indentures not covered by the interest stops rule, it is up to the *CCAA* court to decide if those can now be raised and ruled upon.

F. *Final Comments*

[98] I acknowledge that the Nortel *CCAA* proceedings are exceptional, particularly with respect to the length of the delay. The amount the appellant claims for post-filing interest and related claims under the indentures, and the resulting impact on other unsecured creditors is so great because of the length of that process. The principle, however, is the same whether the *CCAA* process is short or long. After the imposition of a stay in *CCAA* proceedings, allowing one group of unsecured creditors to accumulate post-filing interest, even for a relatively short period of time, would constitute unfair treatment *vis-à-vis* other unsecured creditors whose right to convert their claim into an interest-bearing judgment is stayed.

[99] This decision does not purport to change or limit the powers of *CCAA* judges. Although the decision clearly settles at the outset of a *CCAA* proceeding whether there is a legal entitlement to post-filing interest, it does not dictate how the proceeding will progress thereafter until a plan of compromise or [page663] arrangement is approved, or the *CCAA* proceeding is otherwise brought to an end.

[100] The determination of legal entitlement is important as it clearly establishes the starting point in a *CCAA* proceeding. It tells creditors, debtors and the court what legal claim a particular creditor has. Its significance is not only for purposes of setting the voting rights of creditors on any proposed plan of compromise or arrangement, it also ensures that, in assessing any such proposed plan, the parties will know what they are or are not compromising and the court will be equipped to consider the fairness of such a plan.

G. *Disposition*

[101] For these reasons, I would dismiss the appeal. Pursuant to the agreement of the parties, I would award the respondent monitor, as successful party, costs as against the appellant fixed in the amount of $40,000, inclusive of disbursements and applicable taxes. I would make no other order as to costs.

Appeal dismissed.

Notes

1 There are five Canadian debtors: Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation.

2 As explained in Roderick J. Wood's text on bankruptcy and insolvency law, "insolvency law is the wider concept, encompassing bankruptcy law but also including non-bankruptcy insolvency systems.": Roderick J. Wood, *Bankruptcy & Insolvency Law* (Toronto: Irwin Law, 2009), at p. 1.

3 The respondents are the monitor, the Canadian debtors, the Canadian Creditors' Committee and the Wilmington Trust, National Association. While technically the Bank of New York Mellon and the Law Debenture Trust Company of New York are also respondents, they support the appellant's position and so my use of the term "respondents" excludes them.

COURT FILE NO.: 04-CL-5306
DATE: 20040322

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: FARLEY J.

COUNSEL: *Michael E. Barrack, James D. Gage* and *Geoff R. Hall*, for the Applicants

David Jacobs and *Michael McCreary*, for Locals 1005, 5328 and 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer and *Rob Centa*, for United Steelworkers of America

Bob Thornton and *Kyla Mahar*, for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych, for the Informal Committee of Stelco Bondholders

David R. Byers, for CIT

Kevin McElcheran, for GE

Murray Gold and *Andrew Hatnay*, for Retired Salaried Beneficiaries

Lewis Gottheil, for CAW Canada and its Local 523

Virginie Gauthier, for Fleet

H. Whiteley, for CIBC

Gail Rubenstein, for FSCO

Kenneth D. Kraft, for EDS Canada Inc.

HEARD: March 5, 2004

ENDORSEMENT

[1] As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

[2] Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's management had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

[3] For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed – addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

[4] The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

[5] The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

[6] If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I.C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

[7] S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

[8] Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

[9] This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Re Kenwood Hills Development Inc.* (1995), 30 C.B.R. (3d) 44 (Ont. Gen. Div.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

[10] Anderson J. in *Re MGM Electric Co. Ltd.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This

common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

[11] The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring – which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solutions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

[12] It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

[13] There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Re Inducon Development Corp.* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

[14] It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div.), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if “success” may have been available with earlier spade work.

[15] I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101; 1 O.R. (3d) 280 (C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J.) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

[16] In *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

[17] In *Re Anvil Range Mining Corp.* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

[18] Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

[19] I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

[20] Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational restructuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Pepplar Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

[21] The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of “insolvent person” in s. 2(1) of the *Bankruptcy and Insolvency Act* …
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies’ Creditors Arrangement Act (Canada),* 16 C.B.R. 1 [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

[22] It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

s. 2(1)…

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

[23] Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of “debtor company” as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Limited Partnership* v. *Rex*, [2002] 2 S.C.R. 559 at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[24] I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy – and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt’s assets (not likely involving the business carried on – and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist,

albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

[25] It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on “rescues” as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

[26] Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union’s affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

[27] On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

[28] The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Re Optical Recording Laboratories Inc.* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

[29] In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx,* [2000] 1 S.C.R. 61 at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *Re King Petroleum Ltd.* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

[30] *King* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

[31] Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

[32] I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

[33] I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Re Pacific Mobile Corporation; Robitaille v. Les Industries l'Islet Inc. and Banque Canadienne Nationale* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

[34] Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

[35] But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

[36] I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil*, *supra* at p. 162.

[37] The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:

(a) the ability to meet liabilities as they fall due; and

(b) that assets exceed liabilities.

On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

[38] As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run…eventually*" is not a finite time in the foreseeable future.

[39] I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

[40] It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

[41] What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Reglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Gen. Div.) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that respect, I appreciate that it may

be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (S.C.J.) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (C.A.). At paragraph 33, I observed in closing:

> 33…They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

[42] The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

[43] Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

[44] In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Div Ct.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

[45] The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c) question. However I would refer to one of the Union's cases *Bank of Montreal v. I. M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (C.A.) where it is stated at paragraph 11:

> "11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

[46] In *Barsi v. Farcas*, [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stanton* (1883), 11 Q.B.D. 518 that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

[47] Saunders J. noted in *633746 Ont. Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

[48] There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

[49] In *King, supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

[50] To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

[51] S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

[52] *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

[53] In *Garden v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *In re A Debtor (No. 64 of 1992)*, [1993] 1 W.L.R. 264 (Ch. D) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Re Leo Gagnier* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store – in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

[54] It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

[55] I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

[56] All liabilities, contingent or unliquidated would have to be taken into account. See *King, supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Proviseuers Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S.S.C.) at p. 29; *Re Challmie* (1976), 22 C.B.R. (N.S.) 78 (B.C.S.C.) at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Although the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

[57] With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital, supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139-140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due"

> for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re* 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

[58] There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

[59] It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway* below at pp. 163-4 – at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical supra* at pp. 756-7; *Re Viteway Natural Foods Ltd.* (1986), 63 C.B.R. (N.S.) 157 (B.C.S.C.) at pp. 164-63-4; *Re Consolidated Seed Exports Ltd.* (1986), 62 C.B.R. (N.S.) 156 (B.C.S.C.) at p. 163. In *Consolidated Seed,* Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its

> obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation. …
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

[60] The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

[61] I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged – the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

[62] Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.

> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

[63] Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

[64] As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 – January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

[65] From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

[66] On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

[67] Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

[68] In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible

assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

[69] In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

[70] I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace – and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

J.M. Farley

Released: March 22, 20004

Ontario Supreme Court
T. Eaton Co., Re
Date: 1999-10-24

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 the T. Eaton Company Limited, Applicant

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: October 20, 1999

Judgment: October 24, 1999

Docket: 99-CL-3516

Justin R. Fogarty, for National Retail Credit Services Co.

Robert J. Arcand, for Cambridge Shopping Centre Ltd., Oxford Development Group Inc., Grosvenor International Canada Ltd., Laing Property Corp.

Edmond Lamek, for Richter & Partners Inc., the Monitor.

Jay A. Carfagnini, for Cadillac Fairview Corp. Ltd.

Patricia Jackson and Michael Rotsztain, for Sears Canada Inc.

John MacDonald, for T. Eaton Co. Ltd.

Endorsement. *Farley J*.:

[1] The National Retail Credit Services Company ("N") moved for a direction of specific performance by the T. Eaton Company Limited ("E") and Sears Canada Inc. ("S") of the Card Licence and Services Agreement dated February 13, 1998 ("Card Deal") and the Trademark Licence Agreement dated April 17, 1998 ("Trademark Licence"). E and S have entered into a Share Purchase Agreement which will form part of the foundation of E's plan of arrangement under the CCAA.

[2] N submitted that, notwithstanding E's repudiation of the Trademark Licence (as well as the Card Deal; in Amended and Restated Purchase Agreement dated February 16, 1998 and the

Transition Agreement dated April 4, 1998), N be entitled to use E's trademarks and related intellectual property to collect all outstanding receivables of N owed by customers of E and generated by the customers using the E credit card. During the hearing I confirmed with counsel for E and S that there would be no impediment to N referring in any collection procedure to the name "The T. Eaton's Company Limited". It is unfortunate that this aspect had not been clarified before. With this confirmation it seems to me that N may suffer some modest inconvenience in its collection operations but no material difficulty which requires any remedy outside of a claim for damages.

[3] What then of E's repudiation of the agreements with N whereby N was to be the E private label credit card program provider. Pursuant to the Card Deal, E granted N for a 10 year term "the exclusive licence to provide all of the requirements of Cards Services of (i) [E] and its affiliates…" N paid E a significant amount of money for this grant. "Card Services" are defined as follows in s.1.1 of the Card Deal:

> "Card Services" means the services provided by Supplier to administer, operate, manage and regulate the credit granting, payment processing, and transaction authorization facilities provided under this Agreement; such services include but are not limited to the production and issuance of Cards, the distribution and receipt of applications for Cards, the review and approval or denial of applications for Cards, the granting of credit to Cardholders, the preparation and mailing of statements, the receipt and collection of payments from Cardholders, the adjudication of claims, the provision of balance protection insurance, the collection, management and communication of Customer information, the maintenance and timely provision of non cash transaction records, the payment of Net Settlements to TECO, the maintenance of the Database and all cardholder related records, the authentication of Bank Card transactions by electronic or other means, the operation of the Authorization System including the authorization of Transactions, the operation and monitoring of systems and related facilities and resources for carrying out the above referenced activities, and the operation and
>
> administration of Cardholder Credit Balances together with such other services as may be agreed to from time to time by TECO and Supplier.

Thus N has the right to and is providing a credit type of service for the benefit of E.

[4] I note that s.7.4 of the Card Deal provides for the dispute mechanism for disputes or claims "between the parties arising out of or in relation to this Agreement". Essentially the parties N and E are to negotiate and if resolution is not forthcoming to refer the matter to a single arbitrator with the *Arbitration Act* being invoked. It seems to me that the Claims Procedure as to N's claim for damages as a result of E's repudiation essentially fulfils this

provision. I note that s. 7.4(d)(vii) provides that “nothing herein will prevent a Party who gave notice under this Section 7.4(d) from applying for injunctive relief pending such arbitration proceeding.” I shall deal with this motion in that light since in large respect it is a claim for a mandatory injunction.

[5] In *Re Blue Range Resource Corp.* (1999), 245 A.R. 154 (Alta. Q.B.); leave to appeal granted on other grounds (1999), 12 C.B.R. (4th) 186 (Alta. C.A.), LoVecchio J. held that the debtor company could terminate (in the sense of repudiate, see infra) certain gas supply contracts under a stay order made pursuant to s.l1 of CCAA as long as that did not affect the purchaser’s right to make a claim in damages against the debtor company. He stated at paras. 36-8:

> 36. The purpose of the CCAA proceedings generally and the stay in particular is to permit a company time to reorganize its affairs. This reorganization may take many forms and they need not be listed in this decision. A common denominator in all of them is frequently the variation of existing contractual relationships. Blue Range might, as any person might, breach a contract to which they are a party. They must however bear the consequences. This is essentially what has happened here.

When LoVecchio J. speaks of “the variation of existing contractual relationships”, it is clear that he means that the “variation” is simply a breach of the contract and not that there is a sanctioned revision to the contract.

> 37. A unilateral termination, as in any case of breach, may or may not give rise to a legitimate claim in damages. Although the Order contemplates and to a certain extent permits unilateral termination, nothing in section 16.c or in any other part of the Order would suggest that Blue Range is to be relieved of this consequence; indeed Blue Range’s liability for damages seems to have been assumed by Duke and Engage in their setoff argument. The application amounts to a request for an order of specific performance or an injunction which ought not to be available indirectly. In my view, an order authorizing the termination of contracts is appropriate in a restructuring, particularly given that its does not affect the creditors’ right to claim for damages.
>
> 38. The Applicants are needless to say not happy about having to look to a frail and struggling company for a potentially significant damages claim. They will be relegated to the ranks of unsecured judgment creditors and may not, indeed likely will not, have their judgments satisfied in full. While I sympathize with the Applicants’ positions, they ought not to, in the name of equity, the guide in CCAA proceedings, be able to elevate their claim for damages above the claims of all the other unsecured creditors through this route.

I agree with that analysis. See also *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.); *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce* (1992), 11

C.B.R. (3d) 161 (Ont. Gen. Div.); *Re Dylex Ltd.* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) and generally as to the purpose of the CCAA, *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p.31.

[6] The question of fairness is one that must await the sanction hearing, provided that the plan of arrangement survives the debtor vote. In *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), Freeman JA for the court stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to service and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of the court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable. No amount of disclosure could compensate for such deliberately unfair treatment. Neither disclosure, nor the votes of the majority, can be used to victimize a minority creditor. On the other hand negotiated inequalities of treatment which might be characterized as unfair in another context may well be ameliorated when made part of the plan by disclosure and voted upon by a majority (emphasis added).

In any CCAA (and its "affiliated" legislation) situation, one has to be cognizant of the function of a balancing of the prejudices. Positions must be realistically assessed and weighed, all in the light of what the alternative to a successful plan would be. Wishes are not a firm foundation on which to build a plan; nor are ransom demands. (I wish to make it clear that I am speaking generally about the approach to the CCAA and not specifically about this case as now is not the time to deal with the sanction questions).

[7] It is clear that under CCAA proceedings debtor companies are permitted to unilaterally terminate in the sense of repudiate leases and contracts without regard to the terms of those leases and contracts including any restrictions conferred therein that might ordinarily (i.e. outside CCAA proceedings) prevent the debtor company from so repudiating the agreement. To generally restrict debtor companies would constitute an insurmountable obstacle for most debtor companies attempting to effect compromises and reorganizations under the CCAA. Such a restriction would be contrary to the purposive approach to CCAA proceedings followed by the courts to this date.

[8] Is there something peculiar to the Card Deal and the other agreements which would dictate another result or amelioration in favour of N? Firstly N points to s.8.3 of the Card Deal which sets out the three provisions pursuant to which E could terminate the Card Deal (and

E's obligations thereunder) before the expiration of the 10 year term. None of those provisions come into play. However, s.8.3 contemplates a termination by E *as permitted* under the Card Deal. That is not what E has done. E has repudiated the Card Deal and contrary to a permitted termination, E is to be subject to liability for such a repudiation.

[9] Secondly, N points out that pursuant to the terms of the Card Deal, E is not permitted to assign it without N's prior written consent. However, E's arrangement with S is not an assignment of the Card Deal.

[10] Thirdly, N submits that the Card Deal and other agreements grant it a licence which vests in N as licencee a right which constitutes personal property in the hands of N as licencee citing *Re Foster* (1992), 89 D.L.R. (4th) 555 (Ont. Bktcy.) at p.560 and *Sugarman v. Duca Community Credit Union Ltd.* (1998), 38 O.R. (3d) 429 (Ont. Gen. Div. [Commercial List]) at p.445-6. However, it should be noted that these cases are PPSA cases and under that legislation there is a very expanded view of "personal property" in which there may be a security interest. That definition does not come into play in a CCAA proceeding. See *National Trust Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 (Ont. C.A.) and *Canadian Imperial Bank of Commerce v. Hallahan* (1990), 39 O.A.C. 24 (Ont. C.A.) for examples where similar licenses to those in *Foster* and *Sugarman* were found not to constitute "personal property" for the purposes of the PPSA or the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act.*

[11] It seems to me that where the (exclusive) licence granted to N by E is analyzed in the context of the Card Deal overall, it is not, in the traditional property sense, a licence (sometimes expressed as a licence with a grant). The Card Deal in my view does not purport to transfer, or have the effect of transferring, any type of proprietary interest to N. Rather N is permitted to provide certain services to the customers of E while others are not. In the Card Deal, N and E have expressly and it would appear exhaustively provided for the aspects as to which each holds a proprietary interest in certain assets. There is no statement in the Card Deal that the "exclusive licence" granted by E to N is in itself proprietary in nature in that it creates directly or indirectly a proprietary interest for N's benefit. Examples of proprietary claims spelled out in the Card Deal in the sense that each side merely maintains what it had and not what it is granted are as follows:

> s.6.1(c) the Confidential Information (as defined in s.6.1(a)) of each of the parties is proprietary to that party;
>
> s.6.1(g) Confidential Information in the possession of either party is to be returned on request by the other party;
>
> s.6.2 the trademarks and other intellectual property of E remain E's property, although licensed (in the sense of being permitted by E to be used by N) to N in order to facilitate the performance by N of its obligations under the Card Deal; (s.5.1 of the trademarks licence also confirms that E is the exclusive owner of the trademarks and all goodwill associated thereunder);
>
> s.6.4 the cardholder lists are and remain the property of E; N may use the lists solely for the purposes of providing Card Services under the Card Deal and for certain other specified purposes, including the sale of defined financial products to those Cardholders.

Thus contrary to N's assertion that the assets used in the credit card operations are "vested" in N, both the customer lists and trademarks (the property relevant for the provision of the credit card operations remain exclusively the property of E.

[12] Even if the grant to N of the right to provide the Card Services were construed as a traditional licence, it does not appear to me that N thereby acquires a property interest in such a right. The true nature of an (exclusive) licence is leave or permission to do such a thing, which would otherwise be unlawful (and a contract not to give leave or permission to anyone else to do the same thing. It confers no interest or property in the thing. See *Heap v. Hartley* (1899), 42 Ch. D. 461 (Eng. Ch. Div.) at pp. 468-9 per Cotton L.J.

[13] Can N insist on specific performance of the Card Deal and other agreements, assuming for the purpose of this analysis that we ignore the clear jurisprudence discussed above in *Blue Range Resource Corp.* and the other cases which is to the effect that a debtor company in CCAA proceedings may be permitted to repudiate contracts but of course it will be subject to the damages which may arise from such repudiation, and such damages will have to be accommodated within the plan of arrangement being proposed (as may be awarded) for the creditors to vote upon? In essence, specific performance is only available where the non-repudiating party cannot be adequately compensated in damages for the breach. Here N and E have expressly agreed that a breach of the confidentiality provisions of the Card Deal would not be compensable in damages (and through negotiation, N, E and S have reached a *modus vivendi* as to the confidentiality provisions.) While N and E were free to expressly deal with other breaches of the arrangements in the same way, they did not do so; this is a strong indication of the parties' view that other breaches of the arrangements would be susceptible

to compensation by way of damage claims. In fact, N has retained KPMG to prepare such an identification of damages which it now asserts is what it is entitled to. Where, as in this case, the non-repudiating party (N) cannot carry out the contract without the co-operation of the party who has refused to perform (E) and such co-operation is withheld or rendered impossible, the only remedy is a suit for damages; it is not a question of electing to accept the repudiation. See G.H.L. Fridman, *The Law of Contract* (3rd) ed., 1994; Toronto, Carswell) at p. 614 and p. 794; *Shibamoto & Co. v. Western Fish Producers Inc. (Trustee of)* (1991), 43 F.T.R. 1 (Fed. T.D.) at p. 24; affirmed (1992), 145 N.R. 91 (Fed. C.A.). See also the going dark anchor tenant in the mall cases which I have previously decided (e.g. *Chatham Centre Mall Ltd. v. New Miracle Food Mart Inc.* (1994), 40 R.P.R. (2d) 124 (Ont. Gen. Div. [Commercial List])) and *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.,* [1997] 3 All E.R. 297 (U.K. H.L.); *Centre City Capital Ltd. v. Bank of East Asia (Canada)* (December 23, 1997), Doc. RE 7243/96 (Ont. Gen. Div.) and R.J. Sharpe, *Injunctions and Specific Performance* (2nd ed, Toronto, Canada Law Book) at s.7.450 for the inappropriateness of granting a mandatory injunction where the court would in effect be required to constantly supervise the activities mandated to be performed. Since there is no assignment of the Card Deal contemplated to S or any other contractual or other relationship between S and N established, it would not seem that N can seek specific performance as against S.

[14] I note that Eatons submits that N's request for specific performance is illogical:

> If this relief were to be granted, the inevitable result would be the bankruptcy of Eaton's because the success of the Plan depends on the Sears Agreement, and in order to satisfy the conditions of the Sears Agreement, Eaton's must terminate the Card Services Agreement with NRCS. Not only would a bankruptcy result in diminished recoveries for all creditors, there would be no ongoing business to which NRCS could provide services under the Card Services Agreement.

While there may be some business practicality to the foregoing, logically, vis-à-vis E, all the S Purchase Agreement provides is some "extra" recovery to put into the plan of arrangement. Conceivably, a plan might be approved even without that additional funding. Claimants however given a choice between "more" and "less", usually prefer more. How that all works out and the relative sharings will be the subject of rough-and-tumble negoti-

ations discussed in *Keddy Motor Inns Lid.* supra. It should also be noted that the purpose of the CCAA is not that there be a reorganization of the debtor company so that it survives no matter what; the fairness of the plan must be determined.

[15] E will have to deal with the mechanics of how to accommodate N's damages as assessed in the plan of arrangement including the restructuring contemplated thereunder. It is understood that as per LoVecchio J.'s observations in *Blue Range Resource Corp.* it is extremely unlikely in any CCAA plan that claims generally will be paid off at 100 cents on the dollar. That N may be paid off (as other creditors) in a "devalued currency" if the plan is approved does not give N any higher right to relief in this motion.

[16] N's motion is therefore dismissed.

Motion dismissed.

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18

SUPERIOR COURT OF JUSTICE - ONTARIO

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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015

ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

> **Factors to be considered** – In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. …
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. …
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

[22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

[23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

[24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 at paragraph 62 as follows:

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

[27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

> 64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy

businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

CITATION: Timminco Limited (Re), 2012 ONSC 4471
COURT FILE NO.: CV-12-9539-00CL
DATE: 20120803

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Maria Konyukhova, for the Applicants**

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

Thomas McRae, for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: **JUNE 4, 2012**

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[2] In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

[3] Alternative positions have also been presented by the parties.

[4] Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

[5] In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

[6] Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

FACTS

[7] Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

[8] The preamble to the 1996 Agreement provides:

> The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

[9] The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which $29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

[10] The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due

to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

[11] Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the time limits from time to time of his physical and other abilities…; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

[12] At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

[13] Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of $20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

[14] The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

[15] In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

> Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately.
>
> And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;…I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without limitation obligations pursuant to the *Employment Standards Act (Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

[16] Following his retirement in 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

[17] Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

[18] The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

[19] Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

[20] Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately $2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

[21] Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

[22] Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

[23] Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

[24] On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

[25] On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

ANALYSIS

[26] Counsel to Mr. Timmins set out four issues:

(a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?

(b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:

(i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and

(ii) the disclaimer would result in significant financial hardship to Mr. Timmins.

(c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

[27] Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

[28] In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

(a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and

(b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

[29] Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

[30] Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

[31] Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

[32] Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

[33] Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

[34] In my opinion, the arguments of Mr. Timmins are flawed.

[35] It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

(a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;

(b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;

(c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;

(d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;

(e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and

(f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

[36] From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

[37] In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

[38] It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

[39] Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

[40] In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

[41] The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Limited (Re)* (2009), 55 C.B.R. (5^{th}) 64 (Ont. S.C.J.), *Re Nortel Networks Corporation, Re* [Recommencement of Benefit Motion] (2009) 55 C.B.R. (5^{th}) 68 [Nortel] and *Fraser Papers Inc. (Re)* (2009), 55 C.B.R. (5^{th}) 217.

[42] Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be pre-filing obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:

> …The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

[43] It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

[44] The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

[45] The Monitor expressed no view on whether the monthly payment obligations were a pre-filing or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

[46] In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

[47] The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

[48] Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

[49] Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

(a) the Monitor has approved the proposed disclaimer;

(b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;

(c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;

(d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and

(e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

[51] In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel (Re)* 2009 ONCA 833, there is "no reason…why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern".

[52] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

[53] In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

[54] Similar views were expressed by the court in *Homberg Invest Inc. (Arrangement Relatif á)*, 2011 QCCS 6376 where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

[55] It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

[56] Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

[57] I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which

were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

[67] Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

[68] I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

[69] As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

DISPOSITION

[70] In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

MORAWETZ J.

Date: August 3, 2012

COURT OF APPEAL FOR ONTARIO

CITATION: Wong v. Lui, 2023 ONCA 272
DATE: 20230420
DOCKET: C70618

Gillese, Tulloch and Roberts JJ.A.

BETWEEN

Jessica Wong and Trevor Tan

Plaintiffs
(Respondents)

and

Edward Lui, Rebecca Lui, Ryan De Castro, Re/Max Unique Inc., Brokerage, Freddy Mak, Homelife/Bayview Realty Inc., Brokerage and One Source Home Maintenance Solutions Inc. c.o.b. Professionalhome Consultants, and City of Toronto

Defendant
(Appellant)

Naomi Brown and Aisha Hussain, for the appellant

Julian Binavince, for the respondents

Heard: December 15, 2022

On appeal from the order of Justice Mary A. Sanderson of the Superior Court of Justice, dated March 18, 2022.

Roberts J.A.:

Introduction

[1] At issue in this appeal is the interpretation of s. 15(4)(b) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B ("the Act" or "the current Act"). Section

15(4)(b) provides that the ultimate 15-year limitation period established under s. 15(2) of the Act[1] does not "run during any time in which…the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim". Specifically, whether for s. 15(4)(b) to apply, the plaintiff's claim must arise when the plaintiff is a minor.

[2] The appellant appeals from the dismissal of its motion to dismiss the respondents' negligence claims involving building permits from 1987 opened by the appellant. The 1987 building permits were issued in relation to defective construction carried out on their home prior to the respondents' purchase. The appellant argues that those claims are statute-barred: the respondents commenced their action in 2021, well after the expiry of the 15-year ultimate limitation period under s. 15(2) of the Act on January 1, 2019.

[3] The respondents started their action on July 7, 2021, less than two years after their purchase of the property on August 9, 2019. The parties agree that, but for the application of the tolling provisions of s. 15(4) of the Act, the ultimate 15-year limitation period under s. 15(2) in relation to the claim regarding the 1987 building permits would have expired on January 1, 2019.[2]

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[1] Section 15(2) of the Act reads: "No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place." The basic two-year limitation period in s. 4 of the Act is not at issue on this appeal.

[2] The parties agreed and the motion judge noted that the transitional provisions under s. 24(5) of the Act applied and that the 15-year ultimate limitation period did not start to run until January 1, 2004. It was also

[4] The motion judge determined that the ultimate limitation period under s. 15(2) did not run from 2004, when the Act was passed and the ultimate limitation period was imposed, to 2006, when the respondent, Jessica Wong, turned 18.[3] As a result, the motion judge concluded that the ultimate limitation period did not begin to run until Ms. Wong reached the age of majority on July 11, 2006. Her action against the appellant was therefore not statute-barred – she had commenced her action on July 7, 2021, less than 15 years after July 11, 2006. The motion judge dismissed the appellant's motion with partial indemnity costs to the respondents.

[5] For the reasons that follow, I would allow the appeal.

Background

[6] The relevant facts can be briefly stated. They are taken from the joint facts agreed upon by the parties for the purposes of the appellant's motion and the facts alleged in the respondents' Amended Amended Statement of Claim. For the purposes of the motion, they were taken as true.

[7] On August 9, 2019, Jessica Wong and Trevor Tan jointly purchased the property. At the time of their purchase, Ms. Wong was 31 years old and Mr. Tan was 39 years old. Together, I refer to Ms. Wong and Mr. Tan as the "respondents".

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common ground that if not suspended, the 15-year ultimate limitation period expired on January 1, 2019. These determinations are not challenged on appeal.

[3] Only Ms. Wong's claim is in issue on this appeal; the respondent, Trevor Tan, was not a minor during the relevant time. However, as a co-owner of the property, Mr. Tan benefits from Ms. Wong's claim.

[8] After the closing of their purchase, the respondents discovered substantial latent structural, electrical, and other defects, including defective construction and violations of Ontario's *Building Code*, O. Reg. 332/12. On July 7, 2021, they launched their action against the appellant and others.[4] They claim damages from the appellant in respect of building permits opened in 1987 and 2017.

[9] The respondents' negligence claims with respect to the 1987 building permits all relate to the alleged defects in their property and are pleaded in paragraphs 59.6(b) and (c) of their Amended Amended Statement of Claim, as follows:

> 59.6 The [appellant's] conduct fell below the applicable standard of care in the following ways, among others:
>
> …
>
> (b) the [appellant] closed building permits opened by previous owners of the Property despite the Defective Washroom Support Post and Defective Rear Foundation;
>
> (c) the [appellant] approved and closed building permits opened by previous owners of the Property despite the following defects (the "Legacy Defects");
>
> (i) a wood beam installed under the second floor of the Property was not constructed in accordance with the applicable building permit (a steel beam

[4] The appellant is not the only defendant in the respondents' action. The respondents also brought claims against the vendors of the property, the real estate agents and brokers involved in the transaction, and their home inspector, for negligence and misrepresentations about the latent construction defects and termite infestation and damage that the respondents discovered after closing their purchase. Those claims are not in issue here.

> was required by the building permit) and was otherwise defectively installed;
>
> (ii) the Property's east walls were not constructed in accordance with the *Building Code*. The walls lack necessary moisture membranes and sheathing paper. The permit drawings with respect to the east walls were themselves defective for omitting the required moisture membranes and sheathing paper; and
>
> (iii) a beam located in the Property's second floor, at the east edge of the stairwell, lacked proper post supports in the exterior walls. The applicable permit drawings with respect to the stairwell construction were themselves defective for omitting the required beam supports.

[10] The appellant brought a motion under r. 21.01(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for the determination of a question of law involving the interpretation of s. 15(4)(b) of the Act. It sought a declaration that s. 15(4)(b) of the Act does not toll the ultimate 15-year limitation period where a plaintiff does not have a claim until he or she is an adult and, for s. 15(4)(b) to apply, a plaintiff must have a claim while the plaintiff is a minor. They sought to strike the respondents' negligence claims respecting the 1987 permits set out in paragraphs 59.6(b) and (c) of the Amended Amended Statement of Claim. They argued that the ultimate 15-year limitation period in which to bring an action relating to the 1987 building permits had expired on January 1, 2019, more than two years before the respondents commenced their action on July 7, 2021.

[11] In interpreting s. 15(4)(b) of the Act, the motion judge rejected the appellant's submissions that s. 15(4)(b) was conditional on a plaintiff accruing a cause of action at the time she or he was a minor. She reasoned that, if that were the intended legislative purpose, the legislature "would have used express language to that effect – as it did in s. 47 of the Former Act." She found that any jurisprudence considering s. 47 of the former *Limitations Act*, R.S.O. 1980, c. 240 ("the former Act"), had no application because it was "markedly different" from s. 15(4)(b) of the current Act.

[12] The motion judge determined that "on a plain reading of s. 15(4)(b), the suspension of the ultimate limitation period is conditional on just two things: (i) the plaintiff must be a minor during the ultimate limitation period; and (ii) the plaintiff must not be represented by a litigation guardian with respect to the claim." As a result, the motion judge found that a plaintiff need only show that "the cause of action had crystalized on the date the action was brought" and "that she was a minor without a litigation guardian during the ultimate limitation period in order for the ultimate limitation to roll during her minority."

[13] The motion judge concluded that:

> The plain wording of s. 15(4)(b) of the Act is not tied to the plaintiffs' cause of action when she or he was a minor. It refers only to 15 years from the act or omission giving rise to the claim in this case, the alleged negligent issuance of a city building permit in 1987. [Emphasis in the original.]

[14] The motion judge therefore ordered that the respondents' claims of negligence against the appellant are not statute-barred by s. 15(4)(b) of the Act, and dismissed the appellant's motion, with partial indemnity costs to the respondents.

Issue

[15] The sole issue on appeal is whether the motion judge erred in failing to conclude that for s. 15(4)(b) of the Act to apply, the claim must arise while the plaintiff is a minor.

[16] It is common ground that as the sole issue on appeal raises a question of statutory interpretation, which is a question of law, it is reviewable on a standard of correctness: *York Condominium Corporation No. 382 v. Jay-M Holdings Limited,* 2007 ONCA 49, 84 O.R. (3d) 414, at para. 10.

[17] In my view, the motion judge erred in her interpretation of s. 15(4)(b) of the Act and her order should be set aside. As I shall explain, she erred in her application of the well-established principles of modern statutory interpretation and arrived at an interpretation of s. 15(4)(b) that failed to take into account and was inconsistent with the plain language, scheme, legislative history, and object of the entire Act. When correctly interpreted, s. 15(4)(b) only applies to claims that arise while plaintiffs are minors. As a result, the respondents' claims in relation to the 1987 building permits are statute-barred and should be dismissed.

Analysis

(a) Principles and relevant provisions

[18] This appeal involves the interpretation of s. 15(4)(b) of the Act, which, as noted above, provides that the ultimate 15-year limitation period established in s. 15(2) does not apply where "the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim".

[19] The applicable principles of modern statutory interpretation are well-known. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The court must adopt an interpretation of the statute that best fulfills the objects of the legislation and that avoids any inconsistency between its different provisions and avoids absurd consequences: see e.g., Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis Canada, 2022), at §2.03; *York Condominium*, at paras. 11, 14, 15; *Carmichael v. GlaxoSmithKline Inc.,* 2020 ONCA 447, 151 O.R. (3d) 609, at para. 79, leave to appeal refused, [2020] S.C.C.A. No. 409; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 27.

(b) Historical policy and legislative objectives of limitations statutes

[20] The historical development of limitations statutes and the common law interpretation of their purpose significantly guides the court's interpretation of s.

15(4)(b) by providing context for understanding the purpose of this provision and how it ought to be interpreted.

[21] While the early common law "knew no limitation periods," rules setting out "time limits within which actions must be brought, and outside which actions could not be brought" date back as far as Roman law and continued through the Middle Ages: Williams, *Limitation of Actions in Canada*, 2nd ed (Toronto: Butterworths, 1980), at p. 24; William Ballentine, *A Treatise on the Statute of Limitations* (New York: C. Wiley, 1812), at p. 9; Henricus de Bractona, *De legibus et Consuetudinibus Angliae*, Volume 2 (c. 1210-1268)[5].

[22] The earliest English statutory limitation provisions, from which Canadian statutory limitations periods derive their origin, were introduced in the *Statute of Merton, 1235*, 20 Hen. 3, c.1, c.8, which attached limitation periods to each writ: Graeme Mew, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis Canada, 2016), at p. 4; Williams, at p. 25. In England, general limitation periods were first introduced through the *Statute of Limitations, 1540*, 32 Hen. 8, c.2, which dealt with real property, and later through the *Statute of Limitations, 1623*, 21 Jac. 1, c.

[5] Bracton's treatise on the laws of England ("On the Laws and Customs of England") included the saying "*omnes actiones in mundo infra certa tempora habent limitationem*", translated as "every action in the world is limited to a certain time": The President and Fellows of Harvard College, *Bracton Online*, Volume 2 (1967-1977), at p. 157, available online at: https://amesfoundation.law.harvard.edu/Bracton/Unframed/Latin/v2/157.htm; Carl Guterbock, *Bracton and his Relation to Roman Law* (Philadelphia: J.B. Lippencott & Co., 1866), at, p. 119, available online at: <https://quod.lib.umich.edu/m/moa/AGY1033.0001.001?rgn=main;view=fulltext>.

16, which provided limitation periods for actions including “simple contracts and torts”: Mew, at pp. 4-5.

[23] Limitations statutes in Canadian common law provinces “evolved from the English statutes that were inherited on the appropriate reception date”: Mew, at p. 5. Their purpose has remained consistent throughout the last two hundred years: they serve to bar a claimant’s right to commence legal proceedings after a certain period of time. Seen as “statutes of repose” and “statutes of peace”, their fundamental rationale supports the public interest in the end to litigation and to the revisiting of past errors: *Deaville v. Boegeman* (1984), 14 D.L.R. (4th) 81 (Ont. C.A.), at p. 86; *Sable Offshore Energy Inc. v. Canada (Customs and Revenue Agency)*, 2003 FCA 220, 226 D.L.R. (4th) 673, at para. 20; Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, 1991) at 1.

[24] Finality in litigation is not the only object of limitations statutes. The Act and its predecessors strive to balance the plaintiff’s right to sue with the defendant’s right to certainty and finality: *Canaccord Capital Corporation v. Roscoe,* 2013 ONCA 378, 115 O.R. (3d) 641, at para. 24; *Levesque v. Crampton Estate*, 2017 ONCA 455, 136 O.R. (3d) 161, at para. 54. As the Supreme Court, per Moldaver J. for the majority, reiterated in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 68: “Limitation periods

are always ‘driven by specific policy choices of the legislatures’…as they attempt to ‘balance the interests of both sides’" (citations omitted).

[25] This balance also underlies the purpose of the ultimate 15-year limitation period in s. 15(2) of the Act. As this court stated in *York Condominium*, at para. 32, its purpose is “to balance the concern for plaintiffs with undiscovered causes of action with the need to prevent the indefinite postponement of a limitation period and the associated costs relating to record-keeping and insurance resulting from continuous exposure to liability.”

[26] Moreover, balanced against the right to finality is the acknowledgement that it would be unfair to bar a person’s right to make a claim while in a condition that renders them unable to take steps to pursue their rights. As a result, limitation periods are suspended by reason of incapacity and age. This is not a new provision; it has existed in one form or another for several hundreds of years: see e.g., *Papamonolopoulos v. Board of Education for the City of Toronto* (1986), 56 O.R. (2d) 1 (C.A.), at p. 1, leave to appeal refused, 1987 CanLII 5366 (S.C.C.); *Manitoba Metis Federation Inc. v. Canada (Attorney General*), 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 243.

[27] Indeed, as the Manitoba Court of Appeal noted in *Mumford v. Health Sciences Centre* (1987), 92 D.L.R. (3d) 64 (Man. C.A.), at p. 65, the legislated exception to limitation periods for minors and those “non compos mentis”, among

others, dates back to the *Statute of Limitations, 1623*, s. 7. The exceptions for disability and minors are grounded in a broad view of incapacity: "those under legal disability are presumed not to know their rights and remedies and it would be unfair to expect them to proceed diligently in such matters": *Murphy v. Welsh; Stoddard v. Watson,* [1993] 2 SCR 1069, at p. 1080; *Manitoba Metis Federation*, at para. 246. Accordingly, the exception to limitation periods for those under legal disability is intended as a mechanism for "ensuring fairness to plaintiffs": *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 64, 69.

(c) Motion judge's interpretation

[28] In my respectful view, the motion judge did not take into account the specific purposes of the exceptions for minors and those under disability when coming to her interpretation of s. 15(4)(b). By failing to interpret s. 15(4)(b) in light of the specific purposes of these exceptions, the motion judge deviated from the legislative purpose that had remained constant for several hundreds of years in the section's predecessors, such as in s. 47 of the former Act.

[29] In particular, the motion judge's approach caused her to distinguish s. 47 of the former Act from s. 15(4) of the current Act, finding that "[t]he language of s. 47 of the Former Act is markedly different from that of s. 15(4)(b) of the Act. Section 47 of the Former Act explicitly required a cause of action to accrue to a minor as a

condition of suspending the limitation period. Such an express condition is absent from the text of s. 15(4)(b) of the current Act."

[30] Respectfully, this was an error. The difference in language highlighted by the motion judge does not derogate from the underlying purpose of s. 47 in the former Act. This purpose is the centuries-old protection of persons under a legal disability without a litigation guardian who are presumed not to know their rights and are incapable of preserving them by starting proceedings.

[31] Section 47 of the former *Limitations Act* provides:

> Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind.

[32] Section 47 reflects the legislative purpose of its predecessors that finds its origin in the early laws of England, namely, that "since early days we have recognized that fairness and justice require some relief for those who because of the incapacity of infancy would probably lose their right to compensation by courts for wrongs done to them": *Papamonolopoulos,* at p. 3. Accordingly, s. 47 and its predecessors toll limitation periods for minors because "an infant is unable adequately to look after his own affairs, including the bringing of actions": *Papamonolopoulos*, at p. 3, citing to Williams, at p. 203; *Bisoukis v. Brampton (City)* (1999), 46 O.R. (3d) 417 (C.A.), at para. 33.

[33] This purpose informs and continues into the present Act. Nothing in the text of s. 15(4)(b) ousts the historical public purpose reflected in s. 47 of the former Act and its predecessors. Without express language or legislative intention to the contrary, it is presumed that the legislature did not intend to make significant changes to the law, as it is “improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness”: Peter St. John Langan, Maxwell on the Interpretation of Statutes, 12th ed (London: Sweet & Maxwell, 1969) at p. 116; R. v. D.L.W., 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21.

[34] The exceptions to the limitation periods provided for by the current Act expand the situations where a limitation period may be suspended: see e.g., *Carmichael*, at para. 88. Section 15(4) provides for certain limited exceptions when the 15-year limitation period established by s. 15(2) does not run: when a person is under a disability because of his or her physical, mental or psychological condition, or is a minor, and is not represented by a litigation guardian, or where the claim has been wilfully concealed or the person with the claim has been wilfully misled about the appropriateness of a proceeding as a means of remedying the injury, loss or damage. Importantly, underlying each exception is the inability of the person with the claim to commence a proceeding, whether because of disability or fraud or misrepresentation.

[35] Moreover, the motion judge's narrow approach to s. 15(4)(b) undermines not only the historical and legislative purpose of this provision, but also the balancing objective of the ultimate 15-year limitation period set out in s. 15(2) of the Act. The motion judge correctly stated that the purpose of the ultimate limitation period is to "provide certainty and finality to a defendant's potential liability without unduly restricting a claimant's access to justice". However, the motion judge's approach defeats this purpose because it defines a limitation period entirely by the plaintiff's age without regard to when the claim actually arises. This is inconsistent with s. 15(2) that provides for the commencement of the ultimate limitation period from "the day on which the act or omission on which the claim is based took place". It is not subject to discoverability principles: *York Condominium*, at para. 2.

[36] The motion judge failed to apply a contextual and purposive approach to s. 15(4)(b). Importantly, she failed to give effect to all the words in s. 15(4)(b), as well as to its meaning and purpose in relation to s. 15(2) and the entirety of the Act. As a result, the analysis must be undertaken afresh.

(d) Contextual and purposive interpretation of s. 15(4)(b) of the Act

[37] I start with the plain language of s. 15(4)(b) of the Act. First, "the person with the claim is a minor". This phrase, written in the present tense, links the person with the claim to the present state of being a minor. If it were meant to include persons who were minors at any time during the running of the ultimate limitation

period, the text would have included the past tense, namely, “the person with the claim who was or is a minor”. It did not do so.

[38] Moreover, the phrase, “is not represented by a litigation guardian in relation to the claim”, is conjunctive with the words, “the person with the claim”. Again, the use of the present tense indicates the present time when the person who has the claim is a minor. The only reason for the person with a claim to have a litigation guardian is because the person with a claim is under a legal disability and cannot advance a claim on his or her own behalf: see rr. 1.03 and 7.01(1) of the *Rules of Civil Procedure*. This harkens back to the historical public policy behind the tolling of limitation periods for minors who are unable to commence actions on their own.

[39] This interpretation of s. 15(4)(b) with respect to the ultimate 15-year limitation period is consistent with this court’s interpretation of ss. 6 and 7 of the current Act with respect to the two-year limitation period under s. 4 of the Act. This court’s interpretation of these similarly worded provisions assists in the interpretation of s. 15(4)(b). The relevant provisions of ss. 6 and 7 of the Act are as follows:

> **Minors**
>
> **6** The limitation period established by section 4 does not run during any time in which the person with the claim,
>
> (a) is a minor; and
>
> (b) is not represented by a litigation guardian in relation to the claim.

> **Incapable persons**
>
> **7** (1) The limitation period established by section 4 does not run during any time in which the person with the claim,
>
> (a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and
>
> (b) is not represented by a litigation guardian in relation to the claim.

[40] In *Azzeh (Litigation Guardian of) v. Legendre*, 2017 ONCA 385, 135 O.R. (3d) 721, leave to appeal refused, [2017] S.C.C.A. No. 289, this court interpreted s. 6(1)(b) and the question of when a minor "is not represented by a litigation guardian in relation to the claim". At para. 30, Weiler J.A. interpreted the overall purpose of the Act: "The *Limitations Act, 2002* contemplates a person with a claim and a person against whom the claim is made". Her interpretation clearly links the temporal connection between the "person with a claim" and the period of time the person was incapable of starting an action because of their minority. That the section speaks to the contemporaneity between the incapacity and the claim repeats in Weiler J.A.'s description of the function of a litigation guardian. She stated that "[w]here the person with a claim is a minor, the Act requires that the minor be 'represented by a litigation guardian in relation to the claim'" (emphasis added) and that "[t]he word 'represented' signifies that the litigation guardian may do anything in a proceeding that the party under a disability would ordinarily be required or authorized to do": at para. 30.

[41] *Carmichael* involved the interpretation of s. 7(1)(a) of the Act and the incapacity of a claimant to start an action during the claimant's period of incapacity because of disability. This court clearly interpreted the provisions to mean that the tolling of the limitation period was intended to operate only during the period that the claimant had the claim and, during the same period, was incapable of commencing a proceeding with respect to that claim. The court stated that s. 7(1)(a) was focussed only on "the person's incapacity to pursue the particular claim at issue": at paras. 88-89; and that s. 7(1) "suspends the running of the limitation period in s. 4 only 'during any time' in which the person is incapable, and thus begins to run again once the incapacity ceases": at para. 103. This again points to the temporal nature of the limitation period exceptions for age and incapacity, as the emphasis is on the incapacity that occurs while the person has a legal claim to pursue.

[42] Limitation periods only apply to claims; they do not apply to persons who do not have claims. Moreover, an adult with a claim who is not under a disability has no need of the kind of accommodation and protection that the postponement of limitation periods was historically designed to achieve.

[43] Applying the requisite contextual and purposive approach, the only interpretation on a plain reading of s. 15(4)(b) that is consonant with the other provisions of the Act, the fundamental purpose behind limitations statutes, and the centuries-old policy objectives of the legislation with respect to minors is that it only

postpones the running of the ultimate limitation period for minors who have claims that arose when they were minors.

(e) Principles applied to the present case

[44] Ms. Wong was born on July 11, 1988. She ceased to be a minor when she turned 18 years of age on July 11, 2006. It is common ground that Ms. Wong did not have a claim against the appellant when she was a minor between 1988 and 2006. It is also common ground that if the exception in s. 15(4)(b) of the Act did not apply, by the time she started her action on July 21, 2021, the ultimate 15-year limitation period with respect to the 1987 building permits had expired.

[45] Ms. Wong did not have standing to assert any claim until she purchased the property on August 9, 2019. She was an adult (31 years of age) when she purchased the property in 2019. She was an adult (almost 33 years of age) when she commenced her action against the appellant in 2021.

[46] A plaintiff is “presumed to have been capable of commencing a proceeding, unless the contrary is proven on a balance of probabilities”: *Baig v. Mississauga*, 2020 ONCA 697, at para. 15. There is no suggestion that Ms. Wong was under any disability when she purchased the property or commenced her action. As a result, there is no basis to extend to Ms. Wong the special protection historically afforded to persons under a disability who are unable on their own to start a claim.

[47] Section 15(5) of the Act places the onus squarely on the person with the claim to prove that paragraph (4) applies. Ms. Wong has failed to do so.

[48] As a result, at the time Ms. Wong and Mr. Tan purchased their home, any claims relating to the 1987 building permits were statute-barred because of the expiry on January 1, 2019 of the applicable ultimate limitation period in relation to those claims.

Disposition

[49] Accordingly, I would allow the appeal and set aside the motion judge's order. I would declare that the limitation period for the respondents' claims in relation to the 1987 building permits expired on January 1, 2019 with the result that those claims are statute-barred. I would therefore dismiss the respondents' claims against the appellant in relation to the 1987 building permits.

[50] I would order costs of the appeal and the motion below to the appellant in the agreed-on all-inclusive respective sums of $15,000 and $10,000.

Released: April 20, 2023. "E.E.G."

"Roberts J.A."
"I agree. E.E. Gillese J.A."
"I agree. M. Tulloch J.A."

CANADA

Debates of the Senate

2nd SESSION • 39th PARLIAMENT • VOLUME 144 • NUMBER 12

OFFICIAL REPORT
(HANSARD)

Thursday, November 15, 2007

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

CONTENTS

(Daily index of proceedings appears at back of this issue).

Debates and Publications: Chambers Building, Room 943, Tel. 996-0193

Published by the Senate
Available from PWGSC – Publishing and Depository Services, Ottawa, Ontario K1A 0S5.
Also available on the Internet: http://www.parl.gc.ca

THE SENATE

Thursday, November 15, 2007

The Senate met at 1:30 p.m., the Speaker in the chair.

Prayers.

[*Translation*]

SENATORS' STATEMENTS

OFFICIAL LANGUAGES

LINGUISTIC POLICY AT CANADIAN FORCES BASE BORDEN

Hon. Maria Chaput: Honourable senators, the struggle to enable francophones in Canada to live in French in their very own country is a never-ending one. One often gets the feeling that we are taking two steps forward and one step back. In a letter to General Hillier, Yves Côté, the National Defence and Canadian Forces Ombudsman, revealed that, on the military base in Borden, recruits: remained unaware of their linguistic rights; did not know how to report problems; had not received support from the chain of command; were facing longer waiting periods than their anglophone peers for occupational training; and were not provided meaningful assignments or English language training.

Canada's language policy has been in place for nearly 40 years, and it has had a positive impact from coast to coast. In order to make up for lost time, the Canadian Forces will have to modernize their institution to fully integrate both official languages.

Today, it is unacceptable to find a francophone who functions exclusively in English in a federal government workplace. Frankly, it is embarrassing for a bilingual country such as ours. The Canadian Armed Forces have been ignoring the Official Languages Act and getting away with it for far too long.

I would like to congratulate Yves Côté for having raised this serious issue, and I hope that he will continue to be in contact with Graham Fraser, the Commissioner of Official Languages, to ensure that everything possible will be done to resolve this inequality.

• (1335)

[*English*]

ABORIGINAL REPRESENTATION IN POST-SECONDARY SCIENCES

Hon. Lillian Eva Dyck: Honourable senators, in October I was one of the keynote speakers at the Canadian Aboriginal Science and Technology Conference held in Calgary. I spoke about the areas of post-secondary study and the gaps in the numbers of Aboriginals, especially women, specializing in the sciences compared to non-Aboriginals. The data that I analyzed came from the 2001 Canadian census, and I focused on Saskatchewan.

The area chosen most frequently for study by both Aboriginals and non-Aboriginals, aged 25 to 44, was that comprised of the applied science technologies and trades. The two areas chosen least often were the engineering and applied sciences and the mathematical, computer and physical sciences.

The percentage of Aboriginals who specialized in the engineering, mathematical and physical sciences was markedly less than that of the non-Aboriginal population. Only 0.5 per cent of the Aboriginals, compared to 2.1 per cent of the non-Aboriginal population, chose to specialize in the engineering and applied sciences; and only 0.7 per cent of the Aboriginal population, compared to 2.4 per cent of the non-Aboriginal population, specialized in the mathematical, computer and physical sciences.

In addition, men and women made different choices in their areas of study and there were similar patterns in the Aboriginal and non-Aboriginal populations. In both populations, men chose the applied technologies and trades at about 10 times the rate for women; and men also studied most sciences at much higher rates than women, except for the health sciences where women dominated. However, what was surprising was the relatively greater under-representation of Aboriginal women compared to non-Aboriginal women in the engineering, mathematical, computer and physical sciences.

My key messages were: Aboriginals were under-represented in the physical sciences — mathematics, computer science, physical and engineering sciences — compared to non-Aboriginals; and while it is well known that women are under-represented in the physical sciences, the gender gap was even more pronounced in the Aboriginal population.

What accounts for this low percentage of Aboriginals, especially Aboriginal women, specializing in these sciences? Many theories have been advanced, and it is generally accepted that a lack of role models and an unwelcoming or unfriendly educational environment are important factors. The environment apparently still favours white males.

Honourable senators, the statistics that I presented reinforce the idea that achieving educational equity for Aboriginals and for women in the engineering, mathematical, computer and physical sciences will require improving and even transforming the educational environment to ensure that every student can succeed and achieve his or her full potential.

THE LATE JOHN ARPIN

Hon. Francis William Mahovlich: Honourable senators, I wish to take a moment to mark the passing of John Arpin, who died last Thursday, November 8, at the age of 70 after a lengthy battle with cancer. John Arpin was a musician, recording artist and composer and was regarded as one of the world's top ragtime and among Canada's most innovative musicians.

John Arpin was born in Port McNicoll, Ontario. He graduated from the Royal Conservatory of Music at the age of 16 and later attended the University of Toronto. His first professional

performances were with fellow music popularizers, including Howard Cable from CBC and Leo Romanelli, who played in summertime bands at the Bigwin Inn up in the Lake of Bays and also at the Manoir Richelieu in Murray Bay.

Generations of Canadian children were first introduced to Arpin's piano style through the theme of the popular show, *Polka Dot Door*, where he was a writer, director and performer. CBC radio listeners became familiar with one of his most notable compositions, "Jogging Along," which was the theme song for Peter Gzowski's *Morningside* program in the late-1970s.

During the last two decades of his life, Arpin's name graced the programs of southern Ontario's smaller orchestras, as well as summer festival events.

• (1340)

One of his final public concerts was at Collingwood Music Festival on June 21. In a career that spanned 50 years, Arpin released 67 albums and collected three Juno nominations. Whether playing his signature ragtime or venturing into jazz, Broadway show tunes or even the great arias of opera, John Arpin's playing was a model of poise and elegance. He will be fondly remembered as a great Canadian and a great popularizer of music.

[*Translation*]

ROLE OF WOMEN IN ARMED FORCES

Hon. Lucie Pépin: Honourable senators, officers' mess walls at our military bases and schools are generally covered with photographs honouring only male officers. However, I was pleased to see that this is starting to change.

Last week, a colloquium entitled "Women, Armies and Wars" was held at the military college in Saint-Jean-sur-Richelieu, providing a platform for dialogue on the role of women and their experience within the armed forces.

The Canadian Armed Forces has one of the highest percentage of women to men in the world. In the regular forces, only 17.3 per cent of soldiers are women. However, in Canada, with the exception of the Roman Catholic chaplaincy, women can enrol in all occupations and corps of the army, even in combat units.

Even more interesting is the fact that more and more women are penetrating into the command of the Canadian Forces. At the colloquium in Saint-Jean-sur-Richelieu, the opening remarks were given by Brigadier General Christine Whitecross. Ms. Whitecross is the first woman to command Joint Task Force North. I also had the distinct pleasure of meeting Colonel Karen Ritchie, henceforth in command of 5 Area Support Group, Quebec. She is also the first woman to hold that position. You can imagine to what extent these trailblazers were the topic of discussion at the colloquium. Nonetheless, the integration of women into the armed forces still has its obstacles.

Armed forces have transformed themselves to adapt to the arrival of women. However, their clearly masculine traditions, procedures and codes are delaying the evolution of mentalities. Women must prove that they meet the requirements and that they remain dedicated to their career.

There are initiatives within the Canadian Forces designed to eliminate discrimination. However, as indicated by the Canadian Forces ombudsman, changing military culture is somewhat like changing the course of a ship; it is not something that can be done in an instant.

In today's society, some people still believe that women do not belong in the war. These people believe that the presence of women affects the efficiency of operations. Often, physical and psychological differences are brought up. Of course there are differences. However, it has been shown that these differences are not significant constraints. According to experts, women have management styles and social attitudes that can be effective, for example, in negotiations. These same studies showed that some women are comparable to men when it comes to strength and endurance. Furthermore, it has been suggested that women receive extra training sessions to make up for their physical limitations.

The integration of women from here and elsewhere is based on stereotypes that contradict both the willingness of women to participate and the research on the subject. Despite everything, we can be proud of the gains these women have made. The strength these women showed in paving the way and the achievements of women in uniform today give us hope for the future.

[*English*]

DARFUR

Hon. Yoine Goldstein: Honourable senators, yesterday, in the course of Senators' Statements, I went over my time, for which I apologize. I did not have a chance to complete what I was saying.

I wish to inform honourable senators that you will receive notices for various events from the All-Party Parliamentary Group for the Prevention of Genocide and other Crimes Against Humanity. I urge honourable senators to attend these events to make a statement with respect to your concern about what is taking place in Darfur.

That point provides a segue to an additional element that I wish to draw to honourable senators' attention again, the rapidly changing situation in Darfur. As honourable senators may be aware, the conflict in the region has escalated significantly this summer. A dangerous new dimension emerged when one of the rebel movements attacked an African Union peacekeeping base, killing at least 100 soldiers.

However, there is also some cause for hope. A new European Union peacekeeping mission will soon be deployed to protect Darfuri refugees in Chad and the Central African Republic, and the Security Council has approved the creation of a hybrid African Union-United Nations peacekeeping force with 26,000 personnel to protect civilian populations within Darfur.

• (1345)

In response to these events, the All-Party Parliamentary Group for the Prevention of Genocide and other Crimes Against Humanity has agreed to a resolution that calls for both the Sudanese government and the rebel groups to fully cease all

hostilities and to ensure that humanitarian agencies have complete and secure access to the people of the region. We are also calling for the Government of Sudan to cooperate with the investigation by the International Criminal Court and for the rebel movement to make a genuine commitment as well to the peace process.

As for our own government, the resolution acknowledges Canada's engagement in the past, for which everyone is grateful, but also calls for quick answer in response to recent developments. It calls on the government to do the following: first, to provide further support for the peace process and work to promote participation by unarmed groups, especially those representing women; second, to put more pressure on both the Sudanese government and rebel groups to end the conflict, possibly through the tightening of economic measures; third, help to provide the new hybrid peacekeeping mission with the heavy equipment it requires; fourth, assign a high-level official to represent Canada in the peace process; and, fifth, expand the humanitarian assistance that it now gives to assist those displaced by the most recent fighting.

I propose to put into each honourable senator's email a copy of that resolution. I hope honourable senators will find time to engage in this humanitarian crisis.

The famous theologian, Martin Niemöller, speaking of the Second World War, said that first they came to get the Jews, and he was not a Jew, so he did not say anything. They then came to get the trade unionists, and he was not a trade unionist, so he did not say anything. They then came for the communists, and he was not a communist, so he did not say anything. They then came for the gypsies, and he was not a gypsy, so he did not say anything. They then came for the homosexuals, and he was not a homosexual, so he did not say anything. And then they came for him, and there was no one left to say anything.

NATIONAL CHILD DAY CELEBRATIONS IN THE SENATE

Hon. Jim Munson: Before beginning my statement, I wish to tell the Honourable Senator Goldstein that he gave a nice statement.

Honourable senators, I want to take a moment to remind you of an annual event that transforms the Senate into a place of youthful energy. That event is National Child Day. Next Monday, November 19, this chamber will be filled with children from across this city who will gather to celebrate the contributions they make to our society. The theme of this year's event, "Include us . . . Include us all," will be expressed through performances and presentations from children who have faced adversity and surmounted obstacles to achieve excellence and to give back to others.

For example, Christina Campbell, whom I met in Shanghai, Canada's gold medalist in rhythmic gymnastics at the Special Olympics in Shanghai, will perform and talk about her proud moment as part of her Special Olympics team. Josh Bortolotti, who some honourable senators might remember as a witness for our autism inquiry, will speak as well. We will hear from Josh Sacobie, a tremendous athlete and star quarterback of the University of Ottawa Gee-Gees, who will talk about his journey from the Maliseet First Nation in New Brunswick to Ottawa, where he was named recently the most valuable player of the Ontario University Athletics, after leading the Gee-Gees to an undefeated regular season.

Honourable senators, music and dance will fill this chamber. Performances by Lucas Haneman, a visually impaired jazz guitarist; Jessie Huggett, an accomplished interpretive dancer and speaker with Down's syndrome; and Anastasia Matsell-Savage, a singer with cerebral palsy.

[*Translation*]

The Senate has been celebrating National Child Day for seven years. This event was instituted by Senator Landon Pearson and fills this place with youthfulness, energy and inspiration.

I am very proud to continue this tradition with my honourable colleagues, Senators Keon and Mercer, as well as the honourable Speaker of the Senate.

• (1350)

[*English*]

I cannot promise you any seats on Monday; they will be filled with young people. However, I can promise you a good time, even a rocking good time. We have a lot of fun here for the start of our work week next week, so do not forget National Child Day. "Include us . . . Include us all."

[*Translation*]

ROUTINE PROCEEDINGS

STUDY ON INTERNATIONAL OBLIGATIONS REGARDING CHILDREN'S RIGHTS AND FREEDOMS

GOVERNMENT RESPONSE TO REPORT OF HUMAN RIGHTS COMMITTEE TABLED

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, pursuant to rule 28(3), I have the honour of tabling, in both official languages, the government response to the tenth report of the Standing Senate Committee on Human Rights entitled *Children: The Silenced Citizens, Effective Implementation Of Canada's International Obligations With Respect To The Rights Of Children*, tabled in the Senate on April 25, 2007.

[*English*]

BANKING, TRADE AND COMMERCE

REPORT PURSUANT TO RULE 104 TABLED

Hon. W. David Angus: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Banking, Trade and Commerce. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 123*.)

CANADA-UNITED STATES TAX CONVENTION ACT, 1984

BILL TO AMEND—REPORT OF COMMITTEE

Hon. W. David Angus, Chair of the Standing Senate Committee on Banking, Trade and Commerce, presented the following report:

Thursday, November 15, 2007

The Standing Senate Committee on Banking, Trade and Commerce has the honour to present its

SECOND REPORT

Your Committee, to which was referred Bill S-2, An Act to amend the Canada-United States Tax Convention Act, 1984, has, in obedience to the Order of Reference of Tuesday November 13, 2007, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

W. DAVID ANGUS
Chair

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

On motion of Senator Angus, report placed on the Orders of the Day for consideration at the next sitting of the Senate.

[*Translation*]

LEGAL AND CONSTITUTIONAL AFFAIRS

REPORT PURSUANT TO RULE 104 TABLED

Hon. Joan Fraser: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour of tabling the first report of the Standing Senate Committee on Legal and Constitutional Affairs, which outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 125*.)

[*English*]

ABORIGINAL PEOPLES

REPORT PURSUANT TO RULE 104 TABLED

Hon. Gerry St. Germain: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Aboriginal Peoples. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 126*.)

FOREIGN AFFAIRS AND INTERNATIONAL TRADE

REPORT PURSUANT TO RULE 104 TABLED

Hon. Consiglio Di Nino: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Foreign Affairs and International Trade. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 127*.)

AGRICULTURE AND FORESTRY

REPORT PURSUANT TO RULE 104 TABLED

Hon. Joyce Fairbairn: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Agriculture and Forestry. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 128*.)

SCRUTINY OF REGULATIONS

FIRST REPORT OF JOINT COMMITTEE PRESENTED

Hon. J. Trevor Eyton, Joint Chair of the Standing Joint Committee on Scrutiny of Regulations, presented the following report:

Thursday, November 15, 2007

The Standing Joint Committee for the Scrutiny of Regulations has the honour to present its

FIRST REPORT

Your Committee reports that in relation to its permanent reference, section 19 of *the Statutory Instruments Act*, R.S.C. 1985, c. S-22, the Committee was previously empowered "to study the means by which Parliament can better oversee the government regulatory process and in particular to enquire into and report upon:

1. the appropriate principles and practices to be observed

(*a*) in the drafting of powers enabling delegates of Parliament to make subordinate laws;

(*b*) in the enactment of statutory instruments;

(*c*) in the use of executive regulation — including delegated powers and subordinate laws;

and the manner in which Parliamentary control should be effected in respect of the same;

2. the role, functions and powers of the Standing Joint Committee for the Scrutiny of Regulations.

Your Committee recommends that the same order of reference together with the evidence adduced thereon during previous sessions be again referred to it.

Your Committee informs both Houses of Parliament that the criteria it will use for the review and scrutiny of statutory instruments are the following:

Whether any Regulation or other statutory instrument within its terms of reference, in the judgement of the Committee:

1. is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;

2. is not in conformity with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights;

3. purports to have retroactive effect without express authority having been provided for in the enabling legislation;

4. imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;

5. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

6. tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;

7. has not complied with the Statutory Instruments Act with respect to transmission, registration or publication;

8. appears for any reason to infringe the rule of law;

9. trespasses unduly on rights and liberties;

10. makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;

11. makes some unusual or unexpected use of the powers conferred by the enabling legislation;

12. amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment;

13. is defective in its drafting or for any other reason requires elucidation as to its form or purport.

Your Committee recommends that its quorum be fixed at four members, provided that both Houses are represented whenever a vote, resolution or other decision is taken, and that the Joint Chairmen be authorized to hold meetings to receive evidence and authorize the printing thereof so long as three members are present, provided that both Houses are represented; and, that the Committee have power to engage the services of such expert staff, and such stenographic and clerical staff as may be required.

Your Committee further recommends to the Senate that it be empowered to sit during sittings and adjournments of the Senate.

Your Committee, which was also authorized by the Senate to incur expenses in connection with its permanent reference relating to the review and scrutiny of statutory instruments, reports, pursuant to Rule 104 of the *Rules of the Senate,* that the expenses of the Committee (Senate portion) during the First Session of the Thirty-ninth Parliament were as follows:

Professional and Other Services	$ 703.29
Transport and Communications	0.00
All Other Expenses	$ 1,490.49
Total	**$ 2,193.78**

A copy of the relevant Minutes of Proceedings and Evidence (Issue No. 1, Second Session, Thirty-ninth Parliament) is tabled in the House of Commons.

Respectfully submitted,

J. TREVOR EYTON
Joint Chair

• (1355)

The Hon. the Speaker: When shall this report be taken into consideration?

On motion of Senator Eyton, report placed on the Orders of the Day for consideration at the next sitting of the Senate

NATIONAL BLOOD DONOR WEEK BILL

FIRST READING

Hon. Ethel Cochrane, for Senator Mercer, presented Bill S-220, An Act respecting a National Blood Donor Week.

Bill read first time.

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

On motion of Senator Cochrane, bill placed on the Orders of the Day for second reading two days hence.

• (1400)

BANKING, TRADE AND COMMERCE

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce have power to engage services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY ISSUES DEALING WITH INTERPROVINCIAL BARRIERS TO TRADE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report on issues dealing with interprovincial barriers to trade in Canada, in particular:

- the economic and trade barriers that exist between provinces in Canada;
- the extent to which such interprovincial barriers are limiting the growth and profitability of the affected sectors of the economy as well as the ability of businesses in affected provinces, jointly and with relevant U.S. states, to form the economic regions that will enhance prosperity; and
- measures that could be taken by the federal and provincial governments to facilitate the reduction or the elimination of such interprovincial trade barriers in order to enhance trade, develop a national economy, and strengthen Canada's economic union; and

That the papers and evidence received and taken on the subject during the First Session of the Thirty-ninth Parliament and any other relevant Parliamentary papers and evidence on the said subject be referred to the Committee; and

That the Committee submit its final report no later than December 31 2008, and that the Committee retain until March 31, 2009 all powers necessary to publicize its findings.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY PRESENT STATE OF DOMESTIC AND INTERNATIONAL FINANCIAL SYSTEM AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the present state of the domestic and international financial system; and

That the papers and evidence received and taken on the subject during the First Session of the Thirty-ninth Parliament and any other relevant Parliamentary papers and evidence on the said subject be referred to the Committee; and

That the Committee submit its final report no later than December 31, 2008, and that the Committee retain until March 31, 2009 all powers necessary to publicize its findings.

LEGAL AND CONSTITUTIONAL AFFAIRS

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs have power to engage services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

[*Translation*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*English*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY INCLUDING IN LEGISLATION NON-DEROGATION CLAUSES RELATING TO ABORIGINAL TREATY RIGHTS AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSIONS

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the implications of including, in legislation, non-derogation clauses relating to existing Aboriginal and treaty rights of the Aboriginal peoples of Canada under s.35 of the *Constitution Act, 1982*;

That the papers and evidence received and taken on the subject and the work accomplished during the Second Session of the Thirty-seventh Parliament, the First Session of the Thirty-eighth Parliament and the First Session of the Thirty-ninth Parliament be referred to the committee; and

That the committee present its report to the Senate no later than December 20, 2007.

SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY STATE OF EARLY LEARNING AND CHILD CARE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine the state of early learning and child care in Canada in view of the OECD report *Starting Strong II*, released on September 21-22, 2006 and rating Canada last among 14 countries on spending on early learning and child care programs, which stated ". . . national and provincial policy for the early education and care of young children in Canada is still in its initial stages. . . . and coverage is low compared to other OECD countries;"

That the Committee study and report on the OECD challenge that ". . . significant energies and funding will need to be invested in the field to create a universal system in tune with the needs of a full employment economy, with gender equity and with new understandings of how young children develop and learn."; and

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee.

• (1405)

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY IMPACT AND EFFECTS OF SOCIAL DETERMINANTS OF HEALTH AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine and report on the impact of the multiple factors and conditions that contribute to the health of Canada's population — known collectively as the social determinants of health — including the effects of these determinants on the disparities and inequities in health outcomes that continue to be experienced by identifiable groups or categories of people within the Canadian population;

That the Committee examine government policies, programs and practices that regulate or influence the impact of the social determinants of health on health outcomes across the different segments of the Canadian population, and that the Committee investigate ways in which governments could better coordinate their activities in order to improve these health outcomes, whether these activities involve the different levels of government or various departments and agencies within a single level of government;

That the Committee be authorized to study international examples of population health initiatives undertaken either by individual countries, or by multilateral international bodies such as (but not limited to) the World Health Organization;

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee; and

That the Committee submit its final report no later than June 30, 2009, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY CURRENT SOCIAL ISSUES OF LARGE CITIES AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine and report on current social issues pertaining to Canada's largest cities. In particular, the Committee shall be authorized to examine:

(*a*) poverty

(*b*) housing and homelessness

(*c*) social infrastructure

(*d*) social cohesion

(*e*) immigrant settlement

(*f*) crime

(*g*) transportation

(*h*) the role of the largest cities in Canada's economic development

That the study be national in scope, with a focus on the largest urban community in each of the provinces;

That the study report propose solutions, with an emphasis on collaborative strategies involving federal, provincial and municipal governments;

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee; and

That the Committee submit its final report no later than June 30, 2009, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

AGRICULTURE AND FORESTRY

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY PRESENT STATE AND FUTURE OF AGRICULTURE AND FORESTRY AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to examine and report on the present state and the future of agriculture and forestry in Canada;

That the papers and evidence received and taken on the subject and the work accomplished during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee submit its final report to the Senate no later than December 31, 2008.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY RURAL POVERTY AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to examine and report on rural poverty in Canada. In particular, the Committee shall be authorized to:

(*a*) examine the dimension and depth of rural poverty in Canada;

(*b*) conduct an assessment of Canada's comparative standing in this area, relative to other OECD countries;

(*c*) examine the key drivers of reduced opportunity for rural Canadians;

(*d*) provide recommendations for measures mitigating rural poverty and reduced opportunity for rural Canadians; and

That the papers and evidence received and taken on the subject and the work accomplished during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee submit its final report to the Senate no later than June 30, 2008; and

That the Committee retain until September 30, 2008 all powers necessary to publicize its findings.

• (1410)

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*Translation*]

FOREIGN AFFAIRS AND INTERNATIONAL TRADE

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Consiglio Di Nino: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Foreign Affairs and International Trade be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*English*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Consiglio Di Nino: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

> That the Standing Senate Committee on Foreign Affairs and International Trade have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

QUESTION PERIOD

HON. MARJORY LEBRETON

LETTERS TO CHARLOTTETOWN *GUARDIAN* REGARDING CANADA PENSION PLAN

Hon. Catherine S. Callbeck: Honourable senators, my question is for the Leader of the Government in the Senate.

Last week, she wrote a letter to *The Guardian*, a major newspaper in my home province of Prince Edward Island. In that letter she made false accusations about facts that I used in this chamber when I launched an inquiry into the Canada Pension Plan. In part, the letter read as follows:

> Senator Catherine Callbeck regularly uses such misinformation in the Senate. Now she is using The Guardian to spread more falsehoods. As usual, she has gotten her facts wrong and has misinformed Island seniors yet again.

The facts I used in the Canada Pension Plan speech came from the Minister of Human Resources, the Honourable Monte Solberg, as well as from documents that I received through access to information.

Will the Leader of the Government in the Senate retract her false accusations and apologize for making them in the first place?

Some Hon. Senators: Hear, hear!

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I thank the honourable senator for the question. For quite some time I have watched the honourable senator use *The Guardian* as a personal bulletin, and I responded to the letter. The honourable senator responded again and now I have responded. I do not know whether my further response was printed. The information used by the honourable senator was based on information from the previous Liberal government in 2005, and my purpose in writing *The Guardian* was to make it clear that the attacks against the government and the explanations of what we are doing for seniors are quite incorrect.

Some Hon. Senators: Hear, hear!

Senator Callbeck: The leader has accused me of using misinformation.

• (1415)

The information I used in my Canada Pension Plan speech came from the honourable senator's own minister, the Honourable Monte Solberg, and from documents that I received through access to information.

My question is: Is the honourable senator refusing to retract these false accusations and apologize because the honourable senator simply does not believe her own minister?

Some Hon. Senators: Hear, hear!

Senator LeBreton: Honourable senators, the information that has been attributed to this government in the honourable senator's attacks on the good work that has been done for seniors is based on information that actually belongs to the opposition. I was simply setting the record straight.

Some Hon. Senators: Hear, hear!

Senator Callbeck: I will send the honourable senator copies of the documents that I have received from the Honourable Monte Solberg, as well as the documents that I have received through access to information. Once I have done so, will the honourable senator review those documents and withdraw her false accusations and apologize when she realizes that the information I used was accurate?

Senator LeBreton: Senator Callbeck can send me anything she wishes. I will be happy to look at it, but I do not believe it will change the tenor of her ongoing attacks in *The Guardian* against this government. As I said earlier, the honourable senator uses that newspaper as her own personal bulletin on Prince Edward Island. Since she is a former premier and a prominent person, I imagine *The Guardian* would print her material.

I feel duty bound, as the Leader of the Government in the Senate and the Secretary of State for Seniors, to put into proper context the information that is provided. Facts and figures regarding the treatment of seniors are being attributed to this government when in fact the material used is from 2005, when we had a Liberal government. I have sent a letter to this effect to *The Guardian*. I do not know if they printed it.

Hon. Lowell Murray: Honourable senators, those of us who are not regular readers of *The Guardian* would like one of the disputants in this controversy to arrange to table the letters in question. Can this be done so that we may judge for ourselves?

Senator LeBreton: Certainly.

SECRETARY OF STATE FOR SENIORS

RESPONSIBILITY OF MINISTER

Hon. Sharon Carstairs: Honourable senators, my question is to the Leader of the Government in the Senate and more particularly with respect to her responsibilities as Secretary of State for Seniors.

While I am appalled at the treatment the honourable senator has afforded Senator Callbeck, who is a most distinguished member of this chamber, I am equally disturbed by her lack of recognition of her responsibilities as Secretary of State for Seniors. Does the minister not believe that her most fundamental responsibility is to seniors? Does this not imply that she should ensure that each and every senior in this country is entitled to the fullest support that they can be given?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I believe that since I assumed the responsibility of Secretary of State for Seniors last January that this government has done more for seniors in 21 months than the previous government did in 13 years.

EFFORTS TO INFORM POTENTIAL RECIPIENTS OF GUARANTEED INCOME SUPPLEMENT AND CANADA PENSION PLAN

Hon. Sharon Carstairs: Honourable senators, is the honourable minister prepared to tell this chamber that every single senior entitled to the annual Guaranteed Income Supplement is receiving it? Also, is every senior entitled to Canada Pension Plan benefits receiving them? If the honourable minister cannot give that assurance, will she indicate what is being done about the situation?

• (1420)

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): I can tell the honourable senator that the government has gone to great lengths to try to capture all of the seniors that are entitled to their benefits, including another 32,000. We have used every possible means to communicate with seniors about their entitlements. Service Canada has almost 600 offices across the country, many of them mobile that travel into smaller, more remote areas. A piece of government legislation passed here allows seniors to make a one-time application for the GIS. Once they file their income tax return, a prepared application form that they simply have to sign is ready for submission. Seniors do not need to reapply for the GIS once that application is on file.

I fully realize that this is an issue in areas where people thought that they should have been eligible for GIS and were not receiving it. This government and the previous government have followed pension income actuarial advice on limiting retro-payments to one year once these people are captured into the system. As well, we are communicating the information to seniors in person at seniors' homes and through the mail from Service Canada. We have done everything possible to reach out.

In addition, before they turn 65 years of age, people receive a communication from the government that explains the various services and benefits to which they are entitled as senior citizens.

Senator Carstairs: The minister indicates that the government has done all of these things, but allow me to offer one simple suggestion. The poorest of the poor in this country are Aboriginal people. Has there been any attempt by the minister's government to print any of these forms in any of the Aboriginal languages, such as Inuktitut, so that they can understand the forms in order to make their applications?

Senator LeBreton: Within the Department of Indian and Northern Affairs, there is a concerted effort to reach out to people in more remote areas north of 60 and other Aboriginal communities. As well, I understand we have tried to inform the various leadership groups of the services available so that they can inform their members. I know it is difficult for Senator Carstairs to accept this, but the government is doing everything that is humanly possible to ensure that all eligible seniors receive the GIS and other benefits to which they are entitled.

VETERANS AFFAIRS

ACCESS TO MENTAL HEALTH CARE

Hon. Michael A. Meighen: Honourable senators, my question is for the Leader of the Government in the Senate. In his recent 2006-07 report, the Department of National Defence and Canadian Forces Ombudsman indicated that he was committed to monitoring the effects of the Afghan military operation on military members and their families. In that context, I note that the subject of mental health care and mental illness has long carried such a strong stigma that people have been unwilling to seek assistance. It is only in recent times that we have seen a significant change in the prevailing attitude. Now we have the extensive report of the work done by the Standing Senate Committee on Social Affairs, Science and Technology under the former Chair, Senator Kirby, and his Deputy Chair, Senator Keon. The report is entitled, *Mental Health, Mental Illness and Addiction*.

We also have the subsequent report recommending that a mental health care commission be established. Such a commission was established by this government this year with our former colleague Senator Kirby as chair. The government clearly has mental health care on its agenda and requiring attention.

During a week in which we observed Remembrance Day, I note that a recent survey indicated that a significant number of veterans had to deal with psychological problems resulting from military service, including post-traumatic stress disorder.

My question is: Has the government taken steps to ensure that members of the military, our veterans and their families have appropriate access to mental health care professionals? Can she indicate whether more individuals are taking greater advantage of that access than they did in the past?

• (1425)

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, this is a serious issue, and one that we are hearing more about as our soldiers are returning from theatre in Afghanistan. The great majority of the Canadian Forces who return from deployment, even from difficult areas like Afghanistan, are in good health. Members with mental health problems are encouraged to seek care, and we continue to work on ways to improve mental health programs.

A measure of the success of our various mental health programs is that members with mental health problems now seek care a lot more quickly than they did in the past. Canadian Forces

programs are now set up to capture them. The Armed Forces do rigorous pre- and post-deployment interviews and questionnaires to identify mental health concerns. Then there is a follow-up to monitor the conditions of the soldiers. Across Canada, mental illness health teams are in place, including those specializing in psychiatry, psychology, mental health nursing, addictions counselling — because there is a significant amount of that as well — clinical social work and pastoral counselling. There are also mental health professionals in Afghanistan, as part of the health care team set up to support the troops.

Between 2004 and 2009, $198 million has been earmarked for a new approach to mental health; and the number of mental health professionals is being increased in the Canadian Forces.

Also, as the honourable senator may remember, Budget 2007 provides $10 million a year to establish five new operational stress injury clinics to assist Canadian Forces members and veterans in dealing with stress-related injuries connected to their service and, most important, to provide improved support for their families so that they can assist the returning soldiers to work through this serious illness — and it is an illness.

PUBLIC WORKS AND GOVERNMENT SERVICES

COMPETITION FOR LOCATION OF NATIONAL PORTRAIT GALLERY

Hon. Jim Munson: Honourable senators, in keeping with the civility of the afternoon, I have a question for the unelected, unaccountable, appointed Conservative senator, the Minister of Public Works and Government Services.

Last week we learned about this lottery or competition for Canada's national portrait gallery. We heard Minister Verner talk about Canadians deserving to see the portraits that depict the great figures of our country, past and present. I could not agree more.

However, this city is called the "national capital." There is the national Parliament, the National Gallery of Canada, the national Canadian Museum of Civilization, the national Canadian War Museum and the national cenotaph.

I am curious to find out if this is the Conservatives' version of decentralization in terms of picking only eight cities and saying "Let us compete." Within these eight cities some have a crumbling infrastructure, a lack of child care spaces, a lack of affordable housing, and smog and congestion. Now you are saying to these cities, "Come on with the private sector; let us bid on something so that Canadians can travel to some other part of the country." This is Canada's national capital.

Hon. Michael Fortier (Minister of Public Works and Government Services): Honourable senators, I thank the honourable senator for his question. As a matter of fact, we are talking of nine cities, and they do include the city of Ottawa. It is possible that a developer here in Ottawa would be chosen, depending on the type of proposal that is being tabled.

I understand that the honourable senator may have issues with this proposal. However, the reality is that we are talking about one museum, which is a new museum. We are not talking about moving current museums and national assets that are already here in Ottawa.

I am sorry Senator Joyal is not here because I consider him to be the Liberal Party's beacon on cultural affairs. Before 1,000 people in Montreal on Tuesday, he applauded the decision to offer this opportunity to nine cities across Canada.

Senator Munson: If the honourable senator is going that far, in terms of being discriminatory, why just nine cities? Charlottetown is the home of Confederation. Why not Moncton? Why not Saint-Louis-du-Ha! Ha! Why not St. John's? Why not my home area? Why not Saskatoon or Regina? What is wrong? What happened within the bureaucracy or within the Conservative mindset that excluded those cities from being allowed to compete? At the end of the day, it still must be remembered that this is Canada's national capital, where we as Canadians have the opportunity and right to visit and to see something of worth and value that is still being hidden away by this Conservative government.

An Hon. Senator: Just because you live here.

• (1430)

Senator Fortier: Honourable senators, nine cities were chosen on the basis of population and tourist potential. I know the honourable senator knows that. I refer here not only to the ability for the base population of those nine cities to support the museum, but also the ability for some of these cities, particularly the smaller ones, to have additional tourist draws. When one looks at the situation objectively, it makes sense that we chose those nine cities. No one is talking about changing the capital of our country; it is still Ottawa.

There are tremendous museum offerings in this city. I am sure honourable senators have visited many, if not all, of them. The fact that the portrait gallery may or may not be in Ottawa is not something about which one ought to become excited.

[*Translation*]

DECENTRALIZATION OF EXISTING MUSEUMS IN OTTAWA

Hon. Francis Fox: Honourable senators, I am glad to see that the minister takes an interest in museum policy. I congratulate him, especially for his excellent contribution to the Montreal Museum of Fine Arts. In his decentralization policy, would the minister be willing to consider expanding the network of museums across Canada and, specifically, granting a longstanding request to make the Pointe-à-Callière Museum a national museum of Canada?

Hon. Michael Fortier (Minister of Public Works and Government Services): Honourable senators, it is not the same thing. We are looking at decentralizing museums, but there is absolutely no question of moving museums that are already in Ottawa. I want to make that clear.

Creating additional museums is not part of my portfolio. I will face the Speaker's wrath. My colleague, Josée Verner, already said that she was open to discussing museum proposals with stakeholders across Canada. When she has announcements to make in that regard, she will make them.

SUPPORT FOR NEW PLANETARIUM IN MONTREAL

Hon. Francis Fox: Honourable senators, I would like to come back to that question. There are all sorts of museums. Planetariums could be considered museums. In this case, the minister himself — correct me if I am wrong — signed a letter saying that he would support the development of a new planetarium in Montreal. When is he going to make good on that promise?

Hon. Michael Fortier (Minister of Public Works and Government Services): The honourable senator knows that I have been very busy with the Montreal Museum of Fine Arts, the theatre district and the announcement of public transit between Dorval and downtown to improve transportation in Montreal's western suburbs. Although I have been especially busy in recent months, please know, honourable senators, that I have publicly supported the call for a new planetarium. I have done so publicly, because I would very much like to see one developed.

[*English*]

PUBLIC SAFETY

BORDER SERVICES AGENCY—CROSSING DELAYS

Hon. Francis William Mahovlich: Honourable senators, I rise today to add my voice to the growing concern about the Canada-U.S. border crossing situation. Senator Grafstein recently spoke on this same topic, relating horror stories that are transpiring at border crossings nationwide. One statement that particularly struck me was that this year was a summer from hell, due to incredibly long delays at the border. This is not a description one would like to hear when thinking of travelling to our largest trading partner.

There are programs in place to help those who cross the border on a regular basis, such as the FAST program, which helps to ensure speedy crossings for truckers. These programs, however, do not seem to be working efficiently. Some of those enrolled in the FAST program are still facing secondary screenings. What is the point of such a program if it does not do what it is intended to do?

When I was a member of the Detroit Red Wings and living in Windsor, I used the Ambassador Bridge on a regular basis. In those years, about 30 years ago, the only time there was a traffic jam was when the Montreal Canadiens or the Toronto Maple Leafs were playing.

• (1435)

Today, the Ambassador Bridge is the busiest border crossing in North America, with about 25 per cent of Canada-U.S. merchandise making its way across this single bridge. That amount is expected to double by 2030.

With the Canadian dollar at record highs versus the U.S. dollar, the lineups at the border crossings will, I am sure, reach highs as well. Furthermore, as early as next summer, the U.S. government is expected to start requiring passports at both land and sea crossings. This will no doubt make a bad situation even worse. With wait times of up to one hour at some border crossings, what does the government intend to do to alleviate the current waiting lines and to prevent them from getting worse?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): I wish to thank the honourable senator for that question. Actually, I used to be a Detroit Red Wings fan.

An Hon. Senator: Move them to Windsor!

An Hon. Senator: Oh, no!

Senator LeBreton: Yes, I was. Actually, it was when Gordie Howe, Ted Lindsay, Alex Delvecchio, Terry Sawchuk and all those guys were playing.

Thank you, Senator Mahovlich. That is a very serious question on an issue that consumes a lot of the time and attention of the government.

I mentioned a couple of weeks ago that the Minister of Industry, Minister Prentice, was in Washington. Ambassador Wilson is also focusing almost exclusively on the "thickening of the border," as they call it. The Detroit-Windsor corridor, as you know, is extremely busy. Regarding infrastructure, they are working on a new Windsor-to-Detroit passage. The problem has been compounded by some of the political events south of the border in terms of certain individuals on certain television networks in the United States who have whipped up a lot of concerns about security at the border, which gets in the way of commerce — for example, and fire trucks that attempt to cross over to help put out a fire in the northern states. That is the kind of thing that happens. This is all compounded by the strength of the Canadian dollar and the long lineups at the borders.

Honourable senators, through Minister Day, Minister Cannon and Minister Prentice there are several programs in place including, as the honourable senator mentioned, the fast-track lane for truckers. The problem is this: With the long lineups now at the border with all of the other people waiting to cross, sometimes the truckers cannot even get into the fast-track lane.

It is a very complex question that the honourable senator has asked. The government is doing many things. I would be happy to provide more detailed, department-by-department analysis for the honourable senator about what each department — namely, industry, transport and public safety —, are doing to try to deal with this ongoing problem at our borders.

THE RIGHT HONOURABLE BRIAN MULRONEY

ALLEGED CASH PAYMENTS—PUBLIC INQUIRY—TERMS OF REFERENCE

Hon. Yoine Goldstein: Honourable senators, my question is for the Leader of the Government in the Senate. At the end of Question Period yesterday, the honourable leader characterized my question as a disgrace. Of course she did not answer it, because she could not. I now understand why this portion of our sessions is called Question Period by Senator Lowell Murray — because it is not an "Answer Period".

Could the leader break with the tradition she has single-handedly created in this chamber and answer the following question? A typical set of terms of reference for a

judicial inquiry is three pages, including the boilerplate — or four pages, tops. The operative part of any inquiry and any term of reference is no more than a page at maximum. Does it take a person of Dr. Johnston's stature two months to draft a couple of pages, or was this two-month time period allotted by the Prime Minister as a further and more transparent attempt on the part of the government to stall, delay and postpone the inevitable? Is this not a disgrace?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I thank the honourable senator for his question. I think the appointment of Dr. Johnston has been very well received. He is an eminent Canadian who will address these issues seriously. The terms of reference for his responsibilities have already been posted. They are publicly available, and I would be happy to provide the honourable senator with the terms of reference with which Dr. Johnston will work.

• (1440)

As the Prime Minister announced last Friday, it was clear that the government was planning to appoint an independent third-party adviser. Then, as events evolved over the weekend and the demand for a public inquiry was added to it, it only made sense to have this same independent third party draw up these terms of reference. Given the state of the allegations, the counter allegations and the rumours, there is probably not a person in this place or, certainly, in this city, who could objectively deal with the terms of reference for what this inquiry will eventually entail.

Senator Goldstein: Of course, there has been no answer to that question.

ALLEGED CASH PAYMENTS— SCOPE OF PUBLIC INQUIRY

Hon. Yoine Goldstein: Honourable senators, the mandate of Dr. Johnston makes no reference whatsoever to the role of the government in the handling of the Mulroney-Schreiber affair. Is it not rather obvious that the government is doing everything it can to hide that role from the Canadian people, and is that not a disgrace?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, what the honourable senator has suggested is quite false.

As I have said many times in this place, this particular dispute between Mr. Mulroney and Mr. Schreiber has nothing to do with the government. As I predicted yesterday and as was shown in a poll last night, 66 per cent of Canadians agree with that view.

2009 WORLD POLICE AND FIRE GAMES

GOVERNMENT SUPPORT

Hon. Gerry St. Germain: Honourable senators, I have a short question to the Leader of the Government in the Senate. The World Police and Fire Games are scheduled to take place in Vancouver, British Columbia, between July 31 and August 9, 2009. I am in somewhat of a conflict because, having been a former policeman, I have been solicited to support the participants in this great effort. This event is a prelude to the 2010 Olympics. According to the information I received — I am not certain how accurate it is — the event will attract more people to Vancouver than the Olympics. They are seeking support, and they have spoken to the former and present governments, and I hope that my friends on the police forces, the fire departments, the paramedics and all the people involved can gain the support of our government. Would the minister be prepared to support this event?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I certainly would not want to tell Senator St. Germain that I would not support him and his friends involved in the World Police and Fire Games. The government, Canadians and especially the people in British Columbia are very much looking forward to the World Police and Fire Games in 2009. As Senator St. Germain said, it is anticipated that this event will attract thousands of participants from all over the world. Those of us who have any opportunity to spend time in British Columbia know that they will be the great hosts they have always been.

• (1445)

The Government of Canada is supportive of the games and is interested in contributing to their overall success. I can assure honourable senators that federal officials are in contact with the organizers of the event in order to assess how the activities and components of the games can be funded through federal government programs.

THE RIGHT HONOURABLE BRIAN MULRONEY

ALLEGED CASH PAYMENTS—PUBLIC INQUIRY— MANDATE OF THIRD-PARTY ADVISER

Hon. Joan Fraser: Honourable senators, my question is directed to the Leader of the Government in the Senate and is on the matter of the third-party adviser.

I was pleased that David Johnston was named for this position. He is widely respected as a person of fairness, intelligence and competence. His mandate, however, instructs him to review only allegations respecting financial dealings between Karlheinz Schreiber and Brian Mulroney. If this government is so sure that there is nothing to hide, nothing to worry about, why was it not prepared to seek a mandate for a broad inquiry that would look at all relevant matters concerning anyone who had served in or for the Government of Canada then and/or now? How can you expect Canadians not to think this appointment is set up to be a cover-up?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, many rumours and much information have been flying around. As a matter of fact, I watched the Mike Duffy show on television last night. One of Senator Fraser's own colleagues from the other place told Mike Duffy that he had been lunching with Mr. Schreiber — plotting — so obviously he was getting information from Mr. Schreiber. If it was so important, why did he not, as a privy councillor, turn this information over to the authorities?

Many stories have been going around for years. The thing that changed, as all honourable senators know, is that Mr. Schreiber swore an affidavit last Thursday or Friday, which became public on Friday. As it impacted upon the Office of the Prime Minister, the Prime Minister immediately announced that he would appoint an independent third-party adviser. That affidavit started the whole thing. As the Prime Minister said yesterday, Dr. Johnston will report and the government will follow the recommendations he makes.

ORDERS OF THE DAY

BANKRUPTCY AND INSOLVENCY ACT COMPANIES' CREDITORS ARRANGEMENT ACT WAGE EARNER PROTECTION PROGRAM ACT

BILL TO AMEND—SECOND READING

Hon. Michael A. Meighen moved second reading of Bill C-12, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005.

He said: Honourable senators, it is my pleasure to rise today to open the second reading debate on Bill C-12.

[*Translation*]

Bill C-12 makes a number of technical amendments to the aforementioned legislation in order to correct a wide range of flaws and to allow the government to implement the wage earner protection program.

• (1450)

[*English*]

Honourable senators will recall that the Standing Senate Committee on Banking, Trade and Commerce expressed serious reservations about chapter 47 — or Bill C-55, as it then was — and urged the government of the day not to bring it into force until amendments such as those proposed in this bill were made.

I will begin by highlighting the purpose of chapter 47, which consists of reforms to bankruptcy and insolvency laws in Canada and includes the introduction of a wage earner protection program. Following that, I will share some of the key technical changes the government proposes to make to this legislation so as to meet many if not all of the concerns raised by honourable senators and others.

Even in good economic times, bankruptcies are a fact of life in a free market economy. Businesses fail for many reasons and, when they do, workers are among the most vulnerable due to the uncertainties that ensue.

Anyone who has worked at a company that has experienced a bankruptcy or insolvency will express that it is an unsettling business. Not only are workers left wondering about future employment, but many are troubled with doubts about whether they will receive money owed to them. This bill is another step in helping to resolve those doubts.

Legislation was passed by Parliament in 2005 to address this issue. However, as I indicated earlier, certain technical amendments were required to ensure that insolvency reform and wage earner protection measures will function as intended. The bill now under consideration contains the requisite technical amendments.

[*Translation*]

The government has promised to help all Canadians and their families and the companies that employ them. It is determined to treat all parties fairly and is succeeding in doing so with Bill C-12.

[*English*]

The wage earner protection program will help to safeguard workers in companies facing bankruptcy or receivership. It will ensure that workers will receive their money when they need it most.

Currently, provisions in the Canada Labour Code provide some recourse for workers whose employers do not pay the wages owing. Provincial labour laws also have similar provisions. However, when an employer declares bankruptcy or is subject to receivership, insolvency laws take precedence, and, in a bankruptcy, unpaid wages become a debt of the employer's estate. This places an unfair burden on workers because, unlike other creditors, workers do not generally have other sources of income to fall back on.

Even worse, honourable senators, current laws do not guarantee that insolvent employers will pay claims of unpaid wages owed to their workers. As matters stand, those claims can only be paid after the claims of secured creditors have been resolved. As a result, many workers who find themselves in this position, through no fault of their own, never receive all of the wages owed to them.

One estimate, honourable senators, indicates that only 13 cents on the dollar in unpaid wages are ever recovered. In most cases, that is, three quarters of unpaid wage earners receive absolutely nothing. Just as noteworthy, 70 per cent of corporate bankruptcies are small businesses, companies that have fewer than 10 employees, and many of these are in the retail, food services and accommodation industries, where wages are generally lower than in other areas.

Our government is bringing greater fairness to circumstances such as these. The wage earner protection program guarantees reimbursement of unpaid wages within a reasonable time frame. Earned but unused vacation pay will also be protected.

The program will pay workers an amount up to the equivalent of four weeks' maximum insurable earnings under the Employment Insurance Act. That sum is currently about $3,000. The expectation is that this sum will cover amounts owing for wages and vacation pay in full 97 per cent of the cases. Not only will this program protect workers in the federal jurisdiction, honourable senators, but it will also protect all Canadian workers.

Payment will no longer depend upon the amount of assets in an employer's estate. Workers will be paid what is owed to them in a timely manner.

That brings me to another important consideration about this program, which is the price tag. The program will be very affordable, honourable senators. Annual costs are estimated at $35 million, reaching $50 million in the event of serious economic downturn. However, given the super-priority established in the legislation, the government will be able to recover a large part of its payment from the assets of the insolvent business.

Under the wage earner protection program, payment will be provided in a timely way. Government will wait, as it should, to recover the money from insolvent businesses.

The program will be delivered by Service Canada, in collaboration with trustees in bankruptcy and receivers. The trustee or receiver will inform prospective claimants of eligibility and will provide Service Canada, as well as the unpaid worker, with information on unpaid wages and vacation pay. Service Canada will determine the amount and make the payment.

[*Translation*]

Honourable senators, the wage earner protection program is a good legislative measure that is well thought out and well designed. We were very proud to propose it and adopt it.

Every party in Parliament supported the program during debate on the original bill.

The unions also support it, as do bankruptcy experts. They have witnessed first-hand the need to better protect workers in these circumstances.

Furthermore, this is a program Canadian workers have been asking for. Many of them were surprised to learn that such a protective measure did not already exist.

[*English*]

Honourable senators, as I indicated earlier, key adjustments are being proposed to this important new program. The adjustments include ensuring that standard deductions are made from program payments just as they are for wages; enhancing the fairness of the conditions of eligibility; allowing trustees, receivers and other persons a defence of due diligence when they have proven that they have done everything in their power to fulfil their duties under the act but were unable to do so; and ensuring that people who have acquired payroll information will assist trustees and receivers in performing their duties.

Eligibility requirements are being adjusted to safeguard against those who might attempt to abuse the program. For instance, it is proposed that applicants not be related, whether by marriage, blood or adoption, to the main decision-makers of a company facing insolvency, but those who are excluded, honourable senators, will have an opportunity to prove that their family relationship is not related to their employment relationship. In such cases, an applicant could be eligible for the program.

Measures must also be taken, honourable senators, to ensure that insolvency professionals are supported and properly paid for their work under the program. In cases where a company's assets are modest, insolvency professionals could otherwise decline to take on the bankruptcy, concerned perhaps that they would not recover enough money to cover their fees. That would prevent wage earners from receiving assistance from the program. In turn, this could reduce the number of wage earners eligible for the program and create inequities among unpaid wage earners. This would run counter to the program's intent, which is to protect vulnerable workers.

The amendments contained in Bill C-12 in relation to the wage earner protection program are carefully considered, and I do commend them to the attention of honourable senators.

I now turn to the broader scope of insolvency and bankruptcy reforms proposed in this bill. A smoothly running economy depends on having rules governing businesses that are both fair and balanced. Canada's insolvency system is no exception. It must be fair. It must be predictable as far as being able to assess risk. It must be transparent so creditors can defend their interests, and it must be efficient, ensuring that there are appropriate incentives while deterring abuse.

Building on measures first introduced in Parliament in 2005, as I mentioned earlier, the bill before us today will complete the modernization of Canada's insolvency system. It also addresses technical errors in the previous legislation that prevented it from operating as was intended. The bill makes it easier for financially troubled companies to restructure. It makes the system fairer. The proposed amendments will also reduce the possible abuse by those debtors who might be tempted to dispose of their assets prior to filing insolvency proceedings.

For example, honourable senators, the new rules will deter selling or transferring ownership of assets at unreasonable prices — I believe it is called "transfers undervalued" — to a spouse or family member to reduce the ability of creditors to recover unpaid claims.

Another amendment will help to protect trustees. There was some concern that trustees might be held personally responsible for debts and obligations resulting from the debtor's conduct prior to the trustee's appointment. This was clearly not what was intended, and the amendment clarifies this situation. This will help to encourage insolvency professionals to participate in restructuring efforts and accordingly will help to protect employment.

• (1500)

[*Translation*]

In the past, student loan debt was non-dischargeable if the bankruptcy occurred within 10 years after studies ended. Under the proposed reforms, that period would be reduced to seven years for a normal bankruptcy process and to five years in cases of proven financial difficulty.

[*English*]

In addition, there was an unforeseen deficiency in the earlier legislation. The current wording does not allow the changes to be applied retrospectively, as had originally been intended.

A student loan recipient who filed for bankruptcy before the coming into force of chapter 47 would be required to re-file for bankruptcy in order to apply to the court for hardship under the new five-year rule. The purpose of the amendment to the Bankruptcy and Insolvency Act is to ensure that the new seven and five-year discharge provisions are immediately available to individuals for whom the benefits were intended.

Insolvency laws should prevent the abuse of the rules intended to help honest but unfortunate debtors, but some people try to use bankruptcy to avoid paying income tax while they reap the benefits of keeping that money. That is unfair to the vast majority of Canadians who do pay their taxes.

The plan in chapter 47 was to address this problem by prohibiting an automatic discharge for those debtors with over $200,000 in income tax debt representing 75 per cent or more of their total debt. Debtors would instead be required to go before a judge and explain why their debts should be discharged. A judge could refuse a discharge or order a repayment of a portion or all of the debts. The amendments in Bill C-12 ensure that those who find themselves liable for a tax debt of a third party are not captured inadvertently by these provisions.

Honourable senators, the proposed measures we are contemplating in this chamber today are equitable, balanced and efficient. If brought into force in conjunction with these technical amendments, chapter 47 is an appropriate response, it seems to me, to the many calls heard from Canadians for a more modern insolvency system, and it extends important new provisions to safeguard workers' wages in the event of a bankruptcy or receivership on the part of their employer.

The proposed new measures address technical deficiencies found in previous legislation. By remedying these deficiencies they allow chapter 47 to protect jobs by ensuring that companies have every opportunity to restructure rather than closing their doors.

Honourable senators, this bill does not pretend to be a perfect solution to every issue, but it does make it possible to bring into force some long-awaited improvements to our insolvency and bankruptcy laws. I look forward, both here and probably in committee, to the comments in this regard of Senator Goldstein. Our colleague, as many of you know, is a widely acknowledged expert in matters of bankruptcy and insolvency whose talents I came to admire and respect during the years that I practiced law before the bar of Montreal.

[*Translation*]

In conclusion, honourable senators, I would ask that you carefully consider this important bill, and I urge you to pass it quickly at second reading.

[*English*]

Hon. Yoine Goldstein: Honourable senators, Senator Meighen has given us a splendid overview of Bill C-12 and its history, and I thank him for his very kind and thoroughly unjustified words. I would like to hope that he would have occasion to repeat them to my wife.

Honourable senators, I do not intend to repeat any of what Honourable Senator Meighen has said so very eloquently, nor do I intend to speak for more than just a few minutes. Because of the very important nature of this legislation, I hope that there will be a motion today to refer the bill to committee so that the Standing Senate Committee on Banking, Trade and Commerce, under the supervision, guidance and the presidency of Senator Angus, can give it the study it deserves and move it along. It has been long delayed, and it is time that Canada's bankruptcy legislation were updated.

Before I enter into the few remarks that I intend to make, I want to state for the record that, as Senator Meighen has suggested, I was very active in another life in bankruptcy and insolvency matters. I remain loosely associated with a law firm that handles bankruptcy and insolvency matters. I am occasionally asked questions — not that I have all the answers — about bankruptcy and insolvency, and I answer them.

I say this because I would like to assume and hope that no one in this chamber will think that I am dealing with this legislation, either here or in the committee, in a way suitable to my interests and not suitable to the interests of the people of Canada. My sole interest is to have excellent legislation for the excellent people of Canada.

Honourable senators, bankruptcy law is framework legislation. It is essential to have an updated bankruptcy law for the commercial welfare of Canada. Trade is increasingly cross border or borderless, and unless Canada has a modern and efficient bankruptcy and insolvency system, we cannot be players in this competitive commercial world of ours.

However, independent of commercial insolvency, there remains a generically different type of insolvency, one that directly affects almost a quarter of a million Canadians each and every year. I am talking about personal bankruptcy and insolvency. Honourable senators, almost a hundred thousand Canadians go into bankruptcy each and every year. Many of them — perhaps most of them — have spouses. Many of them have children. All of them obviously have creditors. The net result is that personal insolvency touches, directly and immediately, well over a quarter of a million different Canadians each and every year.

It is therefore essential that the provisions dealing with personal insolvency be fair, humane, equitable, and achieve a reasonable balance between the interests and the needs of creditors who advance credit on the one hand and individual debtors who are unable to cope with the credit system upon which our entire economy relies.

Honourable senators, we faced a dilemma, as almost all of you will recall, in November of 2005. On the one hand, everyone was very anxious to pass the wage earner protection program. On the other hand, that plan was not readily severable from the rest of the bill, and the rest of the bill contained numerous failings. Many of them were technical failures, but some of them were quite substantive. I do not intend to deal with all of them because that would be lengthy, and I do not intend to touch upon the ones with which Honourable Senator Meighen has already dealt.

However, I do want to point out, as the honourable senator has done, that the current legislation effectively precludes students from declaring bankruptcy any earlier than ten years from the date that they finish their studies. That is inhuman and is unknown in the entire Western world. That provision for ten years in the desert was put into the Bankruptcy and Insolvency Act in 1998 without notice or the knowledge of anyone at the behest of, I suppose, certain stakeholders who had a particular interest in so doing. It has wrought untold misery to many students in this country, those who are unfortunate enough to not be able to get the jobs which would allow them to repay their indebtedness.

There is presently pending before this honourable chamber a private member's bill — modesty prevents me from telling you who the sponsor is — that seeks the possibility of students making an application to a court of competent jurisdiction, where there is significant and terrible hardship in the repayment of a student loan, to allow that student to repay only part of that loan, or perhaps none of it, depending on the circumstances and depending on the discretion of the judge and the explanations of that student. I would like to hope that that aspect, which is covered by the bill, will receive further study by the committee.

Another matter which is incomplete is with respect to businesses that are undergoing reorganization and need to borrow money. That is called, for a variety of reasons, "DIP financing." In other words, debtor-in-possession financing. DIP financing is covered by the bill, but incompletely so, in the minds of some stakeholders, and therefore some stakeholders who will be appearing before the committee will be seeking amendments to that clause.

• (1510)

Certain other matters require consideration, and I hope the Standing Senate Committee on Banking, Trade and Commerce will be able to provide legislation to address them as quickly as possible.

The Hon. the Speaker *pro tempore*: Continuing debate?

Senator Comeau: Question!

[*Translation*]

The Hon. the Speaker *pro tempore*: Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read second time.

REFERRED TO COMMITTEE

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the third time?

On motion of Senator Meighen, bill referred to the Standing Senate Committee on Banking, Trade and Commerce.

PROPOSED REGULATIONS AMENDING THE CITIZENSHIP REGULATIONS (ADOPTION) AND REGULATORY IMPACT ANALYSIS STATEMENT

MOTION TO REFER TO SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY COMMITTEE ADOPTED

Hon. Gerald J. Comeau (Deputy Leader of the Government), pursuant to notice of November 14, 2007, proposed:

> That the document entitled *Proposed Regulations Amending the Citizenship Regulations (Adoption) and Regulatory Impact Analysis Statement*, tabled in the Senate on Wednesday, November 14, 2007, be referred to the Standing Senate Committee on Social Affairs, Science, and Technology for review and report.

Motion agreed to.

[*English*]

CANADA PENSION PLAN

SENIORS' BENEFITS—INQUIRY—DEBATE CONTINUED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Callbeck, calling the attention of the Senate to the thousands of Canadian seniors who are not receiving the benefits from the Canada Pension Plan to which they are entitled.—(*Honourable Senator Robichaud, P.C.*)

Hon. Elizabeth Hubley: Honourable senators, I would like to thank Honourable Senator Robichaud, who is allowing me to speak today. When I complete my presentation, I would like the adjournment to remain in his name.

Honourable senators, it is my pleasure to participate in this inquiry calling the attention of the Senate to the thousands of Canadian seniors who are not receiving the benefits to which they are entitled from the Canada Pension Plan.

Senator Callbeck is to be commended for raising this issue, as it is an important one that affects seniors across the country. It is also important for many thousands more Canadians who are approaching retirement age.

The issue is straightforward. According to the government's own statistics, tens of thousands of Canadians have failed to apply for a Canada Pension Plan benefit for which they qualify, whether it is the retirement benefit or the survivor's benefit. This failure to apply appears to result mainly from the fact that beneficiaries do not realize they are eligible.

As Senator Callbeck has pointed out, the problem seems to affect women disproportionately. This situation is particularly true for women who may have participated in the workforce for only a few years, or who may have left the workforce long before reaching retirement age. Often, women in these circumstances are not aware that they are eligible for a benefit.

Honourable senators, I recall a similar problem with the Guaranteed Income Supplement. Often, seniors failed to apply, either because they did not know the GIS existed or they did not know they qualified.

I understand that the situation with the GIS improved after the government implemented measures to promote awareness. Steps were also taken to make direct interventions as the opportunity arose when seniors contacted government through Service Canada and other access points.

These outreach measures were the right thing to do for the GIS, which is simply a benefits program funded entirely by the taxpayer. I know the government makes similar efforts with the CPP, but clearly, there are still people who do not receive the message.

Unlike the GIS, the Canada Pension Plan is funded by obligatory contributions. People who made contributions and who have not applied for benefits are missing out on something they have paid for, something that belongs to them. All the more reason, then, for the government to redouble its efforts to reach out to Canadians who fail to apply for their CPP entitlements, and to take every step necessary to bring application rates into line with the levels achieved in the Quebec Pension Plan.

Honourable senators, Senator Callbeck has provided a service for seniors by voicing the message that people need to apply. I was disappointed at the reaction last week of the Leader of the Government in the Senate and Secretary of State for Seniors.

Last week, Senator LeBreton took issue with an editorial published by *The Guardian* newspaper in Prince Edward Island. In her letter to the editor, the Secretary of State for Seniors missed an opportunity to reinforce the message that many seniors are not aware of their entitlements, and that they need to apply. Quite the contrary, her letter suggested that all was well with seniors programs.

What is truly unfortunate is that the Secretary of State for Seniors used the occasion to attack the integrity and honesty of Senator Callbeck. I think that attack is a shame because Senator Callbeck's approach had been non-partisan and constructive. She called attention to a problem to create greater awareness. By doing so, she helped to coax the department into augmenting its outreach efforts.

At the same time, her message was no doubt reaching individual Canadians, which is what needs to happen if we want to improve application rates. Her efforts on behalf of seniors did not merit the personal attack from Senator LeBreton.

Honourable senators, not every speech by a Liberal is a partisan swipe at the Conservative government. We are here to work together on behalf of our regions and on behalf of all Canadians. Naturally, in a democracy, there are differences among political parties, but the letter to the editor by the Secretary of State for Seniors went too far. It was an unwarranted attack on the integrity of a good senator who works hard on behalf of her province. It was a disproportionate and disappointingly partisan response to a constructive effort to improve results for seniors.

Honourable senators, earlier this week, a public meeting was held in Charlottetown where the principal investigator for the Atlantic Seniors Housing Research Alliance project presented data gathered from a survey of 1,702 Atlantic Canadian seniors.

According to the Canada Mortgage and Housing Corporation housing affordability standards, Canadians should not need to spend more than 30 per cent of their household income on shelter costs, including rent, mortgage, electricity, heating costs and water.

• (1520)

However, this survey shows that almost 50 per cent of Atlantic seniors spend 30 per cent or more of their income on shelter costs. Almost 20 per cent are spending over 40 per cent of their household income on shelter costs. This is a housing affordability crisis for our seniors. Ensuring Canadians are receiving benefits to which they are entitled is part of the solution to this problem.

I hope that the Secretary of State for Seniors will abandon her defensive partisan posture and acknowledge that there is still much work to be done and take up the call to improve outreach to Canadian seniors. Seniors have paid into a system with their hard-earned wages; they have every reason to expect that more will be done. For their sake, I invite the minister responsible for their welfare to join with Senator Callbeck and others in working towards ensuring that every Canadian who qualifies will receive their Canadian Pension Plan benefit.

On motion of Senator Hubley, for Senator Robichaud, debate adjourned.

CHARTER OF RIGHTS AND FREEDOMS

RECOGNITION OF TWENTY-FIFTH ANNIVERSARY—INQUIRY—DEBATE ADJOURNED

Hon. Sharon Carstairs rose pursuant to notice of October 17, 2007:

> That she will call the attention of the Senate to the 25th anniversary of the *Canadian Charter of Rights and Freedoms*.

She said: Honourable senators, I introduce this inquiry because I believe that all Canadians are concerned with the importance of our Charter in its twenty-fifth anniversary year. Cast your mind back to where you were in 1982. All of us can remember the Prime Minister and the Queen of Canada on Parliament Hill signing our new Constitution, which included the Charter of Rights and Freedoms.

I was teaching in a community well-known to Senator Stratton at the time, St. Norbert, and I decided it was important that each of my students understand this new document called the Charter of Rights and Freedoms. I ordered enough copies for every one of my students; I had the documents laminated so they would not get all dog-eared, and I went through every single one of the newly listed rights and freedoms with my students. They may have been somewhat bored. They did not appear to be. It was important for them, as Canadians, to understand the richness of this new Charter which had been given to them.

The people of St. Norbert were particularly interested in francophone and equality rights. Some Aboriginal Canadians in that classroom were concerned about their rights. We spent several weeks talking about what it was that had been enshrined in the Constitution in 1982, although I know that Senator Nancy

Ruth would be quick to point out that some of those provisions did not take effect until 1985, but they were taught to expect them within three years.

Among other principles, I taught that the principle of justice cannot be served in a criminal process if the accused person has no legal counsel. Likewise, I pointed out the rights guaranteed under the Charter are largely meaningless if an individual or group lacked the resources to seek a remedy should their rights be infringed or denied. That is why many Canadians were disappointed by the decision of the current government to eliminate the Court Challenges Program of Canada. The program not only helped to shape our understanding of human rights in a modern democratic society, but it also helped to foster the clarification of those rights. Whether challenges were successful or not, bringing important legal questions before the court for determination was always of great value. This process had the additional benefit of effectively reducing the cost of litigation for those who would later seek redress for grievances in similar situations and effectively help to ensure universal access to the justice system.

Honourable senators, in order that you might better understand the history of the Court Challenges Program of Canada, I wish to go back a moment to its important contribution to the development of a modern egalitarian society where human rights are a core value shared by all Canadians.

The program actually extends prior to the adoption of the Charter. It first came into being in 1978, principally as a means of assisting linguistic minorities in Canada. The program fell under the supervision of the Secretary of State, and it assisted in deferring the legal costs of groups pursuing court challenges to provincial laws and programs that infringed upon linguistic rights. The criteria for funding test cases centred on legal merit and the national importance of the questions of law at issue. Cases were only funded if they involved more than one person.

Many will recall one of the landmark cases for linguistic minorities in the 1980s, which centred on the status of the laws of my home province of Manitoba, which were enacted in English only. This was not a Charter case, but it was nonetheless an important question of legal rights of linguistic minorities under the laws of the province, including the provincial Constitution.

Many observers at the time said that despite the black letter of the law the court simply could not take the enormous step of invalidating the entire statute book of the province of Manitoba. In the end, the Supreme Court of Canada surprised observers when it ruled in the case *Reference re Manitoba Language Rights*, declaring that the laws and regulations not published in both official languages in the province of Manitoba were invalid. However, the court deemed the unilingual versions to be temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

The province undertook the important work with all due diligence and, since that time, I am proud to say the laws of Manitoba and the regulations which accompany them have been passed and published in both official languages.

To many of us this result was not only the illustration of the strong foundations of the rule of law in Canada; it demonstrated that Canada's commitment to human rights was more than just rhetoric. Moreover, in this case, the minorities whose rights were affected were not left to fend for themselves. Early in the process, before it reached the highest court in the land, the federal government provided the needed resources, without which a viable challenge might not have been mounted. A few years later, with the inception of the Charter, the program was expanded beyond its origins as a tool for protecting linguistic minorities. Beginning in 1982, the program's mandate was enlarged to include challenges in cases involving Charter rights, particularly the provisions that came into force in 1985. In addition, funding was no longer limited to provincial matters. Cases would be eligible for funding even where the respondent was to be the federal government.

In 1985, a subcommittee of the other place commented on the program in a report called *Equality For All: Report of the Parliamentary Committee on Equality Rights*. The committee was chaired by the respected Progressive Conservative Patrick Boyer, and the report had unanimous support. As I recall, the Liberal representative in the committee was our former Senate colleague Sheila Finestone, who was then the member of Parliament for Mount Royal. The committee pointed to the need to provide assistance to litigants if the implementation of the Charter was to be meaningful. The report stated:

> In the short time since section 15 came into force on April 17, 1985, there have been many lawsuits initiated on the basis of this provision of the Charter. They involve individuals on the one side and, generally speaking, government departments or agencies on the other side. The imbalance in financial, technical and human resources between the opposing parties constitutes a serious impediment to those who might wish to claim the benefit of section 15, thus reducing the effectiveness of resorting to the courts as a means of obtaining redress.

Thus the value of the program and the importance of funding litigants were acknowledged by all parties in Parliament at that time. Despite the change in government that occurred in 1984, funding was sustained. Since then, the program has assisted in dozens of cases, many of which resulted in landmark rulings from the Supreme Court of Canada. These cases have not only settled the legal questions in individual cases but have helped shape a body of Charter jurisprudence that makes it easier for everyone in Canada to understand, respect, defend and enforce basic human rights in their everyday lives.

• (1530)

At the same time, the elements of the program's original mandate remained. It continued to include cases, particularly linguistic rights, involving legal rights not rooted in the Charter. Fourteen years after its inception, the program in 1992 was abruptly cancelled by then-Secretary of State, Robert de Cotret. The decision to cut the program was revealed through the tabling of the estimates. As I understand it, the rationale for the decision was that the program had accomplished its objective, and funding for litigants was no longer needed. The House of Commons Standing Committee on Human Rights and the Status of Disabled Persons swiftly denounced the decision, and scarcely a year later, the leader of the Progressive Conservative Party reversed the decision. As the Right Honourable Kim Campbell went to the polls to seek a fresh mandate as Prime Minister of Canada, she promised to reinstate the program.

In 1994, shortly after taking office, the new government of the Right Honourable Jean Chrétien reinstated the Court Challenges Program. This time, it was done as an arm's-length non-profit organization funded by contributions through the Department of Canadian Heritage. Funding continued for another 12 years.

Not long after the Conservative government took office, the Minister of Finance and President of the Treasury Board announced the termination of the program on September 26, 2006, as part of a long list of program cuts and spending reductions. Many people were puzzled that the government was willing to undermine its commitment to human rights by sacrificing this tiny program. They listed the savings from the decision as a mere $5.6 million per year, about half of 1 per cent of the savings objective, and this in the context of a ballooning budget surplus. It is revealing that the program was lumped in with lists of other programs that, according to the government's media release, "weren't providing value for money."

This conclusion is surprising as the most recent Canadian Heritage evaluation of the program in 2003 identified no such concerns. In announcing the elimination of the program, the government has not produced any analysis or evaluation that sustains its conclusion.

Honourable senators, it is hard to measure or account for "value for money" in the field of basic human rights and fundamental equality. It is hard to know where to begin when confronted with such an attitude. There are too many cases to mention here today, but let me remind honourable senators of a few that illustrate the contributions made by the Court Challenges Program to our advances in human rights.

One recent example is the 2004 *Iness* case in Ontario, where the practice of charging welfare recipients higher rents in cooperative housing than other subsidized tenants was successfully challenged. A 1999 Supreme Court ruling in *Corbiere* struck down the residency requirements of the Indian Act that prevented off-reserve band members from voting in band elections. This discriminatory practice disenfranchised many Aboriginal persons, and affected women disproportionately. Other cases include the 1995 decision in *Egan* and the 1998 decision in *Rosenberg* that opened the door to the extension of spousal benefits to same-sex couples. These examples are where the Court Challenges Program helped clarify human rights law throughout Canada with a targeted application of a small budget.

Honourable senators, Canada is regarded as an international leader in human rights. I have the honour to serve as Chair of the Inter-Parliamentary Union Committee on the Human Rights of Parliamentarians. In the relatively short time that I have served in that role, it has become clear to me that Canada's commitment — both principled and pragmatic — to the ideal for the respect of human rights has been an inspiration to many countries that have been involved in drafting constitutions and modernizing legal systems and institutions in the past few decades. Many have profited from our experience and our jurisprudence as they develop their own basic laws and institutions.

Canada is an example to others because our experiment with constitutionally entrenched human rights has been a resounding success. Our success in implementing the Charter — in making it a meaningful and enforceable document that Canadians cherish — was largely dependent on the practical decision to fund challenges. Without such funding, our progress in shaping a society that respects and values human rights would have been much slower, our jurisprudence would be far less advanced and we would not be able to say that we have minimized the barriers that prevent people from gaining access to the justice system.

Honourable senators, I hope that those on the other side who have influence in the government will prevail; that the decision to cut the program will be reconsidered before long and acknowledged as a mistake. Nearly 15 years ago, the Progressive Conservative Party realized its error, and set out to correct it. When Mr. Baird and Mr. Flaherty announced their decision to de-fund the program last year, it was in its twenty-eighth year. As we reflect upon the 25 years of Charter rights in Canada, I urge the honourable senators on both sides of this house to reflect on what value we would place on the Charter today if it had not been for the Court Challenges Program.

On motion of Senator Comeau, for Senator Oliver, debate adjourned.

THE SENATE

MOTION TO AUTHORIZE INTERNAL ECONOMY, BUDGETS AND ADMINISTRATION COMMITTEE TO STUDY POLICIES IN ORDER TO REDUCE GREENHOUSE GAS EMISSIONS—DEBATE ADJOURNED

Hon. Nick G. Sibbeston, pursuant to notice of November 1, 2007, moved:

> That the Standing Committee on Internal Economy, Budgets and Administration be authorized to examine and report on changes to Senate policies necessary to incorporate into the 64-point travel system for individual senators and into committee travel budgets the costs of purchasing carbon offsets that meet the goal of reducing greenhouse gas emissions and also meet internationally recognized standards and certification processes;
>
> That the committee also evaluate, as a further means to reduce greenhouse gas emissions, the possibility of expanding the use of teleconferencing and other technological systems to reduce the need for witness travel to Ottawa; and
>
> That the committee present its final report to the Senate no later than December 12, 2007.

He said: Honourable senators, I have spoken a number of times about the effects of global warming on the North. In my visits to various communities last spring, people said they were experiencing real climate change. The spring had come earlier and the winters were warmer; they have experienced unpredictable weather throughout the course of the year.

The North is seeing species of animals, birds and insects that have not been seen before. The honourable senators will have seen reports about the extent of open waters in the Northern Passage as well as the prevalence of thinner ice. These stories and the facts are becoming more prominent in the news.

Some things have been done to reduce the impact of climate change. The government, over the last few years, has had various programs and measures to reduce greenhouse gases. The Prime Minister said recently he will take a leadership role in fighting climate change. Many measures will take a long time to implement and even longer to effect. This delay is understandable; it takes time to replace infrastructure and develop new technologies to move us toward a low-carbon economy. It is possible to do something now, however. The Senate can be a leader in this matter. The modest steps that we take will immediately reduce the amount of greenhouse gases being put into the atmosphere. It is estimated that air travel is responsible for 2 per cent of all greenhouse gases in the air and, according to a noted Canadian environmental economist, Marc Jaccard, that share is likely to grow. The fuel for airplanes is very powerful and cannot be replaced with ethanol or biodiesel, or even with hydrogen. Even with improved technology, we might always need fossil fuels to power our planes.

• (1540)

What is the solution? One thing we can do is purchase carbon offsets for each flight that we take. The cost is fairly low and is estimated at between $20 and $30 per person for a return flight from Ottawa to Fort Simpson in the Northwest Territories. Carbon offsets can be as simple as planting trees that will absorb the carbon from the air as they grow. However, this is not the best approach because trees do not necessarily survive; they might eventually be cut down and burned. Investments in fuel, and switching from high carbon to lower carbon fuels or in the development of renewable energy makes more sense in the long run, even if they cost a little more in the short run. Organizations in Canada and internationally have studied the best way to offset carbon. This is one area that the committee can look into.

Purchasing carbon offsets will make us aware of this issue. Every time we travel we will be conscious of contributing to greenhouse gas emissions and what we are paying to offset them. Just like the hydrogen bus that transports us on Parliament Hill, it will be a concrete example of something that we can do. It is impressive and noticeable, and every time we have people from the North here, I tell them about the hydrogen bus. They are amazed that it does not use gas and can move along the road fuelled by hydrogen. If we get involved in the carbon offset program, however modest, it will send a positive message that senators are doing something about the problem.

British Columbia and Manitoba have already adopted a policy to buy carbon offsets for government travel. This year, they both joined the Western Climate Initiative, which includes a number of U.S. states. Some municipalities have taken similar steps in B.C. and joined the Climate Change Charter, which is committed to carbon neutrality by the year 2012. This fall, a press release stated that 62 communities have joined a plan to deal with greenhouse gases. They established the Western Climate Initiative and set up a climate registry to keep note of all these things.

Yellowknife in the Northwest Territories has taken steps to reduce carbon emissions by 20 per cent by the year 2010. Carbon offsets will play a role in achieving these goals. However, to date, eight provinces and the federal government have not moved in this direction to deal with greenhouse gases.

The Senate can take leadership on this issue. It behoves the Senate to do something positive in this realm. The motion is that the Internal Economy Committee look into the matter and report to the house by December 12, 2007. It is my hope that all honourable senators will support this motion.

On motion of Senator Comeau, debate adjourned.

ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES

COMMITTEE AUTHORIZED TO ENGAGE SERVICES

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject-matters of bills and estimates as are referred to it.

Motion agreed to.

COMMITTEE AUTHORIZED TO PERMIT ELECTRONIC COVERAGE

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

Motion agreed to.

COMMITTEE AUTHORIZED TO STUDY ISSUES RELATED TO MANDATE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources be authorized to examine and report on emerging issues related to its mandate:
>
> (*a*) The current state and future direction of production, distribution, consumption, trade, security and sustainability of Canada's energy resources;
>
> (*b*) Environmental challenges facing Canada including responses to global climate change, air pollution, biodiversity and ecological integrity;
>
> (*c*) Sustainable development and management of renewable and non-renewable natural resources including but not limited to water, minerals, soils, flora and fauna; and

(*d*) Canada's international treaty obligations affecting energy, the environment and natural resources and their influence on Canada's economic and social development.

That the papers and evidence received and taken and work accomplished by the Committee on this subject during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee report to the Senate from time to time, no later than June 30, 2009, and that the Committee retain until September 30, 2009, all powers necessary to publicize its findings.

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I have a brief question for the chairman of the committee. The mandate of the Energy Committee states:

(*a*) The current state and future direction of production, distribution, consumption, trade, security and sustainability of Canada's energy resources;

I am assuming that the words "trade" and "security," given that we have other committees that look after security issues, would be considered apart from matters under the mandate of the Standing Senate Committee on National Security and Defence, or the Standing Senate Committee on Foreign Affairs and International Trade. I would like to know whether there might be overlapping mandates of committees; whether you have discussed this with the chairs of those committees; and whether, in your view, the mandate of the Energy Committee might be encroaching on or interfering with the work of other committees?

Senator Banks: Honourable senators, needless to say, this motion has been approved by the committee in its application to the Senate. The word "security" is in reference to the supply of energy, in the sense that there are two "countries" in Canada as far as oil supply is concerned. Most of the oil processed from Quebec and the East comes from outside Canada, from places where supplies might not be secure one day. In the West, there is a security of supply but an enormous amount of that oil is exported to western parts of the United States. Thus, we have a division down the middle of North America. When the matter is addressed, it will be on the security of supply of not only oil and gas but also other forms of energy in Canada. It does not refer to security in the sense of protecting the infrastructure from terrorism or that kind of thing and, therefore, does not intrude on the mandates of other committees.

The Hon. the Speaker *pro tempore***:** Are honourable senators ready for the question?

Senator Carstairs: Question!

The Hon. the Speaker *pro tempore***:** Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to.

RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT

COMMITTEE AUTHORIZED TO ENGAGE SERVICES

Hon. Wilbert J. Keon, pursuant to notice of November 14, 2007, moved:

That the Standing Committee on Rules, Procedures and the Rights of Parliament have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject-matters of bills and estimates as are referred to it.

Motion agreed to.

COMMITTEE AUTHORIZED TO PERMIT ELECTRONIC COVERAGE

Hon. Wilbert J. Keon, pursuant to notice of November 14, 2007, moved:

That the Standing Committee on Rules, Procedures and the Rights of Parliament be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

Motion agreed to.

MOTION TO AUTHORIZE COMMITTEE TO REQUEST TRANSCRIPTS OF IN CAMERA MEETINGS WITHDRAWN

On Motion No. 26, by Honourable Senator Keon:

That the Chair and Deputy Chair be authorized to request transcripts for in camera meetings be produced, when deemed necessary, for the use of the Chair, Deputy Chair, the members of the committee, the Clerk of the Committee and its analysts in accurately reflecting the discussions of the Committee in minutes and draft reports; and

That these transcripts be destroyed at the end of a session.

Hon. Wilbert J. Keon: Honourable senators, I wish to advise the Senate that I am withdrawing Motion No. 26 on the Notice Paper.

The Hon. the Speaker *pro tempore***:** Senator Keon does not need leave. It was just a Notice of Motion so it does not require leave to be withdrawn. Are honourable senators agreed?

Hon. Senators: Agreed.

Motion withdrawn.

• (1550)

[*Translation*]

ADJOURNMENT

Leave having been given to revert to Government Notices of Motions:

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, with leave of the Senate and notwithstanding rule 58(1)(h), I move:

That when the Senate adjourns today, it do stand adjourned until Tuesday, November 20, 2007, at 2 p.m.

The Hon. the Speaker: Honourable senators, is leave granted?

Motion agreed to.

The Senate adjourned to Tuesday, November 20, 2007, at 2 p.m.

THE SENATE OF CANADA
PROGRESS OF LEGISLATION

(*indicates the status of a bill by showing the date on which each stage has been* ***completed***)

(2nd Session, 39th Parliament)

Thursday, November 15, 2007

(**Where royal assent is signified by written declaration, the Act is deemed to be assented to on the day on which the two Houses of Parliament have been notified of the declaration.*)

GOVERNMENT BILLS
(SENATE)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-2	An Act to amend the Canada-United States Tax Convention Act, 1984	07/10/18	07/11/13	Banking, Trade and Commerce	07/11/15	0			
S-3	An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)	07/10/23	07/11/14	Special Committee on Anti-terrorism					

GOVERNMENT BILLS
(HOUSE OF COMMONS)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-10	An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act	07/10/30							
C-11	An Act to give effect to the Nunavik Inuit Land Claims Agreement and to make a consequential amendment to another Act	07/10/30							
C-12	An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005	07/10/30	07/11/15	Banking, Trade and Commerce					
C-13	An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)	07/10/30							

COMMONS PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-280	An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)	07/10/17							
C-292	An Act to implement the Kelowna Accord	07/10/17							
C-293	An Act respecting the provision of official development assistance abroad	07/10/17							
C-299	An Act to amend the Criminal Code (identification information obtained by fraud or false pretence)	07/10/17							

SENATE PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-201	An Act to amend the Financial Administration Act and the Bank of Canada Act (quarterly financial reports) (Sen. Segal)	07/10/17							
S-202	An Act to amend certain Acts to provide job protection for members of the reserve force (Sen. Segal)	07/10/17	07/11/13	Legal and Constitutional Affairs					
S-203	An Act to amend the Criminal Code (cruelty to animals) (Sen. Bryden)	07/10/17							
S-204	An Act respecting a National Philanthropy Day (Sen. Grafstein)	07/10/17							
S-205	An Act to amend the Bankruptcy and Insolvency Act (student loans) (Sen. Goldstein)	07/10/17							
S-206	An Act to amend the Food and Drugs Act (clean drinking water) (Sen. Grafstein)	07/10/17							
S-207	An Act to repeal legislation that has not come into force within ten years of receiving royal assent (Sen. Banks)	07/10/17							
S-208	An Act to require the Minister of the Environment to establish, in co-operation with the provinces, an agency with the power to identify and protect Canada's watersheds that will constitute sources of drinking water in the future (Sen. Grafstein)	07/10/17		Subject matter 07/11/13 Energy, the Environment and Natural Resources					
S-209	An Act to amend the Criminal Code (protection of children) (Sen. Hervieux-Payette, P.C.)	07/10/17							
S-210	An Act to amend the Criminal Code (suicide bombings) (Sen. Grafstein)	07/10/17							
S-211	An Act to regulate securities and to provide for a single securities commission for Canada (Sen. Grafstein)	07/10/17							

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-212	An Act to amend the Parliamentary Employment and Staff Relations Act (Sen. Joyal, P.C.)	07/10/18							
S-213	An Act to amend the Criminal Code (lottery schemes) (Sen. Lapointe)	07/10/23							
S-214	An Act to amend the Income Tax Act and the Excise Tax Act (tax relief for Nunavik) (Sen. Watt)	07/10/24							
S-215	An Act to protect heritage lighthouses (Sen. Carney, P.C.)	07/10/30							
S-216	An Act to amend the Access to Information Act and the Canadian Wheat Board Act (Sen. Mitchell)	07/10/30							
S-217	An Act to amend the International Boundary Waters Treaty Act (bulk water removal) (Sen. Carney, P.C.)	07/10/31							
S-218	An Act to amend the Immigration and Refugee Protection Act and to enact certain other measures, in order to provide assistance and protection to victims of human trafficking (Sen. Phalen)	07/10/31							
S-219	An Act to amend the Public Service Employment Act (elimination of bureaucratic patronage and establishment of national area of selection) (Sen. Ringuette)	07/11/13							
S-220	An Act respecting a National Blood Donor Week (Sen. Mercer)	07/11/15							

PRIVATE BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.

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CHAPITRE 36

An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)

ASSENTED TO

14th DECEMBER, 2007

BILL C-12

SANCTIONNÉE

LE 14 DÉCEMBRE 2007

PROJET DE LOI C-12

RECOMMENDATION

Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled "*An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*".

RECOMMANDATION

Son Excellence la gouverneure générale recommande à la Chambre des communes l'affectation de deniers publics dans les circonstances, de la manière et aux fins prévues dans une mesure intitulée « *Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)* ».

SUMMARY

This enactment amends the *Bankruptcy and Insolvency Act*, the *Companies' Creditors Arrangement Act*, the *Wage Earner Protection Program Act* and chapter 47 of the Statutes of Canada, 2005 to ensure the effective operation of that chapter 47.

SOMMAIRE

Le texte modifie la *Loi sur la faillite et l'insolvabilité*, la *Loi sur les arrangements avec les créanciers des compagnies*, la *Loi sur le Programme de protection des salariés* et le chapitre 47 des Lois du Canada (2005) pour assurer l'application efficace de ce chapitre.

Also available on the Parliament of Canada Web Site at the following address:
http://www.parl.gc.ca

Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca

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56 ELIZABETH II

CHAPTER 36

CHAPITRE 36

An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies, la Loi sur le Programme de protection des salariés et le chapitre 47 des Lois du Canada (2005)

[*Assented to 14th December, 2007*]

[*Sanctionnée le 14 décembre 2007*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

R.S., c. B-3; 1992, c. 27, s. 2

BANKRUPTCY AND INSOLVENCY ACT

LOI SUR LA FAILLITE ET L'INSOLVABILITÉ

L.R., ch. B-3; 1992, ch. 27, art. 2

1999, c. 28, s. 146(2)

1. (1) The definition "corporation" in section 2 of the *Bankruptcy and Insolvency Act* is replaced by the following:

1. (1) La définition de « personne morale », à l'article 2 de la *Loi sur la faillite et l'insolvabilité*, est remplacée par ce qui suit :

1999, ch. 28, par. 146(2)

"corporation" « *personne morale* »

"corporation" means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies, loan companies or railway companies;

« personne morale » Personne morale qui est autorisée à exercer des activités au Canada ou qui y a un établissement ou y possède des biens, ainsi que toute fiducie de revenu. Sont toutefois exclues les banques, banques étrangères autorisées au sens de l'article 2 de la *Loi sur les banques*, compagnies d'assurance, sociétés de fiducie, sociétés de prêt ou compagnies de chemin de fer constituées en personnes morales.

« personne morale » "*corporation*"

(2) The definitions "court" and "person" in section 2 of the Act, as enacted by subsection 2(3) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(2) Les définitions de « personne » et « tribunal », à l'article 2 de la même loi, édictées par le paragraphe 2(3) du chapitre 47 des Lois du Canada (2005), sont respectivement remplacées par ce qui suit :

"court" « *tribunal* »

"court", except in paragraphs 178(1)(*a*) and (*a.1*) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a

« personne »

« personne » "*person*"

judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

"person" «*personne*»

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person;

a) Sont assimilés aux personnes les sociétés de personnes, associations non constituées en personne morale, personnes morales, sociétés et organisations coopératives, ainsi que leurs successeurs;

b) sont par ailleurs assimilés aux personnes leurs héritiers, liquidateurs de succession, exécuteurs testamentaires, administrateurs et autres représentants légaux.

« tribunal » Sauf aux alinéas 178(1)*a*) et *a.1*) et aux articles 204.1 à 204.3, tout tribunal mentionné aux paragraphes 183(1) ou (1.1). Y est assimilé tout juge de ce tribunal ainsi que le greffier ou le registraire de celui-ci, lorsqu'il exerce les pouvoirs du tribunal qui lui sont conférés au titre de la présente loi.

« tribunal » "*court*"

(3) The definitions "current assets", "director", "income trust" and "transfer at undervalue" in section 2 of the Act, as enacted by subsection 2(5) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(3) Les définitions de « actif à court terme », « administrateur », « fiducie de revenu » et « opération sous-évaluée », à l'article 2 de la même loi, édictées par le paragraphe 2(5) du chapitre 47 des Lois du Canada (2005), sont respectivement remplacées par ce qui suit :

"current assets" «*actif à court terme*»

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets;

« actif à court terme » Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs.

« actif à court terme » "*current assets*"

"director" «*administrateur*»

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called;

« administrateur » S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre.

« administrateur » "*director*"

"income trust" «*fiducie de revenu*»

"income trust" means a trust that has assets in Canada if

(*a*) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(*b*) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

« fiducie de revenu » Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date.

« fiducie de revenu » "*income trust*"

"transfer at undervalue" «*opération sous-évaluée*»

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for

« opération sous-évaluée » Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en

« opération sous-évaluée » "*transfer at undervalue*"

which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée.

(4) Paragraph (*b*) of the definition "date of the bankruptcy" in section 2 of the English version of the Act, as enacted by subsection 2(5) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(4) L'alinéa *b*) de la définition de « date of the bankruptcy », à l'article 2 de la version anglaise de la même loi, édicté par le paragraphe 2(5) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

(*b*) the filing of an assignment in respect of the person, or

(*b*) the filing of an assignment in respect of the person, or

1997, c. 12, s. 1(5)

(5) The portion of the definition "date of the initial bankruptcy event" in section 2 of the English version of the Act before paragraph (*a*) is replaced by the following:

(5) Le passage de la définition de « date of the initial bankruptcy event » précédant l'alinéa *a*), à l'article 2 de la version anglaise de la même loi, est remplacé par ce qui suit :

1997, ch. 12, par. 1(5)

"date of the initial bankruptcy event" « *ouverture de la faillite* »

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

"date of the initial bankruptcy event" « *ouverture de la faillite* »

(6) The definition "date of the initial bankruptcy event" in section 2 of the Act is amended by striking out the word "or" at the end of paragraph (*d*), by adding the word "or" at the end of paragraph (*e*) and by adding the following after paragraph (*e*):

(6) La définition de « ouverture de la faillite », à l'article 2 de la même loi, est modifiée par adjonction, après l'alinéa *e*), de ce qui suit :

(*f*) proceedings under the *Companies' Creditors Arrangement Act*;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*.

(7) Section 2 of the Act is amended by adding the following in alphabetical order:

(7) L'article 2 de la même loi est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

"equity claim" « *réclamation relative à des capitaux propres* »

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*a*) a dividend or similar payment,

(*b*) a return of capital,

(*c*) a redemption or retraction obligation,

(*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);

« actionnaire » S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie.

« actionnaire » "*shareholder*"

« intérêt relatif à des capitaux propres »

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

« intérêt relatif à des capitaux propres » "*equity interest*"

"equity interest" « *intérêt relatif à des capitaux propres* »

"equity interest" means

(*a*) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"shareholder" « *actionnaire* »

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible.

« réclamation relative à des capitaux propres » "*equity claim*"

« réclamation relative à des capitaux propres » Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas *a*) à *d*).

2. Subsection 4(5) of the Act, as enacted by subsection 5(4) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

2. Le paragraphe 4(5) de la même loi, édicté par le paragraphe 5(4) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(*b*) or 96(1)(*b*), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

Présomption

(5) Les personnes liées entre elles sont réputées avoir un lien de dépendance tant qu'elles sont ainsi liées et il en va de même, sauf preuve contraire, pour l'application des alinéas 95(1)*b*) ou 96(1)*b*).

3. Section 11.1 of the Act is amended by adding the following after subsection (2):

3. L'article 11.1 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Agreement to provide compilation

(3) The Superintendent may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

Accord visant la fourniture d'une compilation

(3) Enfin, il peut conclure un accord visant la fourniture d'une compilation de tout ou partie des renseignements figurant au registre public.

4. Subsection 13.3(1.1) of the French version of the Act, as enacted by subsection 11(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

4. Le paragraphe 13.3(1.1) de la version française de la même loi, édicté par le paragraphe 11(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Avis au surintendant

(1.1) S'il demande l'autorisation visée au paragraphe (1), le syndic envoie sans délai une copie de sa demande au surintendant.

5. Subsection 13.4(1) of the Act, as enacted by section 12 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Trustee may act for secured creditor

13.4 (1) No trustee may, while acting as the trustee of an estate, act for or assist a secured creditor to assert a claim against the estate or to realize or otherwise deal with a security that the secured creditor holds, unless the trustee has obtained a written opinion from independent legal counsel that the security is valid and enforceable against the estate.

1997, c. 12, s. 12

6. The portion of subsection 14.01(1) of the Act before paragraph (*a*) is replaced by the following:

Decision affecting licence

14.01 (1) If, after making or causing to be made an inquiry or investigation into the conduct of a trustee, it appears to the Superintendent that

7. Subsections 14.02(1.1) and (1.2) of the Act, as enacted by section 15 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

Summons

(1.1) The Superintendent may, for the purpose of the hearing, issue a summons requiring and commanding any person named in it

(*a*) to appear at the time and place mentioned in it;

(*b*) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the trustee; and

(1.1) S'il demande l'autorisation visée au paragraphe (1), le syndic envoie sans délai une copie de sa demande au surintendant.

Avis au surintendant

5. Le paragraphe 13.4(1) de la même loi, édicté par l'article 12 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

13.4 (1) Le syndic d'un actif ne peut, pendant qu'il exerce ses fonctions, agir pour le compte d'un créancier garanti ni lui prêter son concours dans le but de faire valoir une réclamation contre l'actif ou d'exercer un droit afférent à la garantie détenue par ce créancier, notamment celui de la réaliser, à moins d'avoir obtenu l'avis écrit d'un conseiller juridique indépendant attestant que cette garantie est valide et exécutoire.

Possibilité pour le syndic d'agir pour un créancier garanti

1997, ch. 12, art. 12

6. Le passage du paragraphe 14.01(1) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

14.01 (1) Après avoir tenu ou fait tenir une investigation ou une enquête sur la conduite du syndic, le surintendant peut prendre l'une ou plusieurs des mesures énumérées ci-après, soit lorsque le syndic ne remplit pas adéquatement ses fonctions ou a été reconnu coupable de mauvaise administration de l'actif, soit lorsqu'il n'a pas observé la présente loi, les Règles générales, les instructions du surintendant ou toute autre règle de droit relative à la bonne administration de l'actif, soit lorsqu'il est dans l'intérêt public de le faire :

Décision relative à la licence

7. Les paragraphes 14.02(1.1) et (1.2) de la même loi, édictés par l'article 15 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

(1.1) Il peut, aux fins d'audition, convoquer des témoins par assignation leur enjoignant :

a) de comparaître aux date, heure et lieu indiqués;

b) de témoigner sur tous faits connus d'eux se rapportant à l'investigation ou à l'enquête sur la conduite du syndic;

Convocation de témoins

(*c*) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

Effect throughout Canada

(1.2) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (1.1).

8. Paragraph 14.03(2)(*b*) of the French version of the Act, as enacted by subsection 16(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

b) la tenue des investigations ou des enquêtes prévues à l'alinéa 5(3)*e*);

9. (1) Paragraph 14.06(1.1)(*c*) of the French version of the Act, as enacted by section 17 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

c) les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

(2) Subsection 14.06(1.2) of the Act, as enacted by section 17 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

No personal liability in respect of matters before appointment

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(*a*) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(*b*) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

1997, c. 12, s. 15(1)

(3) Subsection 14.06(1.3) of the Act is replaced by the following:

c) de produire tous livres, registres, données, documents ou papiers, sur support électronique ou autre, qui se rapportent à l'investigation ou à l'enquête et dont ils ont la possession ou la responsabilité.

Effet

(1.2) Les assignations visées au paragraphe (1.1) ont effet sur tout le territoire canadien.

8. L'alinéa 14.03(2)*b*) de la version française de la même loi, édicté par le paragraphe 16(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

b) la tenue des investigations ou des enquêtes prévues à l'alinéa 5(3)*e*);

9. (1) L'alinéa 14.06(1.1)*c*) de la version française de la même loi, édicté par l'article 17 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

c) les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

(2) Le paragraphe 14.06(1.2) de la même loi, édicté par l'article 17 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Immunité

(1.2) Par dérogation au droit fédéral et provincial, le syndic qui, en cette qualité, continue l'exploitation de l'entreprise du débiteur ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation du débiteur, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés du débiteur, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée sur la base d'une période la précédant.

1997, ch. 12, par. 15(1)

(3) Le paragraphe 14.06(1.3) de la même loi est remplacé par ce qui suit :

Status of liability

(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.

Liability of other successor employers

(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

10. Subsections 30(5) and (6) of the Act, as enacted by section 23 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

Related persons

(5) For the purpose of subsection (4), in the case of a bankrupt other than an individual, a person who is related to the bankrupt includes

(*a*) a director or officer of the bankrupt;

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

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

Factors to be considered

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

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

(*b*) the extent to which the creditors were consulted;

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

(*d*) whether the consideration to be received for the property is reasonable and fair, taking into account the market value of the property;

(*e*) whether good faith efforts were made to sell or otherwise dispose of the property to persons who are not related to the bankrupt; and

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

Obligation exclue des frais

(1.3) L'obligation visée au paragraphe (1.2) ne peut être imputée à l'actif au titre des frais d'administration.

Responsabilité de l'employeur successeur

(1.4) Le paragraphe (1.2) ne dégage aucun employeur successeur, autre que le syndic, de sa responsabilité.

10. Les paragraphes 30(5) et (6) de la même loi, édictés par l'article 23 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées au failli qui n'est pas une personne physique :

a) le dirigeant ou l'administrateur de celui-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas *a*) ou *b*).

Facteurs à prendre en considération

(6) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) la suffisance des consultations menées auprès des créanciers;

c) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

d) le caractère juste et raisonnable de la contrepartie reçue pour les biens compte tenu de leur valeur marchande;

e) la suffisance et l'authenticité des efforts déployés pour disposer des biens en faveur d'une personne qui n'est pas liée au failli;

f) le caractère plus avantageux de la contrepartie offerte pour les biens par rapport à celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

11. Subsection 36(1) of the French version of the Act, as enacted by section 28 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Devoirs de l'ancien syndic en cas de substitution

36. (1) À la nomination d'un syndic substitué, le syndic qui l'a précédé soumet immédiatement ses comptes au tribunal et remet au syndic substitué tous les biens de l'actif, avec tous les livres, registres et documents du failli et ceux qui sont relatifs à l'administration de l'actif. Il lui remet également un état complet des recettes provenant des biens du failli ou d'autres sources, intérêts y compris, et de ses débours et dépenses, ainsi que de la rémunération qu'il réclame. L'état est accompagné d'un document contenant la description détaillée de tous les biens du failli qui n'ont pas été vendus ou réalisés, où sont indiqués, en plus de leur valeur, le motif pour lequel ils ne l'ont pas été, ainsi que la façon dont il en a été disposé.

1997, c. 12, s. 25(2)

12. Subsection 41(8.1) of the Act is replaced by the following:

Investigation not precluded

(8.1) Nothing in subsection (8) is to be construed as preventing an inquiry, investigation or proceeding in respect of a trustee under subsection 14.01(1).

13. Section 46 of the Act is amended by adding the following after subsection (2):

Place of filing

(3) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

14. (1) Subsection 47(1) of the Act, as enacted by subsection 30(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Appointment of interim receiver

47. (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor's property that is subject to the security to which the notice relates until the earliest of

11. Le paragraphe 36(1) de la version française de la même loi, édicté par l'article 28 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Devoirs de l'ancien syndic en cas de substitution

36. (1) À la nomination d'un syndic substitué, le syndic qui l'a précédé soumet immédiatement ses comptes au tribunal et remet au syndic substitué tous les biens de l'actif, avec tous les livres, registres et documents du failli et ceux qui sont relatifs à l'administration de l'actif. Il lui remet également un état complet des recettes provenant des biens du failli ou d'autres sources, intérêts y compris, et de ses débours et dépenses, ainsi que de la rémunération qu'il réclame. L'état est accompagné d'un document contenant la description détaillée de tous les biens du failli qui n'ont pas été vendus ou réalisés, où sont indiqués, en plus de leur valeur, le motif pour lequel ils ne l'ont pas été, ainsi que la façon dont il en a été disposé.

12. Le paragraphe 41(8.1) de la même loi est remplacé par ce qui suit :

1997, ch. 12, par. 25(2)

Application

(8.1) Le paragraphe (8) n'a pas pour effet d'empêcher la tenue de l'investigation ou de l'enquête ou la prise des mesures visées au paragraphe 14.01(1).

13. L'article 46 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Lieu du dépôt

(3) La demande visant l'obtention de l'ordonnance prévue au paragraphe (1) est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

14. (1) Le paragraphe 47(1) de la même loi, édicté par le paragraphe 30(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Nomination d'un séquestre intérimaire

47. (1) S'il est convaincu qu'un préavis a été envoyé ou est sur le point de l'être aux termes du paragraphe 244(1), le tribunal peut, sous réserve du paragraphe (3), nommer un syndic à titre de séquestre intérimaire de tout ou partie des biens du débiteur faisant l'objet de la garantie sur laquelle porte le préavis. Ce séquestre intérimaire demeure en fonctions jusqu'à celui des événements ci-après qui se produit le premier :

(*a*) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(*b*) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(*c*) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

a) la prise de possession par un séquestre, au sens du paragraphe 243(2), des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

b) la prise de possession par un syndic des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

c) l'expiration de la période de trente jours suivant la date de la nomination du séquestre intérimaire ou de la période précisée par le tribunal.

1992, c. 27, s. 16(1)

(2) Subsection 47(2) of the Act is amended by striking out the word "and" at the end of paragraph (*b*) and by replacing paragraph (*c*) with the following:

(2) L'alinéa 47(2)*c*) de la même loi est remplacé par ce qui suit :

1992, ch. 27, par. 16(1)

(*c*) take conservatory measures; and

(*d*) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

c) de prendre des mesures conservatoires;

d) de disposer sommairement des biens périssables ou susceptibles de perdre rapidement de leur valeur.

(3) Section 47 of the Act is amended by adding the following after subsection (3):

(3) L'article 47 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(4) La demande visant l'obtention de l'ordonnance prévue au paragraphe (1) est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

15. (1) Subsection 47.1(1.1) of the Act, as enacted by subsection 31(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

15. (1) Le paragraphe 47.1(1.1) de la même loi, édicté par le paragraphe 31(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Duration of appointment

(1.1) The appointment expires on the earliest of

(*a*) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor's property over which the interim receiver was appointed,

(*b*) the taking of possession by a trustee of the debtor's property over which the interim receiver was appointed, and

(*c*) court approval of the proposal.

Durée des fonctions

(1.1) Le séquestre intérimaire demeure en fonctions jusqu'à celui des événements ci-après qui se produit le premier :

a) la prise de possession par un séquestre, au sens du paragraphe 243(2), des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

b) la prise de possession par un syndic des biens du débiteur placés sous la responsabilité du séquestre intérimaire;

c) l'approbation de la proposition par le tribunal.

1992, c. 27, s. 16(1)

(2) Subsection 47.1(2) of the Act is amended by striking out the word "and" at the end of paragraph (*c*) and by replacing paragraph (*d*) with the following:

(*d*) take conservatory measures; and

(*e*) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

(3) Section 47.1 of the Act is amended by adding the following after subsection (3):

Place of filing

(4) An application under subsection (1) is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

16. (1) Paragraph 50(6)(*a*) of the Act, as enacted by subsection 34(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(*a*) a statement — or a revised cash-flow statement if a cash-flow statement had previously been filed under subsection 50.4(2) in respect of that insolvent person — (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the person making the proposal, reviewed for its reasonableness by the trustee and signed by the trustee and the person making the proposal;

1992, c. 27, s. 18(4)

(2) Paragraph 50(10)(*a*) of the Act is replaced by the following:

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

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

(ii) with the court at any time that the court may order; and

1992, c. 27, s. 18(4)

(3) Paragraph 50(10)(*b*) of the Act is replaced by the following:

1992, ch. 27, par. 16(1)

(2) L'alinéa 47.1(2)*d*) de la même loi est remplacé par ce qui suit :

d) de prendre des mesures conservatoires;

e) de disposer sommairement des biens périssables ou susceptibles de perdre rapidement de leur valeur.

(3) L'article 47.1 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Lieu du dépôt

(4) La demande visant l'obtention de l'ordonnance prévue au paragraphe (1) est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

16. (1) L'alinéa 50(6)*a*) de la même loi, édicté par le paragraphe 34(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

a) un état établi par l'auteur de la proposition — ou une version révisée d'un tel état lorsqu'on en a déjà déposé un à l'égard de la même personne insolvable aux termes du paragraphe 50.4(2) —, appelé « l'état » au présent article, portant, projections au moins mensuelles à l'appui, sur l'évolution de l'encaisse de la personne insolvable, et signé par lui et par le syndic après que celui-ci en a vérifié le caractère raisonnable;

1992, ch. 27, par. 18(4)

(2) Le sous-alinéa 50(10)*a*)(ii) de la même loi est remplacé par ce qui suit :

(ii) auprès du tribunal aux moments déterminés par ordonnance de celui-ci;

1992, ch. 27, par. 18(4)

(3) L'alinéa 50(10)*b*) de la même loi est remplacé par ce qui suit :

(*b*) send, in the prescribed manner, a report on the state of the insolvent person's business and financial affairs — containing the trustee's opinion as to the reasonableness of a decision, if any, to include in a proposal a provision that sections 95 to 101 do not apply in respect of the proposal and containing the prescribed information, if any — to the creditors and the official receiver at least 10 days before the day on which the meeting of creditors referred to in subsection 51(1) is to be held.

17. (1) Paragraph 50.4(2)(*a*) of the Act, as enacted by subsection 35(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

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

1992, c. 27, s. 19

(2) Paragraph 50.4(7)(*b*) of the English version of the Act is replaced by the following:

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

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

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

18. Section 50.6 of the Act, as enacted by section 36 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

b) d'envoyer aux créanciers et au séquestre officiel, de la manière prescrite et au moins dix jours avant la date de la tenue de l'assemblée des créanciers prévue au paragraphe 51(1), un rapport portant sur l'état des affaires et des finances de la personne insolvable et contenant notamment, en plus des renseignements prescrits, son opinion sur le caractère raisonnable de la décision d'inclure une disposition dans la proposition prévoyant la non-application à celle-ci des articles 95 à 101.

17. (1) L'alinéa 50.4(2)*a*) de la même loi, édicté par le paragraphe 35(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

a) un état établi par la personne insolvable — appelé « l'état » au présent article — portant, projections au moins mensuelles à l'appui, sur l'évolution de son encaisse, et signé par elle et par le syndic désigné dans l'avis d'intention après que celui-ci en a vérifié le caractère raisonnable;

(2) L'alinéa 50.4(7)*b*) de la version anglaise de la même loi est remplacé par ce qui suit : 1992, ch. 27, art. 19

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

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

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

18. L'article 50.6 de la même loi, édicté par l'article 36 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(*a*) or 50.4(2)(*a*), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)*a*) ou 50.4(2)*a*), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

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 property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

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

(*a*) the period during which the debtor is expected to be subject to proceedings under this Act;

(*b*) how the debtor's business and financial affairs are to be managed during the proceedings;

(*c*) whether the debtor's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

(*e*) the nature and value of the debtor's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the trustee's report referred to in paragraph 50(6)(*b*) or 50.4(2)(*b*), as the case may be.

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

g) le rapport du syndic visé aux alinéas 50(6)*b*) ou 50.4(2)*b*), selon le cas.

1992, c. 27, s. 22

19. Paragraph 54(2)(*d*) of the Act is replaced by the following:

(*d*) the proposal is deemed to be accepted by the creditors if, and only if, all classes of unsecured creditors — other than, unless the court orders otherwise, a class of creditors having equity claims — vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present, personally or by proxy, at the meeting and voting on the resolution.

1992, ch. 27, art. 22

19. L'alinéa 54(2)*d*) de la même loi est remplacé par ce qui suit :

d) la proposition est réputée acceptée par les créanciers seulement si toutes les catégories de créanciers non garantis — mis à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — votent en faveur de son acceptation par une majorité en nombre et une majorité des deux tiers en valeur des créanciers non garantis de chaque catégorie présents personnellement ou représentés par fondé de pouvoir à l'assemblée et votant sur la résolution.

20. The Act is amended by adding the following after section 54:

Class — creditors having equity claims

54.1 Despite paragraphs 54(2)(*a*) and (*b*), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

20. La même loi est modifiée par adjonction, après l'article 54, de ce qui suit :

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

54.1 Malgré les alinéas 54(2)*a*) et *b*), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

21. Section 59 of the Act is amended by adding the following after subsection (3):

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

21. L'article 59 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Modification des statuts constitutifs

(4) Le tribunal qui approuve une proposition peut ordonner la modification des statuts constitutifs du débiteur conformément à ce qui est prévu dans la proposition, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

1992, c. 27, s. 24(2)

22. Subsection 60(5) of the Act is replaced by the following:

Power of court

(5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

1992, ch. 27, par. 24(2)

22. Le paragraphe 60(5) de la même loi est remplacé par ce qui suit :

Pouvoirs du tribunal

(5) Sous réserve des paragraphes (1) à (1.7), le tribunal peut approuver ou refuser la proposition.

23. Subsection 62(2.1) of the Act, as enacted by subsection 41(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

When insolvent person is released from debt

(2.1) A proposal accepted by the creditors and approved by the court does not release the insolvent person from any particular debt or liability referred to in subsection 178(1) unless the proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the proposal.

23. Le paragraphe 62(2.1) de la même loi, édicté par le paragraphe 41(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Cas où la personne insolvable est libérée d'une dette

(2.1) Toutefois, l'acceptation d'une proposition par les créanciers et son approbation par le tribunal ne libèrent la personne insolvable d'une dette ou obligation visée au paragraphe 178(1) que si la proposition prévoit expressément la possibilité de transiger sur cette dette ou obligation et que le créancier intéressé a voté en faveur de l'acceptation de la proposition.

24. Sections 64.1 and 64.2 of the Act, as enacted by section 42 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

24. Les articles 64.1 et 64.2 de la même loi, édictés par l'article 42 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(*a*) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(*b*) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Individual

(3) In the case of an individual,

(*a*) the court may not make the order unless the individual is carrying on a business; and

(*b*) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

1992, c. 27, s. 30; 1997, c. 12, s. 41(2)

25. The definition "eligible financial contract" in subsection 65.1(8) of the Act is replaced by the following:

1992, ch. 27, art. 30; 1997, ch. 12, par. 41(2)

25. La définition de « contrat financier admissible », au paragraphe 65.1(8) de la même loi, est remplacée par ce qui suit :

"eligible financial contract" « *contrat financier admissible* »

"eligible financial contract" means an agreement of a prescribed kind;

« *contrat financier admissible* » "*eligible financial contract*"

« contrat financier admissible » Contrat d'une catégorie prescrite.

26. Section 65.11 of the Act, as enacted by section 44 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

26. L'article 65.11 de la même loi, édicté par l'article 44 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Disclaimer or resiliation of agreements

65.11 (1) Subject to subsections (3) and (4), a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) may — on notice given in the prescribed form and manner to the other parties to the agreement and the trustee — disclaim or resiliate any agreement to which the debtor is a party on the day on which the notice of intention or proposal was filed. The debtor may not give notice unless the trustee approves the proposed disclaimer or resiliation.

Résiliation de contrats

65.11 (1) Sous réserve des paragraphes (3) et (4), le débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) peut — sur préavis donné en la forme et de la manière prescrites aux autres parties au contrat et au syndic et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel il est partie à la date du dépôt de l'avis ou de la proposition.

Individuals

(2) In the case of an individual,

(*a*) they may not disclaim or resiliate an agreement under subsection (1) unless they are carrying on a business; and

(*b*) only an agreement in relation to the business may be disclaimed or resiliated.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut effectuer la résiliation que s'il exploite une entreprise et, le cas échéant, seuls les contrats relatifs à l'entreprise peuvent être résiliés.

Court may prohibit disclaimer or resiliation

(3) Within 15 days after the day on which the debtor gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Contestation

(3) Dans les quinze jours suivant la date à laquelle le débiteur donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au syndic, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Court ordered disclaimer or resiliation

(4) If the trustee does not approve the proposed disclaimer or resiliation, the debtor may, on notice to the other parties to the agreement and the trustee, apply to a court for an order that the agreement be disclaimed or resiliated.

Absence d'acquiescement du syndic

(4) Si le syndic n'acquiesce pas au projet de résiliation, le débiteur peut, sur préavis aux autres parties au contrat et au syndic, demander au tribunal d'ordonner la résiliation du contrat.

Factors to be considered

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

(*a*) whether the trustee approved the proposed disclaimer or resiliation;

(*b*) whether the disclaimer or resiliation would enhance the prospects of a viable proposal being made in respect of the debtor; and

(*c*) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du syndic au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la présentation d'une proposition viable à l'égard du débiteur;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Date of disclaimer or resiliation

(6) An agreement is disclaimed or resiliated

(*a*) if no application is made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1);

Résiliation

(6) Le contrat est résilié :

a) trente jours après la date à laquelle le débiteur donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (3);

(*b*) if the court dismisses the application made under subsection (3), on the day that is 30 days after the day on which the debtor gives notice under subsection (1) or any later day fixed by the court; or

(*c*) if the court orders that the agreement is disclaimed or resiliated under subsection (4), on the day that is 30 days after the day on which the debtor gives notice or any later day fixed by the court.

b) trente jours après la date à laquelle le débiteur donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (3);

c) trente jours après la date à laquelle le débiteur donne le préavis mentionné au paragraphe (4) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Intellectual property

(7) If the debtor has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Propriété intellectuelle

(7) Si le débiteur a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Loss related to disclaimer or resiliation

(8) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Pertes découlant de la résiliation

(8) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Reasons for disclaimer or resiliation

(9) A debtor shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Motifs de la résiliation

(9) Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, le débiteur lui expose par écrit les motifs de son projet de résiliation.

Exceptions

(10) This section does not apply in respect of

(*a*) an eligible financial contract within the meaning of subsection 65.1(8);

(*b*) a lease referred to in subsection 65.2(1);

(*c*) a collective agreement;

(*d*) a financing agreement if the debtor is the borrower; or

(*e*) a lease of real property or of an immovable if the debtor is the lessor.

Exceptions

(10) Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles au sens du paragraphe 65.1(8);

b) les baux visés au paragraphe 65.2(1);

c) les conventions collectives;

d) les accords de financement au titre desquels le débiteur est l'emprunteur;

e) les baux d'immeubles ou de biens réels au titre desquels le débiteur est le locateur.

27. Section 65.13 of the Act, as enacted by section 44 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

27. L'article 65.13 de la même loi, édicté par l'article 44 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Restriction on disposition of assets

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

Individuals

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

Notice to secured creditors

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

Factors to be considered

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

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

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

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

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

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

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

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

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

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

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

Related persons

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

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

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

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

Assets may be disposed of free and clear

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

Restriction — employers

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

28. (1) Subsection 66(1.1) of the Act, as enacted by section 45 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

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

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas *a*) ou *b*).

Autorisation de disposer des actifs en les libérant de restrictions

(7) Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(8) Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)*a*) et (1.5)*a*) s'il avait approuvé la proposition.

28. (1) Le paragraphe 66(1.1) de la même loi, édicté par l'article 45 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Cession

(1.1) Pour l'application du paragraphe (1), le tribunal, pour décider s'il rend l'ordonnance visée au paragraphe 84.1(1), prend en considé-

addition to the factors referred to in subsection 84.1(3), whether the trustee approved the proposed assignment.

ration, en plus des facteurs visés au paragraphe 84.1(3), l'acquiescement du syndic au projet de cession, le cas échéant.

(2) Subsection 66(1.3) of the Act, as enacted by section 45 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(2) Le paragraphe 66(1.3) de la même loi, édicté par l'article 45 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Examination by official receiver

(1.3) For the purposes of subsection (1), the examination under oath by the official receiver under subsection 161(1) is to be held — on the attendance of the person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) — before the proposal is approved by the court or the person becomes bankrupt.

Interrogatoire par le séquestre officiel

(1.3) Pour l'application du paragraphe (1), l'interrogatoire prévu au paragraphe 161(1) a lieu lorsque la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) se présente devant le séquestre officiel, avant l'approbation de la proposition par le tribunal ou sa mise en faillite.

Division to be applied conjointly with other Acts

(1.4) The provisions of this Division may be applied together with the provisions of an Act of Parliament, or of the legislature of a province, that authorizes or provides for the sanction of compromises or arrangements between a corporation and its shareholders or any class of its shareholders.

Application concurrente

(1.4) Les dispositions de la présente section peuvent être appliquées conjointement avec celles de toute loi fédérale ou provinciale autorisant ou prévoyant l'homologation de transactions ou d'arrangements entre une personne morale et ses actionnaires ou une catégorie de ceux-ci.

29. Subsection 66.28(2.1) of the Act, as enacted by section 51 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

29. Le paragraphe 66.28(2.1) de la même loi, édicté par l'article 51 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

When consumer debtor is released from debt

(2.1) A consumer proposal accepted, or deemed accepted, by the creditors and approved, or deemed approved, by the court does not release the consumer debtor from any particular debt or liability referred to in subsection 178(1) unless the consumer proposal explicitly provides for the compromise of that debt or liability and the creditor in relation to that debt or liability voted for the acceptance of the consumer proposal.

Cas où la personne insolvable est libérée d'une dette

(2.1) Toutefois, l'acceptation effective ou présumée d'une proposition par les créanciers et son approbation effective ou présumée par le tribunal ne libèrent la personne insolvable d'une dette ou obligation visée au paragraphe 178(1) que si la proposition prévoit expressément la possibilité de transiger sur cette dette ou obligation et que le créancier intéressé a voté en faveur de l'acceptation de la proposition.

30. Subsections 66.31(2) to (10) of the Act, as enacted by section 52 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

30. Les paragraphes 66.31(2) à (10) de la même loi, édictés par l'article 52 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Deemed annulment — amendment withdrawn or refused

(2) If an amendment to a consumer proposal filed before the deemed annulment of the consumer proposal under subsection (1) is withdrawn or refused by the creditors or the court, the consumer proposal is deemed to be annulled at the time that the amendment is withdrawn or refused.

Annulation présumée — retrait ou rejet d'une modification

(2) La proposition est réputée annulée dès le retrait ou le rejet, par les créanciers ou le tribunal, de toute modification qui lui est apportée et dont le texte est déposé avant l'annulation présumée visée au paragraphe (1).

Duties of administrator in relation to deemed annulment

(3) Without delay after a consumer proposal is deemed to be annulled, the administrator shall

(*a*) file with the official receiver a report in the prescribed form in relation to the deemed annulment; and

(*b*) send a notice to the creditors informing them of the deemed annulment.

Avis et rapport

(3) En cas d'annulation présumée de la proposition, l'administrateur doit, sans délai, en informer par écrit les créanciers et en faire rapport, en la forme prescrite, au séquestre officiel.

Effects of deemed annulment — consumer proposal made by a bankrupt

(4) If a consumer proposal made by a bankrupt is deemed to be annulled,

(*a*) the consumer debtor is deemed to have made an assignment on the day on which the consumer proposal is deemed to be annulled;

(*b*) the trustee who is the administrator of the consumer proposal shall, within five days after the day on which the consumer proposal is deemed to be annulled, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, despite section 14, affirm the appointment of the trustee or appoint another trustee in lieu of that trustee; and

(*c*) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed annulment and the official receiver shall, without delay, issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49.

Effets de l'annulation présumée de la proposition faite par un failli

(4) Dès l'annulation présumée de la proposition faite par un failli :

a) le débiteur consommateur est réputé avoir fait cession de ses biens à la date de l'annulation présumée;

b) le syndic agissant dans le cadre de la proposition convoque, dans les cinq jours qui suivent la date de l'annulation présumée, l'assemblée des créanciers prévue à l'article 102, à laquelle les créanciers peuvent, par résolution ordinaire et malgré l'article 14, confirmer sa nomination ou lui substituer un autre syndic;

c) le syndic en fait rapport sans délai, en la forme prescrite, au séquestre officiel, qui doit alors délivrer, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet que la cession faite au titre de l'article 49.

Validity of things done before deemed annulment

(5) A deemed annulment of a consumer proposal does not prejudice the validity of any sale or disposition of property or payment duly made, or anything duly done under or in pursuance of the consumer proposal and, despite the deemed annulment, a guarantee given under the consumer proposal remains in full force and effect in accordance with its terms.

Validité des mesures prises avant l'annulation présumée

(5) L'annulation présumée est sans effet sur la validité des mesures — paiement, vente ou autre forme de disposition — prises en vertu de la proposition ou conformément à celle-ci, et toute garantie donnée sous son régime conserve son plein effet conformément à ses conditions.

Notice of possibility of consumer proposal being automatically revived

(6) In the case of a deemed annulment of a consumer proposal made by a person other than a bankrupt, if the administrator considers it appropriate to do so in the circumstances, he or she may, with notice to the official receiver, send to the creditors — within 30 days, or any other number of days that is prescribed, after the day on which the consumer proposal was deemed to be annulled — a notice in the

Avis du rétablissement d'office de la proposition

(6) S'il l'estime indiqué dans les circonstances, l'administrateur peut, sur avis au séquestre officiel et dans les trente jours suivant la date de l'annulation présumée de la proposition faite par un débiteur consommateur autre qu'un failli — ou dans tout autre délai prescrit —, envoyer aux créanciers un avis en la forme prescrite les informant que la proposition sera rétablie d'office soixante jours après la date

prescribed form informing them that the consumer proposal will be automatically revived 60 days, or any other number of days that is prescribed, after the day on which it was deemed to be annulled unless one of them files with the administrator, in the prescribed manner, a notice of objection to the revival.

d'annulation — ou dans tout autre délai prescrit — à moins que l'un d'eux ne l'avise, de la manière prescrite, qu'il s'y oppose.

Automatic revival

(7) If the notice is sent by the administrator and no notice of objection is filed during the period referred to in subsection (6), the consumer proposal is automatically revived on the expiry of that period.

Rétablissement d'office

(7) Si l'administrateur envoie l'avis prévu au paragraphe (6) et si, dans le délai prévu à ce paragraphe, aucun avis d'opposition n'a été déposé, la proposition est rétablie d'office à l'expiration de ce délai.

Notice if no automatic revival

(8) If a notice of objection is filed during the period referred to in subsection (6), the administrator is to send, without delay, to the official receiver and to each creditor a notice in the prescribed form informing them that the consumer proposal is not going to be automatically revived on the expiry of that period.

Avis : non-rétablissement d'office

(8) Toutefois, si un avis d'opposition est déposé dans le délai prévu au paragraphe (6), l'administrateur envoie sans délai au séquestre officiel et à chaque créancier un avis en la forme prescrite les informant que la proposition ne sera pas rétablie d'office à l'expiration de ce délai.

Administrator may apply to court to revive consumer proposal

(9) The administrator may at any time apply to the court, with notice to the official receiver and the creditors, for an order reviving any consumer proposal of a consumer debtor who is not a bankrupt that was deemed to be annulled, and the court, if it considers it appropriate to do so in the circumstances, may make an order reviving the consumer proposal, on any terms that the court considers appropriate.

Pouvoir du tribunal de rétablir la proposition

(9) L'administrateur peut, en tout temps, demander au tribunal, sur préavis aux créanciers et au séquestre officiel, d'ordonner le rétablissement de la proposition présumée annulée d'un débiteur consommateur qui n'est pas en faillite; le cas échéant, le tribunal peut faire droit à la demande, s'il l'estime opportun dans les circonstances, aux conditions qu'il juge indiquées.

Duty of administrator if consumer proposal is revived

(10) Without delay after a consumer proposal is revived, the administrator shall

(*a*) file with the official receiver a report in the prescribed form in relation to the revival; and

(*b*) send a notice to the creditors informing them of the revival.

Avis et rapport

(10) En cas de rétablissement de la proposition, l'administrateur doit, sans délai, en informer par écrit les créanciers et en faire rapport, en la forme prescrite, au séquestre officiel.

31. Section 66.34 of the Act is amended by adding the following after subsection (6):

31. L'article 66.34 de la même loi est modifié par adjonction, après le paragraphe (6), de ce qui suit :

Eligible financial contracts

(7) Subsection (1) does not apply in respect of an eligible financial contract.

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles.

Existing eligible financial contracts

(8) For greater certainty, if an eligible financial contract, entered into before a consumer proposal is filed, is terminated on or after the filing of the proposal, the setting off or compensation of obligations — between the

Précision

(8) Il demeure entendu que, si un contrat financier admissible conclu avant le dépôt d'une proposition de consommateur est résilié lors de ce dépôt ou par suite de celui-ci, il est permis d'effectuer la compensation entre les obligations

consumer debtor and the other parties to the eligible financial contract, in accordance with its provisions — is permitted and, if net termination values determined in accordance with the eligible financial contract are owed by the consumer debtor to another party to the eligible financial contract, the other party is deemed, for the purposes of subsection 69.2(1), to be a creditor of the consumer debtor with a claim provable in bankruptcy in respect of the net termination values.

Definitions

(9) In this section, "eligible financial contract" and "net termination value" have the same meanings as in subsection 65.1(8).

32. (1) Paragraphs 67(1)(*b*) to (*b.3*) of the same statute, as enacted by subsection 57(1) of Chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(*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;

(*b.1*) goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (*a*) or (*b*);

(*b.2*) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (*a*) or (*b*); or

(*b.3*) without restricting the generality of paragraph (*b*), property in a registered retirement savings plan or a registered retirement income fund, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy,

(2) Paragraph 67(1)(*c*) of the Act, as enacted by subsection 57(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

du débiteur consommateur et celles des autres parties au contrat en conformité avec les stipulations de celui-ci. Si, après détermination des valeurs nettes dues à la date de résiliation conformément aux conditions du contrat, le débiteur consommateur est débiteur d'une autre partie au contrat, celle-ci est réputée, pour l'application du paragraphe 69.2(1), être créancière du débiteur consommateur et a une réclamation prouvable en matière de faillite relativement à ces valeurs nettes.

Définitions

(9) Pour l'application du présent article, « contrat financier admissible » et « valeurs nettes dues à la date de résiliation » s'entendent au sens du paragraphe 65.1(8).

32. (1) Les alinéas 67(1)*b*) à *b.3*) de la même loi, édictés par le paragraphe 57(1) du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

b) les biens qui, selon le droit applicable dans la province dans laquelle ils sont situés et où réside le failli, ne peuvent faire l'objet d'une mesure d'exécution ou de saisie contre celui-ci;

b.1) dans les circonstances prescrites, les paiements qui sont faits au failli au titre de crédits de taxe sur les produits et services et qui ne sont pas des biens visés aux alinéas *a*) ou *b*);

b.2) dans les circonstances prescrites, les paiements prescrits qui sont faits au failli relativement aux besoins essentiels de personnes physiques et qui ne sont pas des biens visés aux alinéas *a*) ou *b*);

b.3) sans restreindre la portée générale de l'alinéa *b*), les biens détenus dans un régime enregistré d'épargne-retraite ou un fonds enregistré de revenu de retraite, au sens de la *Loi de l'impôt sur le revenu*, ou dans tout régime prescrit, à l'exception des cotisations au régime ou au fonds effectuées au cours des douze mois précédant la date de la faillite,

(2) L'alinéa 67(1)*c*) de la même loi, édicté par le paragraphe 57(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

(*c*) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that

(i) is not subject to the operation of this Act, or

(ii) in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the *Family Orders and Agreements Enforcement Assistance Act*, is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and

33. (1) The portion of the definition "total income" in subsection 68(2) of the Act before paragraph (*b*), as enacted by subsection 58(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"total income" "total income"

(*a*) includes, despite paragraphs 67(1)(*b*) and (*b.3*), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but

(2) The definition "surplus income" in subsection 68(2) of the English version of the Act, as enacted by subsection 58(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"surplus income" "surplus income" means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1).

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, y compris les remboursements qui lui sont dus au titre de la *Loi de l'impôt sur le revenu* relativement à l'année civile — ou à l'exercice lorsque celui-ci diffère de l'année civile — au cours de laquelle il a fait faillite, mais à l'exclusion de la partie de ces remboursements qui :

(i) soit sont des sommes soustraites à l'application de la présente loi,

(ii) soit sont des sommes qui lui sont dues et qui sont saisissables en vertu d'un bref de saisie-arrêt signifié à Sa Majesté en application de la *Loi d'aide à l'exécution des ordonnances et des ententes familiales* dans lequel il est nommé comme débiteur;

33. (1) La définition de « revenu total », au paragraphe 68(2) de la même loi, édictée par le paragraphe 58(1) du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

« revenu total » Malgré les alinéas 67(1)*b*) et *b.3*), revenus de toute nature ou source gagnés ou reçus par le failli entre la date de sa faillite et celle de sa libération, y compris les sommes reçues entre ces dates à titre de dommages-intérêts pour congédiement abusif ou de règlement en matière de parité salariale, ou en vertu d'une loi fédérale ou provinciale relative aux accidents du travail. Ne sont pas visées par la présente définition les sommes inattendues que le failli reçoit entre ces dates, notamment par donation, legs ou succession. « revenu total » "*total income*"

(2) La définition de « surplus income », au paragraphe 68(2) de la version anglaise de la même loi, édictée par le paragraphe 58(1) du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

"surplus income" means the portion of a bankrupt individual's total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (1). "surplus income" « *revenu excédentaire* »

(3) Subsection 68(4) of the French version of the Act, as enacted by subsection 58(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(3) Le paragraphe 68(4) de la version française de la même loi, édicté par le paragraphe 58(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Obligations du syndic par suite de la décision

(4) Il avise, de la manière prescrite, le séquestre officiel et les créanciers qui en font la demande de sa conclusion et, s'il conclut que le failli a un revenu excédentaire, il fixe, conformément aux normes applicables, la somme que celui-ci doit verser à l'actif de la faillite et prend les mesures indiquées pour qu'il s'exécute.

Obligations du syndic par suite de la décision

(4) Il avise, de la manière prescrite, le séquestre officiel et les créanciers qui en font la demande de sa conclusion et, s'il conclut que le failli a un revenu excédentaire, il fixe, conformément aux normes applicables, la somme que celui-ci doit verser à l'actif de la faillite et prend les mesures indiquées pour qu'il s'exécute.

(4) Subsection 68(7) of the English version of the Act, as enacted by subsection 58(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(4) Le paragraphe 68(7) de la version anglaise de la même loi, édicté par le paragraphe 58(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Creditor may request mediation

(7) On a creditor's request made within 30 days after the day on which the trustee informed the creditor of the amount fixed under subsection (4) or (5.1), the trustee shall, within five days after the day on which the 30-day period ends, send to the official receiver a request, in the prescribed form, that the matter of the amount that the bankrupt is required to pay be determined by mediation and send a copy of the request to the bankrupt and the creditor.

Creditor may request mediation

(7) On a creditor's request made within 30 days after the day on which the trustee informed the creditor of the amount fixed under subsection (4) or (5.1), the trustee shall, within five days after the day on which the 30-day period ends, send to the official receiver a request, in the prescribed form, that the matter of the amount that the bankrupt is required to pay be determined by mediation and send a copy of the request to the bankrupt and the creditor.

(5) Subsections 68(14) and (15) of the Act, as enacted by subsection 58(4) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(5) Les paragraphes 68(14) et (15) de la même loi, édictés par le paragraphe 58(4) du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Application is a proceeding

(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

Présomption

(14) La demande présentée au tribunal au titre du paragraphe (10) constitue, pour l'application de l'article 38, une procédure à l'avantage de l'actif de la faillite.

Property included for enforcement purposes

(15) For the purpose of this section, a requirement that a bankrupt pay an amount to the estate is enforceable against the bankrupt's total income.

Biens pouvant faire l'objet d'une exécution

(15) Pour l'application du présent article, la somme à verser à l'actif de la faillite peut être recouvrée par voie d'exécution contre le revenu total du failli.

When obligation to pay ceases

(16) If an opposition to the automatic discharge of a bankrupt individual who is required to pay an amount to the estate is filed, the bankrupt's obligation under this section ceases on the day on which the bankrupt would have been automatically discharged had the opposition not been filed, but nothing in this

Cessation des versements

(16) L'obligation du failli qui est une personne physique de faire des versements à l'actif de la faillite au titre du présent article cesse, en cas d'opposition à sa libération d'office, le jour où il aurait été libéré n'eût été l'avis d'opposi-

subsection precludes the court from determining that the bankrupt is required to pay to the estate an amount that the court considers appropriate.

tion, rien n'empêchant toutefois le tribunal de reconduire l'obligation pour la somme qu'il estime indiquée.

1992, c. 27, s. 36(1)

34. The portion of subsection 69(1) of the Act before paragraph (*a*) is replaced by the following:

34. Le passage du paragraphe 69(1) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

1992, ch. 27, par. 36(1)

Stay of proceedings — notice of intention

69. (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

69. (1) Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :

Suspension des procédures en cas d'avis d'intention

1992, c. 27, s. 36(1); 1997, c. 12, s. 63(1)

35. The portion of subsection 69.1(1) of the Act before paragraph (*a*) is replaced by the following:

35. Le passage du paragraphe 69.1(1) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

1992, ch. 27, par. 36(1); 1997, ch. 12, par. 63(1)

Stay of proceedings — Division I proposals

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

69.1 (1) Sous réserve des paragraphes (2) à (6) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt d'une proposition visant une personne insolvable et :

Suspension des procédures en cas de dépôt d'une proposition

36. Subsection 69.3(1) of the French version of the Act, as enacted by subsection 62(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

36. Le paragraphe 69.3(1) de la version française de la même loi, édicté par le paragraphe 62(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Suspension des procédures en cas de faillite

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

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

Suspension des procédures en cas de faillite

37. The Act is amended by adding the following after section 69.5:

37. La même loi est modifiée par adjonction, après l'article 69.5, de ce qui suit :

Meaning of "regulatory body"

69.6 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

69.6 (1) Au présent article, « organisme administratif » s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par les Règles générales.

Définition de « organisme administratif »

Regulatory bodies — sections 69 and 69.1

(2) Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(*a*) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and

(*b*) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the insolvent person and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

38. Sections 81.3 and 81.4 of the Act, as enacted by section 67 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of $2,000 — less any amount paid for those services by the

Organisme administratif — suspensions prévues aux articles 69 ou 69.1

(2) Sous réserve du paragraphe (3), les suspensions prévues aux articles 69 ou 69.1 ne portent aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la personne insolvable par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la personne insolvable et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de proposition viable à l'égard de la personne insolvable si ce paragraphe s'appliquait;

b) la suspension demandée au titre des articles 69 ou 69.1 n'est pas contraire à l'intérêt public.

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer par ordonnance, sur demande de la personne insolvable et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

38. Les articles 81.3 et 81.4 de la même loi, édictés par l'article 67 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Sûreté relative aux salaires non payés — faillite

81.3 (1) La réclamation de tout commis, préposé, voyageur de commerce, journalier ou ouvrier à qui le failli doit des gages, salaires, commissions ou autre rémunération pour services rendus au cours de la période commençant à la date précédant de six mois la date de l'ouverture de la faillite et se terminant à la date de la faillite est garantie, à compter de cette date et jusqu'à concurrence de deux mille dollars, moins toute somme que le syndic ou un séquestre peut lui avoir versée pour ces

trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

services, par une sûreté portant sur les actifs à court terme appartenant au failli à la date de la faillite.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

Commissions

(2) Pour l'application du paragraphe (1), les commissions payables sur expédition, livraison ou paiement de marchandises sont réputées, dans le cas où celles-ci ont été expédiées, livrées ou payées pendant la période visée à ce paragraphe, avoir été gagnées pendant cette période.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of $1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

Sûreté relative aux déboursés non payés

(3) La réclamation de tout voyageur de commerce à qui le failli est redevable des sommes qu'il a régulièrement déboursées pour son entreprise ou relativement à celle-ci au cours de la période visée au paragraphe (1) est garantie, à compter de la date de la faillite et jusqu'à concurrence de mille dollars, moins toute somme que le syndic ou un séquestre peut lui avoir versée à ce titre, par une sûreté portant sur les actifs à court terme appartenant au failli à cette date.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

Priorité

(4) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — quelle que soit la date à laquelle ils ont pris naissance — grevant les actifs à court terme en cause, à l'exception des droits prévus aux articles 81.1 et 81.2 et des sommes mentionnées au paragraphe 67(3) qui sont réputées être détenues en fiducie.

Liability of trustee

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

Responsabilité du syndic

(5) Le syndic qui dispose d'actifs à court terme grevés par la sûreté est responsable de la réclamation du commis, du préposé, du voyageur de commerce, du journalier ou de l'ouvrier jusqu'à concurrence du produit de la disposition, et est subrogé dans tous leurs droits jusqu'à concurrence des sommes ainsi payées.

Claims of officers and directors

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

Réclamations des dirigeants et administrateurs

(6) Aucun dirigeant ou administrateur du failli n'a droit à la garantie prévue au présent article.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances — including the

Lien de dépendance

(7) La personne qui, alors qu'elle avait avec lui un lien de dépendance, a conclu une transaction avec un failli n'a pas droit à la garantie prévue au présent article pour toute réclamation découlant de cette transaction, sauf si, compte tenu des circonstances, notamment la

remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

rétribution, les conditions de la prestation, ainsi que la durée, la nature et l'importance des services rendus, le syndic peut raisonnablement conclure que la transaction en cause est en substance pareille à celle qu'elle aurait conclue si elle n'avait pas eu de lien de dépendance avec le failli.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

(8) Toute réclamation visée au présent article est prouvée par la remise, au syndic, d'une preuve de la réclamation établie en la forme prescrite.

Remise de preuve

Definitions

(9) The following definitions apply in this section.

(9) Les définitions qui suivent s'appliquent au présent article.

Définitions

"compensation" « *rémunération* »

"compensation" includes vacation pay but does not include termination or severance pay.

« rémunération » S'entend notamment de l'indemnité de vacances, mais non de l'indemnité de départ ou de cessation d'emploi.

« rémunération » "*compensation*"

"receiver" « *séquestre* »

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

« séquestre » Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des paragraphes 46(1), 47(1) ou 47.1(1).

« séquestre » "*receiver*"

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

81.4 (1) La réclamation de tout commis, préposé, voyageur de commerce, journalier ou ouvrier à qui la personne faisant l'objet d'une mise sous séquestre doit des gages, salaires, commissions ou autre rémunération pour services rendus au cours des six mois précédant la date à laquelle le séquestre entre en fonctions est garantie, à compter de cette date et jusqu'à concurrence de deux mille dollars, moins toute somme qu'un séquestre ou syndic peut lui avoir versée pour ces services, par une sûreté portant sur les actifs à court terme en cause qui sont en la possession ou sous la responsabilité du séquestre en fonctions.

Sûreté relative aux salaires non payés — mise sous séquestre

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

(2) Pour l'application du paragraphe (1), les commissions payables sur expédition, livraison ou paiement de marchandises sont réputées, dans le cas où celles-ci ont été expédiées, livrées ou payées pendant la période visée à ce paragraphe, avoir été gagnées pendant cette période.

Commissions

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of $1,000

(3) La réclamation de tout voyageur de commerce à qui la personne faisant l'objet d'une mise sous séquestre est redevable des sommes qu'il a régulièrement déboursées pour son entreprise ou relativement à celle-ci au cours des six mois précédant la date à laquelle le séquestre entre en fonctions est garantie, à

Sûreté relative aux débours non payés

— less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

compter de cette date et jusqu'à concurrence de mille dollars, moins toute somme qu'un séquestre ou syndic peut lui avoir versée à ce titre, par une sûreté portant sur les actifs à court terme en cause qui sont en la possession ou sous la responsabilité du séquestre en fonctions.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Priorité

(4) La sûreté visée au présent article a priorité sur tout autre droit, sûreté, charge ou réclamation — quelle que soit la date à laquelle ils ont pris naissance — grevant les actifs à court terme en cause, à l'exception des droits prévus aux articles 81.1 et 81.2.

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Responsabilité du séquestre

(5) Le séquestre qui prend possession ou dispose des actifs à court terme grevés par la sûreté est responsable de la réclamation du commis, du préposé, du voyageur de commerce, du journalier ou de l'ouvrier jusqu'à concurrence du produit de la disposition, et est subrogé dans tous leurs droits jusqu'à concurrence des sommes ainsi payées.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Réclamations des dirigeants et administrateurs

(6) Aucun dirigeant ou administrateur de la personne faisant l'objet d'une mise sous séquestre n'a droit à la garantie prévue au présent article.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Lien de dépendance

(7) La personne qui, alors qu'elle avait avec elle un lien de dépendance, a conclu une transaction avec une personne faisant l'objet d'une mise sous séquestre n'a pas droit à la garantie prévue au présent article pour toute réclamation découlant de cette transaction, sauf si, compte tenu des circonstances, notamment la rétribution, les conditions de la prestation, ainsi que la durée, la nature et l'importance des services rendus, le syndic peut raisonnablement conclure que la transaction en cause est en substance pareille à celle qu'elle aurait conclue si elle n'avait pas eu de lien de dépendance avec la personne mise sous séquestre.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Remise de preuve

(8) Toute réclamation visée au présent article est prouvée par la remise, au séquestre, d'une preuve de la réclamation établie en la forme prescrite.

Definitions

(9) The following definitions apply in this section.

Définitions

(9) Les définitions qui suivent s'appliquent au présent article.

"compensation" «*rémunération*»

"compensation" includes vacation pay but does not include termination or severance pay.

"person who is subject to a receivership" «*personne faisant l'objet d'une mise sous séquestre*»

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"receiver" «*séquestre*»

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

39. (1) The definition "receiver" in subsection 81.6(4) of the Act, as enacted by section 67 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"receiver" «*séquestre*»

"receiver" means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

(2) The definition "person who is subject to a receivership" in subsection 81.6(4) of the English version of the Act, as enacted by section 67 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"person who is subject to a receivership" «*personne faisant l'objet d'une mise sous séquestre*»

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

40. Sections 84.1 and 84.2 of the Act, as enacted by section 68 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

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

« personne faisant l'objet d'une mise sous séquestre » Personne dont un bien quelconque est en la possession ou sous la responsabilité d'un séquestre.

« personne faisant l'objet d'une mise sous séquestre » "*person who is subject to a receivership*"

« rémunération » S'entend notamment de l'indemnité de vacances, mais non de l'indemnité de départ ou de cessation d'emploi.

« rémunération » "*compensation*"

« séquestre » Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des paragraphes 46(1), 47(1) ou 47.1(1).

« séquestre » "*receiver*"

39. (1) La définition de « séquestre », au paragraphe 81.6(4) de la même loi, édictée par l'article 67 du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

« séquestre » Séquestre au sens du paragraphe 243(2) ou séquestre intérimaire nommé en vertu des paragraphes 46(1), 47(1) ou 47.1(1).

« séquestre » "*receiver*"

(2) La définition de « person who is subject to a receivership », au paragraphe 81.6(4) de la version anglaise de la même loi, édictée par l'article 67 du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

"person who is subject to a receivership" means a person any of whose property is in the possession or under the control of a receiver.

"person who is subject to a receivership" «*personne faisant l'objet d'une mise sous séquestre*»

40. Les articles 84.1 et 84.2 de la même loi, édictés par l'article 68 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Cessions

84.1 (1) Sur demande du syndic et sur préavis à toutes les parties à un contrat, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations du failli découlant du contrat.

Personne physique

(2) Toutefois, lorsque le failli est une personne physique, la demande de cession ne peut être présentée que si celui-ci exploite une entreprise et, le cas échéant, seuls les droits et obligations découlant de contrats relatifs à l'entreprise peuvent être cédés.

(*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 within the meaning of subsection 65.1(8); or

(*c*) a collective agreement.

Exceptions

(3) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date de la faillite ou par la suite, soit d'un contrat financier admissible au sens du paragraphe 65.1(8), soit d'une convention collective.

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.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

b) l'opportunité de lui céder les droits et obligations.

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.

Restriction

(5) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la personne a fait faillite, est insolvable ou ne s'est pas conformée à une obligation non pécuniaire.

Copy of order

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

Copie de l'ordonnance

(6) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

Certain rights limited

84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

Limitation de certains droits

84.2 (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec un failli qui est une personne physique, ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif qu'il a fait faillite ou est insolvable.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, the lease by reason only of the bankruptcy or insolvency or of the fact that the bankrupt has not paid rent in respect of any period before the time of the bankruptcy.

Baux

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où le failli n'a pas payé son loyer à l'égard d'une période antérieure au moment de la faillite.

Public utilities

(3) No public utility may discontinue service to a bankrupt individual by reason only of the individual's bankruptcy or insolvency or of the

Entreprise de service public

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'un failli qui est une personne physique au seul motif qu'il a fait faillite, qu'il

fact that the bankrupt individual has not paid for services rendered or material provided before the time of the bankruptcy.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the time of the bankruptcy; or

(*b*) requiring the further advance of money or credit.

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Eligible financial contracts

(7) Subsection (1)

(*a*) does not apply in respect of an eligible financial contract within the meaning of subsection 65.1(8); and

(*b*) does not prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

41. The heading "PREFERENCES" of the Act, as enacted by section 71 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

PREFERENCES AND TRANSFERS AT UNDERVALUE

1997, c. 12, s. 78(2); 2004, c. 25, s. 56

42. Subsections 95(1) to (2.1) of the Act are replaced by the following:

est insolvable ou qu'il n'a pas payé certains services ou du matériel fournis avant le moment de la faillite.

Exceptions

(4) Le présent article n'a pas pour effet :

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après le moment de la faillite;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Pouvoirs du tribunal

(6) À la demande de l'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer le présent article inapplicable, ou applicable uniquement dans la mesure qu'il précise, s'il est établi par le demandeur que son application lui causerait vraisemblablement de sérieuses difficultés financières.

Contrats financiers admissibles

(7) Le paragraphe (1) :

a) ne s'applique pas aux contrats financiers admissibles au sens du paragraphe 65.1(8);

b) n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une personne insolvable, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

41. L'intertitre « TRAITEMENT PRÉFÉRENTIEL » de la même loi, édicté par l'article 71 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

TRAITEMENTS PRÉFÉRENTIELS ET OPÉRATIONS SOUS-ÉVALUÉES

1997, ch. 12, par. 78(2); 2004, ch. 25, art. 56

42. Les paragraphes 95(1) à (2.1) de la même loi sont remplacés par ce qui suit :

Preferences

95. (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(*a*) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(*b*) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Traitements préférentiels

95. (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

b) en faveur d'un créancier avec qui elle a un lien de dépendance ou d'une personne en fiducie pour ce créancier, et ayant eu pour effet de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de douze mois la date de l'ouverture de la faillite et se terminant à la date de la faillite.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(*a*) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Préférence — présomption

(2) Lorsque le transfert, l'affectation, le paiement, l'obligation ou l'instance judiciaire visé à l'alinéa (1)*a*) a pour effet de procurer une préférence, il est réputé, sauf preuve contraire, avoir été fait, contracté ou intenté, selon le cas, en vue d'en procurer une, et ce même s'il l'a été sous la contrainte, la preuve de celle-ci n'étant pas admissible en l'occurrence.

Exception — margin deposits

(2.1) In the case of a margin deposit made by a clearing member with a clearing house, the clearing member and the clearing house are deemed to be dealing with each other at arm's length and subsection (2) does not apply.

Exception

(2.1) S'agissant d'un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre, le membre et la chambre sont réputés n'avoir aucun lien de dépendance et le paragraphe (2) ne s'applique pas.

43. Sections 96 and 96.1 of the Act, as enacted by section 73 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

43. Les articles 96 et 96.1 de la même loi, édictés par l'article 73 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Transfer at undervalue

96. (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(*a*) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(*b*) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the

Opération sous-évaluée

96. (1) Sur demande du syndic, le tribunal peut, s'il estime que le débiteur a conclu une opération sous-évaluée, déclarer cette opération inopposable au syndic ou ordonner que le débiteur verse à l'actif, seul ou avec l'ensemble ou certaines des parties ou personnes intéressées par l'opération, la différence entre la valeur de la contrepartie qu'il a reçue et la valeur de celle qu'il a donnée, dans l'un ou l'autre des cas suivants :

a) l'opération a été effectuée avec une personne sans lien de dépendance avec le débiteur et les conditions suivantes sont réunies :

(i) l'opération a eu lieu au cours de la période commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) le débiteur était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(iii) le débiteur avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement;

b) l'opération a été effectuée avec une personne qui a un lien de dépendance avec le débiteur et elle a eu lieu au cours de la période :

(i) soit commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) soit commençant à la date précédant de cinq ans la date de l'ouverture de la faillite et se terminant à la date qui précède d'un jour la date du début de la période visée au sous-alinéa (i) dans le cas où le débiteur :

(A) ou bien était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(B) ou bien avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement.

Établissement des valeurs

(2) Lorsqu'il présente la demande prévue au présent article, le syndic doit déclarer quelle était à son avis la juste valeur marchande des biens ou services ainsi que la valeur de la

trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

contrepartie réellement donnée ou reçue par le débiteur, et l'évaluation faite par le syndic est, sauf preuve contraire, celle sur laquelle le tribunal se fonde pour rendre une décision en conformité avec le présent article.

Meaning of "person who is privy"

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

(3) Au présent article, « personne intéressée » s'entend de toute personne qui est liée à une partie à l'opération et qui, de façon directe ou indirecte, soit en bénéficie elle-même, soit en fait bénéficier autrui.

Définition de « personne intéressée »

1992, c. 27, s. 42(1); 2004, c. 25, s. 62

44. Sections 101.1 and 101.2 of the Act are replaced by the following:

44. Les articles 101.1 et 101.2 de la même loi sont remplacés par ce qui suit :

1992, ch. 27, par. 42(1); 2004, ch. 25, art. 62

Application of sections 95 to 101

101.1 (1) Sections 95 to 101 apply, with any modifications that the circumstances require, to a proposal made under Division I of Part III unless the proposal provides otherwise.

101.1 (1) Les articles 95 à 101 s'appliquent, avec les adaptations nécessaires, à la proposition faite au titre de la section I de la partie III, sauf disposition contraire de la proposition.

Application des articles 95 à 101

Interpretation

(2) For the purposes of subsection (1), a reference in sections 95 to 101

(*a*) to "date of the bankruptcy" is to be read as a reference to "day on which a notice of intention is filed" or, if a notice of intention is not filed, as a reference to "day on which a proposal is filed"; and

(*b*) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor in respect of whom the proposal is filed".

(2) Pour l'application du paragraphe (1), la mention aux articles 95 à 101, de la date de la faillite vaut mention de la date du dépôt de l'avis d'intention ou, si un tel avis n'est pas déposé, de la date du dépôt de la proposition, et la mention, à ces articles, du failli, de la personne insolvable ou du débiteur vaut mention du débiteur à l'égard de qui une proposition a été déposée.

Interprétation

Application of sections 95 to 101 if proposal annulled

(3) If the proposal is annulled by the court under subsection 63(1) or as a result of a bankruptcy order or assignment, sections 95 to 101 apply as though the debtor became bankrupt on the date of the initial bankruptcy event.

(3) Les articles 95 à 101 s'appliquent en cas d'annulation de la proposition par le tribunal au titre du paragraphe 63(1) ou à la suite d'une ordonnance de faillite ou d'une cession comme si la faillite du débiteur était survenue à la date de l'ouverture de la faillite.

Application des articles 95 à 101 en cas d'annulation de la proposition

45. Subsection 109(6) of the Act, as enacted by subsection 80(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

45. Le paragraphe 109(6) de la même loi, édicté par le paragraphe 80(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Vote of creditors not dealing at arm's length

(6) If the chair is of the opinion that the outcome of a vote was determined by the vote of a creditor who did not deal with the debtor at arm's length at any time during the period that begins on the day that is one year before the date of the initial bankruptcy event and that

(6) S'il estime que le vote d'un créancier ayant eu, à tout moment au cours de la période commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite, un lien de dépendance avec le débiteur a influé sur le résultat du vote, le

Votes du créancier ayant un lien de dépendance

ends on the date of the bankruptcy, the chair shall redetermine the outcome by excluding the creditor's vote. The redetermined outcome is the outcome of the vote unless a court, on application within 10 days after the day on which the chair redetermined the outcome of the vote, considers it appropriate to include the creditor's vote and determines another outcome.

président établit un nouveau résultat en excluant ce vote; ce nouveau résultat est définitif, à moins que le tribunal ne soit saisi de la question dans les dix jours, qu'il juge indiqué de compter le vote et qu'il ne substitue au résultat du vote un nouveau résultat.

46. The Act is amended by adding the following after section 115:

46. La même loi est modifiée par adjonction, après l'article 115, de ce qui suit :

Court order — interlocutory or permanent

115.1 In an application to revoke or vary a decision that affects or could affect the outcome of a vote, the court may make any order that it considers appropriate, including one that suspends the effect of the vote until the application is determined and one that redetermines the outcome of the vote.

115.1 Lorsqu'il est saisi d'une demande visant l'annulation ou la modification d'une décision ayant ou pouvant avoir une incidence sur le résultat du vote, le tribunal peut, par ordonnance, prendre toute mesure qu'il estime indiquée, notamment suspendre les effets du vote jusqu'à ce qu'il se prononce sur la demande ou établisse un nouveau résultat.

Ordonnance du tribunal — provisoire ou non

2000, c. 12, s. 15

47. Subsection 137(2) of the Act is repealed.

47. Le paragraphe 137(2) de la même loi est abrogé.

2000, ch. 12, art. 15

2000, c. 12, s. 16

48. Section 138 of the Act is repealed.

48. L'article 138 de la même loi est abrogé.

2000, ch. 12, art. 16

49. Section 140.1 of the Act, as enacted by section 90 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

49. L'article 140.1 de la même loi, édicté par l'article 90 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Postponement of equity claims

140.1 A creditor is not entitled to a dividend in respect of an equity claim until all claims that are not equity claims have been satisfied.

140.1 Le créancier qui a une réclamation relative à des capitaux propres n'a pas droit à un dividende à cet égard avant que toutes les réclamations qui ne sont pas des réclamations relatives à des capitaux propres aient été satisfaites.

Réclamations relatives à des capitaux propres

2004, c. 25, s. 72(E)

50. Section 146 of the Act is replaced by the following:

50. L'article 146 de la même loi est remplacé par ce qui suit :

2004, ch. 25, art. 72(A)

Application of provincial law to lessors' rights

146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1, the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

146. Sauf quant à la priorité de rang que prévoit l'article 136 et sous réserve du paragraphe 73(4) et de l'article 84.1, les droits des propriétaires sont déterminés conformément au droit de la province où sont situés les lieux loués.

Application de la loi provinciale aux droits des propriétaires d'immeubles

1997, c. 12, s. 91

51. (1) Subsection 149(3) of the Act is repealed.

51. (1) Le paragraphe 149(3) de la même loi est abrogé.

1997, ch. 12, art. 91

(2) Subsections 149(4) and (5) of the Act, as enacted by subsection 92(2) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(2) Les paragraphes 149(4) et (5) de la même loi, édictés par le paragraphe 92(2) du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Certain federal claims

(3) Despite subsection (2), a claim may be filed for an amount payable under the following Acts or provisions within the time limit referred to in subsection (2) — or within three months after the return of income or other evidence of the facts on which the claim is based is filed or comes to the attention of the Minister of National Revenue or, in the case of an amount payable under legislation referred to in paragraph (*c*), the minister in that province responsible for the legislation:

(*a*) the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or *Employment Insurance Act* that refers to 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;

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

(*d*) the *Excise Tax Act*;

(*e*) the *Excise Act, 2001*;

(*f*) the *Customs Act*; and

(*g*) the *Air Travellers Security Charge Act*.

Certaines réclamations fédérales

(3) Par dérogation au paragraphe (2), une réclamation peut être présentée pour une somme exigible au titre de l'un des textes législatifs ci-après dans les délais visés à ce paragraphe ou dans les trois mois suivant le moment où la déclaration du revenu ou une preuve des faits sur laquelle est fondée la réclamation est déposée auprès du ministre du Revenu national ou est signalée à son attention ou, dans le cas d'une réclamation pour une somme exigible au titre d'une loi visée à l'alinéa *c*), auprès du ministre provincial chargé de l'application du texte en cause :

a) 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 à 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 loi provinciale dont l'objet est semblable à celui de la *Loi de l'impôt sur le revenu*, ou qui renvoie à cette loi, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités et autres charges afférents, laquelle somme :

(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 a institué un régime provincial de pensions au sens de ce paragraphe;

d) la *Loi sur la taxe d'accise*;

e) la *Loi de 2001 sur l'accise*;

f) la *Loi sur les douanes*;

g) la *Loi sur le droit pour la sécurité des passagers du transport aérien.*

No dividend allowed

(4) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under legislation referred to in subsection (3), no dividend is to be declared until the expiry of three months after the trustee has filed all returns that the trustee is required to file.

Aucun dividende

(4) À moins que le syndic ne retienne des fonds suffisants pour pourvoir au paiement de toute réclamation qui peut être produite sous l'autorité des textes législatifs visés au paragraphe (3), aucun dividende ne peut être déclaré avant l'expiration des trois mois suivant le dépôt par le syndic de toutes les déclarations à déposer.

52. The portion of subsection 172(2) of the Act before paragraph (*a*), as enacted by subsection 104(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

52. Le passage du paragraphe 172(2) de la même loi précédant l'alinéa *a*), édicté par le paragraphe 104(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Powers of court to refuse or suspend discharge or grant conditional discharge

(2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,

Le tribunal peut refuser ou suspendre la libération ou l'accorder conditionnellement

(2) Sur preuve de l'un des faits mentionnés à l'article 173, laquelle peut être faite oralement sous serment, par affidavit ou autrement, le tribunal, selon le cas :

53. (1) The portion of subsection 172.1(1) of the French version of the Act before paragraph (*a*), as enacted by section 105 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

53. (1) Le passage du paragraphe 172.1(1) de la version française de la même loi précédant l'alinéa *a*), édicté par l'article 105 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Exception — failli ayant une dette fiscale

172.1 (1) Dans le cas d'un failli qui a une dette fiscale impayée d'un montant de deux cent mille dollars ou plus représentant soixante-quinze pour cent ou plus de la totalité des réclamations non garanties prouvées, l'audition de la demande de libération ne peut se tenir avant l'expiration :

Exception — failli ayant une dette fiscale

172.1 (1) Dans le cas d'un failli qui a une dette fiscale impayée d'un montant de deux cent mille dollars ou plus représentant soixante-quinze pour cent ou plus de la totalité des réclamations non garanties prouvées, l'audition de la demande de libération ne peut se tenir avant l'expiration :

(2) Subsection 172.1(8) of the Act, as enacted by section 105 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(2) Le paragraphe 172.1(8) de la même loi, édicté par l'article 105 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Meaning of "personal income tax debt"

(8) For the purpose of this section, "personal income tax debt" means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs (*b*) to (*c*), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or

Définition de « dette fiscale »

(8) Au présent article, « dette fiscale » s'entend du montant payable, au sens du paragraphe 223(1) de la *Loi de l'impôt sur le revenu*, compte non tenu des alinéas *b*) à *c*), par un particulier et de la somme à payer par un particulier au titre d'une loi provinciale qui prévoit 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*, y compris le montant des intérêts, sanctions et amendes imposés sous le régime

the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.

de cette loi et de la loi provinciale. N'est cependant pas visée la somme relative aux obligations d'une personne morale dont un particulier peut être responsable en qualité d'administrateur ou d'ancien administrateur de celle-ci.

54. Paragraph 178(1)(*e*) of the Act, as enacted by subsection 107(1) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

54. L'alinéa 178(1)*e*) de la même loi, édicté par le paragraphe 107(1) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

(*e*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

e) de toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation qui découle d'une réclamation relative à des capitaux propres;

1997, c. 12, s. 114

55. Section 216 of the Act is repealed.

55. L'article 216 de la même loi est abrogé.

1997, ch. 12, art. 114

56. Subsection 219(1) of the Act is replaced by the following:

56. Le paragraphe 219(1) de la même loi est remplacé par ce qui suit :

Application for consolidation order

219. (1) A debtor who resides in a province in respect of which this Part applies may apply to the clerk of the court having jurisdiction where they reside for a consolidation order.

219. (1) Tout débiteur qui réside dans une province où la présente partie s'applique peut demander au greffier du tribunal ayant juridiction là où il réside que soit rendue une ordonnance de fusion.

Demande d'ordonnance de fusion

2002, c. 7, s. 85

57. Section 242 of the Act is replaced by the following:

57. L'article 242 de la même loi est remplacé par ce qui suit :

2002, ch. 7, art. 85

Application of this Part

242. (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

242. (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

Application automatique

58. (1) Subsections 243(1) and (2) of the Act, as enacted by subsection 115(1) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

58. (1) Les paragraphes 243(1) et (2) de la même loi, édictés par le paragraphe 115(1) du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(*a*) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(*b*) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(*c*) take any other action that the court considers advisable.

Nomination d'un séquestre

243. (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(*a*) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(*b*) the court considers it appropriate to appoint a receiver before then.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

(*a*) is appointed under subsection (1); or

(*b*) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

Définition de « séquestre »

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), « séquestre » s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

1992, c. 27, s. 89(1)

(2) Subsection 243(3) of the Act is replaced by the following:

(2) Le paragraphe 243(3) de la même loi est remplacé par ce qui suit :

1992, ch. 27, par. 89(1)

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (*a*) or subparagraph (*b*)(ii).

(3) Pour l'application du paragraphe 248(2), la définition de « séquestre », au paragraphe (2), s'interprète sans égard à l'alinéa *a*) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Définition de « séquestre » — paragraphe 248(2)

(3) Subsection 243(4) of the Act, as enacted by subsection 115(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(3) Le paragraphe 243(4) de la même loi, édicté par le paragraphe 115(2) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(*b*).

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)*b*).

Syndic

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Lieu du dépôt

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Ordonnances relatives aux honoraires et débours

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

Sens de « débours »

59. Section 275 of the Act, as enacted by section 122 of chapter 47 of the Statutes of Canada, 2005, is amended by adding the following after subsection (2):

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(*a*) the appointment of a person to act at the direction of the court;

(*b*) the communication of information by any means considered appropriate by the court;

(*c*) the coordination of the administration and supervision of the debtor's assets and affairs;

(*d*) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(*e*) the coordination of concurrent proceedings regarding the same debtor.

59. L'article 275 de la même loi, édicté par l'article 122 du chapitre 47 des Lois du Canada (2005), est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

a) la nomination d'une personne chargée d'agir suivant les instructions du tribunal;

b) la communication de renseignements par tout moyen jugé approprié par celui-ci;

c) la coordination de l'administration et de la surveillance des biens et des affaires du débiteur;

d) l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;

e) la coordination de procédures concurrentes concernant le même débiteur.

60. Subsection 284(2) of the Act, as enacted by section 122 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

60. Le paragraphe 284(2) de la même loi, édicté par l'article 122 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

R.S., c. C-36

COMPANIES' CREDITORS ARRANGEMENT ACT

L.R., ch. C-36

LOI SUR LES ARRANGEMENTS AVEC LES CRÉANCIERS DES COMPAGNIES

61. (1) The definition "shareholder" in subsection 2(1) of the *Companies' Creditors Arrangement Act*, as enacted by subsection 124(2) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"shareholder" « *actionnaire* »

"shareholder" includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies;

61. (1) La définition de « actionnaire », au paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*, édictée par le paragraphe 124(2) du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

« actionnaire » "*shareholder*"

« actionnaire » S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie.

(2) The definitions "director" and "income trust" in subsection 2(1) of the Act, as enacted by subsection 124(3) of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(2) Les définitions de « administrateur » et « fiducie de revenu », au paragraphe 2(1) de la même loi, édictées par le paragraphe

124(3) du chapitre 47 des Lois du Canada (2005), sont respectivement remplacées par ce qui suit :

"director" «*administrateur*»

"director" means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called;

« administrateur » S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre.

« administrateur » "*director*"

"income trust" «*fiducie de revenu*»

"income trust" means a trust that has assets in Canada if

(*a*) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(*b*) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

« fiducie de revenu » Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par règlement à la date à laquelle des procédures sont intentées sous le régime de la présente loi, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date.

« fiducie de revenu » "*income trust*"

(3) The definition "agent négociateur" in subsection 2(1) of the French version of the Act, as enacted by subsection 124(3) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(3) La définition de « agent négociateur », au paragraphe 2(1) de la version française de la même loi, édictée par le paragraphe 124(3) du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

« agent négociateur » "*bargaining agent*"

« agent négociateur » Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie.

« agent négociateur » Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie.

« agent négociateur » "*bargaining agent*"

(4) Subsection 2(2) of the Act, as enacted by subsection 124(5) of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(4) Le paragraphe 2(2) de la même loi, édicté par le paragraphe 124(5) du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Meaning of "related" and "dealing at arm's length"

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

(2) Pour l'application de la présente loi, l'article 4 de la *Loi sur la faillite et l'insolvabilité* s'applique pour établir si une personne est liée à une compagnie débitrice ou agit sans lien de dépendance avec une telle compagnie.

Définition de « personnes liées »

62. Paragraph 11.02(3)(*b*) of the French version of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

62. L'alinéa 11.02(3)*b*) de la version française de la même loi, édicté par l'article 128 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

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.

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.

63. (1) Subsection 11.05(1) of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Eligible financial contracts

11.05 (1) No order may be made under this Act that has the effect of staying or restraining the exercise of a right to terminate or amend an eligible financial contract or claim an accelerated payment or a forfeiture of the term under it.

(2) The definition "eligible financial contract" in subsection 11.05(3) of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

"eligible financial contract" « *contrat financier admissible* »

"eligible financial contract" means an agreement of a prescribed kind.

64. Section 11.06 of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Member of the Canadian Payments Association

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

65. Sections 11.1 to 11.4 of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

Meaning of "regulatory body"

11.1 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in

63. (1) Le paragraphe 11.05(1) de la même loi, édicté par l'article 128 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Contrat financier admissible

11.05 (1) Aucune ordonnance prévue par la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit de résilier ou de modifier un contrat financier admissible ou de se prévaloir d'une clause de déchéance du terme.

(2) La définition de « contrat financier admissible », au paragraphe 11.05(3) de la même loi, édictée par l'article 128 du chapitre 47 des Lois du Canada (2005), est remplacée par ce qui suit :

« contrat financier admissible » "*eligible financial contract*"

« contrat financier admissible » Contrat d'une catégorie prévue par règlement.

64. L'article 11.06 de la même loi, édicté par l'article 128 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Membre de l'Association canadienne des paiements

11.06 Aucune ordonnance prévue par la présente loi ne peut avoir pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

65. Les articles 11.1 à 11.4 de la même loi, édictés par l'article 128 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Définition de « organisme administratif »

11.1 (1) Au présent article, « organisme administratif » s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la

respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(*a*) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(*b*) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made

compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre

under subsection (1) only with the consent of the person in whose favour the previous order was made.

d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

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

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers de la compagnie;

g) le rapport du contrôleur visé à l'alinéa 23(1)*b*).

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.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

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 within the meaning of subsection 11.05(3); or

(*c*) a collective agreement.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible au sens du paragraphe 11.05(3), soit d'une convention collective.

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.

Facteurs à prendre en considération

(3) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

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.

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copy of order

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

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

66. Sections 11.51 and 11.52 of the Act, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

66. Les articles 11.51 et 11.52 de la même loi, édictés par l'article 128 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

Security or charge relating to director's indemnification

11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

11.51 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de celle-ci sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après l'introduction d'une procédure sous le régime de la présente loi.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la compagnie peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

Biens grevés d'une charge ou sûreté pour couvrir certains frais

11.52 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie débitrice sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

(*a*) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

a) les débours et honoraires du contrôleur, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(*c*) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

b) ceux des experts dont la compagnie retient les services dans le cadre de procédures intentées sous le régime de la présente loi;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente loi.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité

1997, c. 12, s. 124

67. Subsections 11.8(1) and (2) of the Act are replaced by the following:

67. Les paragraphes 11.8(1) et (2) de la même loi sont remplacés par ce qui suit :

1997, ch. 12, art. 124

No personal liability in respect of matters before appointment

11.8 (1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(*a*) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

(*b*) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

11.8 (1) Par dérogation au droit fédéral et provincial, le contrôleur qui, en cette qualité, continue l'exploitation de l'entreprise de la compagnie débitrice ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation de la compagnie, notamment à titre d'employeur successeur, si celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés de la compagnie, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée par référence à une période la précédant.

Immunité

Status of liability

(2) A liability referred to in subsection (1) shall not rank as costs of administration.

(2) L'obligation visée au paragraphe (1) ne fait pas partie des frais d'administration.

Obligation exclue des frais

Liability of other successor employers

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

(2.1) Le paragraphe (1) ne dégage aucun employeur successeur, autre que le contrôleur, de sa responsabilité.

Responsabilité de l'employeur successeur

68. Section 12 of the Act, as enacted by section 130 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

68. L'article 12 de la même loi, édicté par l'article 130 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Fixing deadlines

12. The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

12. Le tribunal peut fixer des échéances aux fins de votation et aux fins de distribution aux termes d'une transaction ou d'un arrangement.

Échéances

69. Section 19 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

69. L'article 19 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Claims that may be dealt with by a compromise or arrangement

19. (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(*a*) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(*b*) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(*b*) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

Réclamations considérées dans le cadre des transactions ou arrangements

19. (1) Les seules réclamations qui peuvent être considérées dans le cadre d'une transaction ou d'un arrangement visant une compagnie débitrice sont :

a) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles la compagnie est assujettie à celle des dates ci-après qui est antérieure à l'autre :

(i) la date à laquelle une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie,

(ii) la date d'ouverture de la faillite, au sens de l'article 2 de la *Loi sur la faillite et l'insolvabilité*, si elle a déposé un avis d'intention sous le régime de l'article 50.4 de cette loi ou qu'elle a intenté une procédure sous le régime de la présente loi avec le consentement des inspecteurs visés à l'article 116 de la *Loi sur la faillite et l'insolvabilité*;

b) celles se rapportant aux dettes et obligations, présentes ou futures, auxquelles elle peut devenir assujettie avant l'acceptation de la transaction ou de l'arrangement, en raison d'une obligation contractée antérieurement à celle des dates mentionnées aux sous-alinéas *a*)(i) et (ii) qui est antérieure à l'autre.

Exception

(2) La réclamation se rapportant à l'une ou l'autre des dettes ou obligations ci-après ne peut toutefois être ainsi considérée, à moins que la transaction ou l'arrangement ne prévoie expressément la possibilité de transiger sur cette réclamation et que le créancier intéressé n'ait voté en faveur de la transaction ou de l'arrangement proposé :

a) toute ordonnance d'un tribunal imposant une amende, une pénalité, la restitution ou une autre peine semblable;

b) toute indemnité accordée en justice dans une affaire civile :

(i) pour des lésions corporelles causées intentionnellement ou pour agression sexuelle,

(ii) pour décès découlant d'un acte visé au sous-alinéa (i);

(*c*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

(*d*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or

(*e*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*d*).

c) toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l'abus de confiance alors que la compagnie agissait, au Québec, à titre de fiduciaire ou d'administrateur du bien d'autrui ou, dans les autres provinces, à titre de fiduciaire;

d) toute dette ou obligation résultant de l'obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu'une dette ou obligation de la compagnie qui découle d'une réclamation relative à des capitaux propres;

e) toute dette relative aux intérêts dus à l'égard d'une somme visée à l'un des alinéas *a*) à *d*).

70. Subsection 20(3) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is repealed.

70. Le paragraphe 20(3) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est abrogé.

71. Section 22 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

71. L'article 22 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Établissement des catégories de créanciers

22. (1) La compagnie débitrice peut établir des catégories de créanciers en vue des assemblées qui seront tenues au titre des articles 4 ou 5 relativement à une transaction ou un arrangement la visant; le cas échéant, elle demande au tribunal d'approuver ces catégories avant la tenue des assemblées.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(*a*) the nature of the debts, liabilities or obligations giving rise to their claims;

(*b*) the nature and rank of any security in respect of their claims;

(*c*) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(*d*) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

Critères

(2) Pour l'application du paragraphe (1), peuvent faire partie de la même catégorie les créanciers ayant des droits ou intérêts à ce point semblables, compte tenu des critères énumérés ci-après, qu'on peut en conclure qu'ils ont un intérêt commun :

a) la nature des créances et obligations donnant lieu à leurs réclamations;

b) la nature et le rang de toute garantie qui s'y rattache;

c) les voies de droit ouvertes aux créanciers, abstraction faite de la transaction ou de l'arrangement, et la mesure dans laquelle il pourrait être satisfait à leurs réclamations s'ils s'en prévalaient;

d) tous autres critères réglementaires compatibles avec ceux énumérés aux alinéas *a*) à *c*).

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

Class — creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

72. (1) Subparagraph 23(1)(*a*)(ii) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(2) Paragraphs 23(1)(*d*) to (*f*) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, are replaced by the following:

(*d*) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

Créancier lié

(3) Le créancier lié à la compagnie peut voter contre, mais non pour, l'acceptation de la transaction ou de l'arrangement.

Catégorie de créanciers ayant des réclamations relatives à des capitaux propres

22.1 Malgré le paragraphe 22(1), les créanciers qui ont des réclamations relatives à des capitaux propres font partie d'une même catégorie de créanciers relativement à ces réclamations, sauf ordonnance contraire du tribunal, et ne peuvent à ce titre voter à aucune assemblée, sauf ordonnance contraire du tribunal.

72. (1) Le sous-alinéa 23(1)*a*)(ii) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

(ii) dans les cinq jours suivant la date du prononcé de l'ordonnance :

(A) de rendre l'ordonnance publique selon les modalités réglementaires,

(B) d'envoyer un avis, selon les modalités réglementaires, à chaque créancier connu ayant une réclamation supérieure à mille dollars les informant que l'ordonnance a été rendue publique,

(C) d'établir la liste des nom et adresse de chacun de ces créanciers et des montants estimés des réclamations et de la rendre publique selon les modalités réglementaires;

(2) Les alinéas 23(1)*d*) à *f*) de la même loi, édictés par l'article 131 du chapitre 47 des Lois du Canada (2005), sont remplacés par ce qui suit :

d) de déposer auprès du tribunal un rapport portant sur l'état des affaires financières et autres de la compagnie et contenant les renseignements réglementaires :

(i) dès qu'il note un changement défavorable important au chapitre des projections relatives à l'encaisse ou de la situation financière de la compagnie,

(ii) au plus tard quarante-cinq jours — ou le nombre de jours supérieur que le tribunal fixe — après la fin de chaque trimestre d'exercice,

(iii) at any other time that the court may order;

(*d.1*) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d.1*);

(*f*) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(*f.1*) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(3) Paragraph 23(1)(*j*) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(*j*) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(4) Subsection 23(2) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d.1*), the

(iii) à tout autre moment fixé par ordonnance du tribunal;

d.1) de déposer auprès du tribunal, au moins sept jours avant la date de la tenue de l'assemblée des créanciers au titre des articles 4 ou 5, un rapport portant sur l'état des affaires financières et autres de la compagnie, contenant notamment son opinion sur le caractère raisonnable de la décision d'inclure dans la transaction ou l'arrangement une disposition prévoyant la non-application à celle-ci des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, et contenant les renseignements réglementaires;

e) d'informer les créanciers de la compagnie du dépôt du rapport visé à l'un ou l'autre des alinéas *b*) à *d.1*);

f) de déposer auprès du surintendant des faillites, selon les modalités réglementaires, de temps et autre, une copie des documents précisés par règlement;

f.1) afin de défrayer le surintendant des faillites des dépenses engagées par lui dans l'exercice de ses attributions prévues par la présente loi, de lui verser, pour dépôt auprès du receveur général, le prélèvement réglementaire, et ce au moment prévu par les règlements;

(3) L'alinéa 23(1)*j*) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

(4) Le paragraphe 23(2) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)*b*) à *d.1*), le

monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

73. Section 26 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is amended by adding the following after subsection (2):

73. L'article 26 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Agreement to provide compilation

(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

Accord visant la fourniture d'une compilation

(3) Enfin, il peut conclure un accord visant la fourniture d'une compilation de tout ou partie des renseignements figurant au registre public.

74. (1) Subsection 29(2) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

74. (1) Le paragraphe 29(2) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Rights

(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

Droit d'accès

(2) Pour les besoins de ces investigations ou enquêtes, le surintendant des faillites ou la personne qu'il nomme à cette fin :

(*a*) shall have access to and the right to examine and make copies of the books, records, data, documents or papers — including those in electronic form — in the possession or under the control of a monitor under this Act; and

a) a accès aux livres, registres, données, documents ou papiers, sur support électronique ou autre, se trouvant, en vertu de la présente loi, en la possession ou sous la responsabilité du contrôleur et a droit de les examiner et d'en tirer des copies;

(*b*) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, documents or papers — including those in electronic form — relating to any compromise or arrangement in respect of which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

b) peut, avec la permission du tribunal donnée *ex parte*, examiner les livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont en la possession ou sous la responsabilité de toute autre personne désignée dans l'ordonnance et se rapportent aux transactions ou arrangements auxquels la présente loi s'applique et peut, en vertu d'un mandat du tribunal et aux fins d'examen, pénétrer dans tout lieu et y faire des perquisitions.

(2) Subsection 29(3) of the French version of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

(2) Le paragraphe 29(3) de la version française de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Personnel

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile à l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues à

Personnel

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile à l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues à

ces personnes sont, une fois certifiées par le surintendant, imputables sur les crédits affectés à son bureau.

75. (1) Subsection 30(3) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Summons

(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring the person named in it

(*a*) to appear at the time and place mentioned in it;

(*b*) to testify to all matters within their knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and

(*c*) to bring and produce any books, records, data, documents or papers — including those in electronic form — in their possession or under their control relative to the subject matter of the inquiry or investigation.

(2) Subsection 30(4) of the English version of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Effect throughout Canada

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

76. Section 32 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

Disclaimer or resiliation of agreements

32. (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

ces personnes sont, une fois certifiées par le surintendant, imputables sur les crédits affectés à son bureau.

75. (1) Le paragraphe 30(3) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Convocation de témoins

(3) Le surintendant des faillites peut, aux fins d'audition, convoquer des témoins par assignation leur enjoignant :

a) de comparaître aux date, heure et lieu indiqués;

b) de témoigner sur tous faits connus d'eux se rapportant à l'investigation ou à l'enquête sur la conduite du contrôleur;

c) de produire tous livres, registres, données, documents ou papiers, sur support électronique ou autre, qui sont pertinents et dont ils ont la possession ou la responsabilité.

(2) Le paragraphe 30(4) de la version anglaise de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Effect throughout Canada

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

76. L'article 32 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Résiliation de contrats

32. (1) Sous réserve des paragraphes (2) et (3), la compagnie débitrice peut — sur préavis donné en la forme et de la manière réglementaires aux autres parties au contrat et au contrôleur et après avoir obtenu l'acquiescement de celui-ci relativement au projet de résiliation — résilier tout contrat auquel elle est partie à la date à laquelle une procédure a été intentée sous le régime de la présente loi.

Contestation

(2) Dans les quinze jours suivant la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), toute partie au contrat peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner que le contrat ne soit pas résilié.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(3) Si le contrôleur n'acquiesce pas au projet de résiliation, la compagnie peut, sur préavis aux autres parties au contrat et au contrôleur, demander au tribunal d'ordonner la résiliation du contrat.

Absence d'acquiescement du contrôleur

Factors to be considered

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

(*a*) whether the monitor approved the proposed disclaimer or resiliation;

(*b*) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(*c*) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) l'acquiescement du contrôleur au projet de résiliation, le cas échéant;

b) la question de savoir si la résiliation favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

c) le risque que la résiliation puisse vraisemblablement causer de sérieuses difficultés financières à une partie au contrat.

Facteurs à prendre en considération

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(*a*) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(*b*) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(*c*) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

(5) Le contrat est résilié :

a) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1), si aucune demande n'est présentée en vertu du paragraphe (2);

b) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (1) ou à la date postérieure fixée par le tribunal, si ce dernier rejette la demande présentée en vertu du paragraphe (2);

c) trente jours après la date à laquelle la compagnie donne le préavis mentionné au paragraphe (3) ou à la date postérieure fixée par le tribunal, si ce dernier ordonne la résiliation du contrat en vertu de ce paragraphe.

Résiliation

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

(6) Si la compagnie a autorisé par contrat une personne à utiliser un droit de propriété intellectuelle, la résiliation n'empêche pas la personne de l'utiliser ni d'en faire respecter l'utilisation exclusive, à condition qu'elle respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce pour la période prévue au contrat et pour toute période additionnelle dont elle peut et décide de se prévaloir de son propre gré.

Propriété intellectuelle

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

(7) En cas de résiliation du contrat, toute partie à celui-ci qui subit des pertes découlant de la résiliation est réputée avoir une réclamation prouvable.

Pertes découlant de la résiliation

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

(8) Dans les cinq jours qui suivent la date à laquelle une partie au contrat le lui demande, la compagnie lui expose par écrit les motifs de son projet de résiliation.

Motifs de la résiliation

Exceptions

(9) This section does not apply in respect of

(*a*) an eligible financial contract within the meaning of subsection 11.05(3);

(*b*) a collective agreement;

(*c*) a financing agreement if the company is the borrower; or

(*d*) a lease of real property or of an immovable if the company is the lessor.

(9) Le présent article ne s'applique pas aux contrats suivants :

a) les contrats financiers admissibles au sens du paragraphe 11.05(3);

b) les conventions collectives;

c) les accords de financement au titre desquels la compagnie est l'emprunteur;

d) les baux d'immeubles ou de biens réels au titre desquels la compagnie est le locateur.

Exceptions

77. Section 34 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

77. L'article 34 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Certain rights limited

34. (1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that proceedings commenced under this Act or that the company is insolvent.

34. (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec une compagnie débitrice ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie ou que celle-ci est insolvable.

Limitation de certains droits

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings.

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où la compagnie est insolvable ou n'a pas payé son loyer à l'égard d'une période antérieure à l'introduction de la procédure.

Baux

Public utilities

(3) No public utility may discontinue service to a company by reason only that proceedings commenced under this Act, that the company is insolvent or that the company has not paid for services rendered or goods provided before the commencement of those proceedings.

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'une compagnie débitrice au seul motif qu'une procédure a été intentée sous le régime de la présente loi à l'égard de la compagnie, que celle-ci est insolvable ou qu'elle n'a pas payé des services ou marchandises fournis avant l'introduction de la procédure.

Entreprise de service public

Certain acts not prevented

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings under this Act;

(*b*) requiring the further advance of money or credit; or

(*c*) preventing a lessor of aircraft objects under an agreement with the company from taking possession of the aircraft objects

(i) if, after proceedings commence under this Act, the company defaults in protecting or maintaining the aircraft objects in accordance with the agreement,

(ii) 60 days after the day on which proceedings commence under this Act unless, during that period, the company

(A) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(B) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until the proceedings under this Act end, and

(C) agreed to perform all of the obligations arising under the agreement after the proceedings under this Act end, or

(iii) if, during the period that begins on the expiry of the 60-day period and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

Exceptions

(4) Le présent article n'a pas pour effet :

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après l'introduction d'une procédure sous le régime de la présente loi;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits;

c) d'empêcher le bailleur d'un bien aéronautique au titre d'un contrat conclu avec la compagnie de prendre possession du bien dans les cas suivants :

(i) après l'introduction d'une procédure sous le régime de la présente loi, la compagnie manque à l'obligation prévue au contrat de préserver ou d'entretenir le bien,

(ii) à l'expiration d'un délai de soixante jours après la date de l'introduction d'une procédure sous le régime de la présente loi :

(A) elle n'a pas remédié aux manquements aux autres obligations prévues au contrat, exception faite du manquement résultant de l'introduction d'une telle procédure ou de la violation d'une stipulation du contrat relative à sa situation financière,

(B) elle ne s'est pas engagée à se conformer jusqu'à la conclusion de la procédure à toutes les obligations qui sont prévues au contrat, sauf l'obligation de ne pas devenir insolvable ou toute autre obligation relative à sa situation financière,

(C) elle ne s'est pas engagée à se conformer, après cette date, à toutes les obligations prévues au contrat,

(iii) pendant la période commençant à l'expiration du délai de soixante jours et se terminant à la date de conclusion de la procédure intentée sous le régime de la présente loi, elle manque à l'une des obligations prévues au contrat, sauf l'o-

bligation de ne pas devenir insolvable ou toute autre obligation relative à sa situation financière.

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Pouvoirs du tribunal

(6) À la demande de l'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer le présent article inapplicable, ou applicable uniquement dans la mesure qu'il précise, s'il est établi par le demandeur que son application lui causerait vraisemblablement de sérieuses difficultés financières.

Eligible financial contracts

(7) Subsection (1)

(*a*) does not apply in respect of an eligible financial contract within the meaning of subsection 11.05(3); and

(*b*) does not prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with the *Canadian Payments Act* or the by-laws or rules of that Association.

Contrats financiers admissibles

(7) Le paragraphe (1) :

a) ne s'applique pas aux contrats financiers admissibles au sens du paragraphe 11.05(3);

b) n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une personne insolvable, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'Association.

78. Section 36 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

78. L'article 36 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Restriction on disposition of business assets

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

Restriction à la disposition d'actifs

36. (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Notice to creditors

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

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

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

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

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

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

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

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

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

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

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

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

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

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

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

(*a*) a director or officer of the company;

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

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

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas *a*) ou *b*).

Assets may be disposed of free and clear

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

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Autorisation de disposer des actifs en les libérant de restrictions

Restriction — employers

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

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(4)*a*) et (5)*a*) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard des employeurs

PREFERENCES AND TRANSFERS AT UNDERVALUE

TRAITEMENTS PRÉFÉRENTIELS ET OPÉRATIONS SOUS-ÉVALUÉES

Application of sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

36.1 (1) Les articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité* s'appliquent, avec les adaptations nécessaires, à la transaction ou à l'arrangement sauf disposition contraire de ceux-ci.

Application des articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*

Interpretation

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(*a*) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(*b*) to "trustee" is to be read as a reference to "monitor"; and

(*c*) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

(2) Pour l'application du paragraphe (1), la mention, aux articles 38 et 95 à 101 de la *Loi sur la faillite et l'insolvabilité*, de la date de la faillite vaut mention de la date à laquelle une procédure a été intentée sous le régime de la présente loi, celle du syndic vaut mention du contrôleur et celle du failli, de la personne insolvable ou du débiteur vaut mention de la compagnie débitrice.

Interprétation

79. Subsection 39(1) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

79. Le paragraphe 39(1) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Statutory Crown securities

39. (1) In relation to proceedings under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the day on which proceedings commence, the security is registered under a

39. (1) Dans le cadre de toute procédure intentée à l'égard d'une compagnie débitrice sous le régime de la présente loi, les garanties créées aux termes d'une loi fédérale ou provinciale dans le seul but — ou principalement dans le but — de protéger des 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 ne sont

Garanties créées par législation

system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

valides que si elles ont été enregistrées avant la date d'introduction de la procédure et selon un système d'enregistrement des garanties qui est accessible non seulement à Sa Majesté du chef du Canada ou de la province ou à l'organisme, mais aussi aux autres créanciers détenant des garanties, et qui est accessible au public à des fins de consultation ou de recherche.

80. Section 52 of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is amended by adding the following after subsection (2):

80. L'article 52 de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est modifié par adjonction, après le paragraphe (2), de ce qui suit :

Forms of cooperation

(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(*a*) the appointment of a person to act at the direction of the court;

(*b*) the communication of information by any means considered appropriate by the court;

(*c*) the coordination of the administration and supervision of the debtor company's assets and affairs;

(*d*) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(*e*) the coordination of concurrent proceedings regarding the same debtor company.

Moyens d'assurer la collaboration

(3) Pour l'application du présent article, la collaboration peut être assurée par tout moyen approprié, notamment :

a) la nomination d'une personne chargée d'agir suivant les instructions du tribunal;

b) la communication de renseignements par tout moyen jugé approprié par celui-ci;

c) la coordination de l'administration et de la surveillance des biens et des affaires de la compagnie débitrice;

d) l'approbation ou l'application par les tribunaux des accords concernant la coordination des procédures;

e) la coordination de procédures concurrentes concernant la même compagnie débitrice.

81. Subsection 61(2) of the Act, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

81. Le paragraphe 61(2) de la même loi, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Public policy exception

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

Exception relative à l'ordre public

(2) La présente partie n'a pas pour effet d'empêcher le tribunal de refuser de prendre une mesure contraire à l'ordre public.

82. The portion of section 62 of the Act before paragraph (*a*), as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, is replaced by the following:

82. Le passage de l'article 62 de la même loi précédant l'alinéa *a*), édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), est remplacé par ce qui suit :

Regulations

62. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including regulations

Règlements

62. Le gouverneur en conseil peut, par règlement, prendre toute mesure d'application de la présente loi, notamment :

2005, c. 47, s. 1

WAGE EARNER PROTECTION PROGRAM ACT

83. Section 2 of the *Wage Earner Protection Program Act* is amended by adding the following after subsection (4):

Related persons

(5) Despite subsection 4(5) of the *Bankruptcy and Insolvency Act*,

(*a*) for the purposes of paragraph 6(*d*), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and

(*b*) for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

84. Paragraph 5(*a*) of the Act is replaced by the following:

(*a*) the individual's employment terminated in the circumstances prescribed by regulation;

85. Section 6 of the Act is replaced by the following:

Exceptions

6. An individual is not eligible to receive a payment in respect of any wages earned during a period in which the individual

(*a*) was an officer or director of the former employer;

(*b*) had a controlling interest within the meaning of the regulations in the business of the former employer;

(*c*) occupied a managerial position within the meaning of the regulations with the former employer; or

(*d*) was not dealing at arm's length with

2005, ch. 47, art. 1

LOI SUR LE PROGRAMME DE PROTECTION DES SALARIÉS

83. L'article 2 de la *Loi sur le Programme de protection des salariés* est modifié par adjonction, après le paragraphe (4), de ce qui suit :

Personnes liées

(5) Malgré le paragraphe 4(5) de la *Loi sur la faillite et l'insolvabilité* :

a) pour l'application de l'alinéa 6*d*), il est réputé n'exister aucun lien de dépendance si le ministre est convaincu, compte tenu des circonstances, notamment des modalités d'emploi de la personne auprès de son ancien employeur, de sa rétribution, ainsi que de la durée, la nature et l'importance du travail accompli, qu'il est raisonnable de conclure que celle-ci a conclu avec lui un contrat de travail en substance pareil à celui qu'elle aurait conclu n'eût été le lien de dépendance;

b) pour l'application du paragraphe 21(4), les personnes physiques liées entre elles sont, sauf preuve contraire, réputées avoir un lien de dépendance tant qu'elles sont ainsi liées.

84. L'alinéa 5*a*) de la même loi est remplacé par ce qui suit :

a) son emploi auprès d'un employeur a pris fin dans les circonstances réglementaires;

85. L'article 6 de la même loi est remplacé par ce qui suit :

Exceptions

6. La personne n'est pas admissible au versement de prestations à l'égard des salaires gagnés au cours d'une période durant laquelle, selon le cas :

a) elle occupait un poste de dirigeant ou d'administrateur auprès de son ancien employeur;

b) elle avait une participation lui assurant le contrôle, au sens des règlements, dans les affaires de son ancien employeur;

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

c) elle occupait un poste de cadre, au sens des règlements, auprès de son ancien employeur;

d) elle avait un lien de dépendance avec une personne physique occupant un poste de dirigeant ou d'administrateur auprès de son ancien employeur, ou de cadre auprès de celui-ci au sens des règlements, ou avec une personne qui avait une participation lui assurant le contrôle, au sens des règlements, dans les affaires de son ancien employeur.

86. (1) Subsection 7(1) of the Act is replaced by the following:

86. (1) Le paragraphe 7(1) de la même loi est remplacé par ce qui suit :

Amount of payment

7. (1) The amount that may be paid under this Act to an individual is the amount owing to the individual for wages earned during the six months immediately before the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer, as the case may be, less any amount prescribed by regulation. In the case of a former employer who is both bankrupt and subject to a receivership, the amount owing is the greater of the amount determined in respect of the bankruptcy and the amount determined in respect of the receivership.

Montant des prestations

7. (1) Le montant des prestations à verser à une personne au titre de la présente loi est égal au salaire qui lui est dû et a été gagné au cours de la période de six mois précédant la date de la faillite ou celle à laquelle le séquestre entre en fonctions, selon le cas, défalcation faite de la somme réglementaire. S'agissant d'un ancien employeur qui à la fois est en faillite et fait l'objet d'une mise sous séquestre, le salaire à retenir est le salaire le plus élevé de celui qui est déterminé dans le cas de la faillite et de celui qui est déterminé dans le cas de la mise sous séquestre.

(2) The portion of subsection 7(2) of the Act before paragraph (*a*) is replaced by the following:

(2) Le passage du paragraphe 7(2) de la même loi précédant l'alinéa *a*) est remplacé par ce qui suit :

Maximum

(2) The maximum amount that may be paid to an individual is the greater of the following amounts, less any amount prescribed by regulation:

Plafond

(2) Le plafond du montant des prestations à verser à une personne est égal à la plus élevée des sommes ci-après, défalcation faite de la somme réglementaire :

(3) The portion of subsection 7(2) of the English version of the Act after paragraph (*b*) is repealed.

(3) Le passage du paragraphe 7(2) de la version anglaise de la même loi suivant l'alinéa *b*) est abrogé.

(4) Subsection 7(3) of the French version of the Act is replaced by the following :

(4) Le paragraphe 7(3) de la version française de la même loi est remplacé par ce qui suit :

Affectation des prestations

(3) Sauf disposition réglementaire contraire, les prestations versées au titre de la présente loi ne sont affectées à l'indemnité de vacances qu'après affectation à tous les autres éléments du salaire.

Affectation des prestations

(3) Sauf disposition réglementaire contraire, les prestations versées au titre de la présente loi ne sont affectées à l'indemnité de vacances qu'après affectation à tous les autres éléments du salaire.

87. Sections 8 to 14 of the Act are replaced by the following:

87. Les articles 8 à 14 de la même loi sont remplacés par ce qui suit :

Application

8. To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

Demande

8. Pour obtenir des prestations, la personne présente une demande au ministre selon les modalités — de temps et autres — prévues par règlement.

Minister's determination of eligibility

9. If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

Décision du ministre relativement à l'admissibilité

9. Le ministre décide si le demandeur est admissible aux prestations et, le cas échéant, il en effectue le versement.

Notification

10. The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

Notification

10. Le ministre informe le demandeur de sa décision, qu'elle lui soit favorable ou non.

REVIEW BY MINISTER

RÉVISION PAR LE MINISTRE

Request for review

11. An applicant who is informed under section 10 may request a review of their eligibility or ineligibility, as the case may be.

Demande de révision

11. Le demandeur visé par la décision peut en demander la révision.

Review

12. The Minister may confirm, vary or rescind a determination of eligibility made under section 9. If the Minister varies the determination, the Minister shall make any payment resulting from the variation.

Révision

12. Le ministre peut confirmer, modifier ou infirmer sa décision et, s'il la modifie, il verse toute prestation à laquelle le demandeur est admissible par suite de la modification.

Review is final

13. Subject to the right of appeal under section 14, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

Caractère définitif de la révision

13. Sous réserve du droit d'appel prévu à l'article 14, toute confirmation, modification ou infirmation de la décision par le ministre est définitive et insusceptible de recours judiciaires.

APPEAL TO ADJUDICATOR

APPEL DEVANT UN ARBITRE

Appeal on question of law or jurisdiction

14. The applicant may appeal the decision made by the Minister under section 12 to an adjudicator only on a question of law or jurisdiction.

Appel sur une question de droit ou de compétence

14. Le demandeur peut interjeter appel à un arbitre de la décision rendue par le ministre en vertu de l'article 12, et ce uniquement sur une question de droit ou de compétence.

88. Sections 16 and 17 of the Act are replaced by the following:

88. Les articles 16 et 17 de la même loi sont remplacés par ce qui suit :

Appeal on the record

16. The appeal is to be an appeal on the record and no new evidence is admissible.

Appel sur dossier

16. L'appel est tranché sur dossier et aucun nouvel élément de preuve n'est admissible.

Adjudicator's decision

17. The adjudicator may confirm, vary or rescind the decision made by the Minister under section 12. If the adjudicator varies the decision, the Minister shall make any payment resulting from the variation.

Décision de l'arbitre

17. L'arbitre peut confirmer, modifier ou infirmer la décision rendue par le ministre en vertu de l'article 12. S'il la modifie, le ministre verse toute prestation à laquelle le demandeur est admissible par suite de la décision de l'arbitre.

89. Sections 19 to 22 of the Act are replaced by the following:

89. Les articles 19 à 22 de la même loi sont remplacés par ce qui suit :

No review by *certiorari*, etc.

19. No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of an adjudicator under this Act.

Interdiction de recours extraordinaire

19. Il n'est admis aucun recours — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action de l'arbitre dans le cadre de la présente loi.

Decision is final

20. The adjudicator's decision is final and may not be questioned or reviewed in any court.

Caractère définitif des décisions

20. Les décisions de l'arbitre sont définitives et insusceptibles de recours judiciaires.

ADMINISTRATION

DUTIES OF TRUSTEES AND RECEIVERS

General duties

21. (1) For the purposes of this Act, a trustee or a receiver, as the case may be, shall

(*a*) identify each individual who is owed wages that were earned during the six months immediately before the date of the bankruptcy or the first day on which there was a receiver in relation to the individual's employer, as the case may be;

(*b*) determine the amount of wages owing to each individual in respect of those six months;

(*c*) inform each individual other than one who is in a class prescribed by regulation of the existence of the program established by section 4 and of the conditions under which payments may be made under this Act;

(*d*) provide the Minister and each individual other than one who is in a class prescribed by regulation with the information prescribed by regulation in relation to the individual and with the amount of wages owing to the individual in respect of those six months; and

(*e*) inform the Minister of when the trustee is discharged or the receiver completes their duties, as the case may be.

Obligations générales

ADMINISTRATION

FONCTIONS DES SYNDICS ET DES SÉQUESTRES

21. (1) Pour l'application de la présente loi, il incombe au syndic ou au séquestre, selon le cas :

a) d'identifier chaque personne qui est titulaire d'une créance, au titre du salaire gagné au cours de la période de six mois précédant la date de la faillite ou celle à laquelle le séquestre entre en fonctions;

b) de déterminer, pour chaque personne, le montant du salaire qui lui est dû à l'égard de la période de six mois;

c) d'informer chaque personne, sauf celle qui fait partie d'une catégorie réglementaire, de l'existence du programme établi à l'article 4 et des conditions auxquelles les prestations peuvent être versées au titre de la présente loi;

d) de transmettre au ministre et à chaque personne, sauf celle qui fait partie d'une catégorie réglementaire, les renseignements réglementaires la concernant et le montant du salaire qui lui est dû à l'égard de la période de six mois;

e) d'informer le ministre lorsque le syndic est libéré ou que le séquestre a complété l'exécution des fonctions dont il a été chargé.

Compliance with directions

(2) A trustee or receiver shall comply with any directions of the Minister relating to the administration of this Act.

Obligation de se conformer aux instructions

(2) Le syndic et le séquestre sont tenus de se conformer à toute instruction donnée par le ministre relativement à l'application de la présente loi.

Duty to assist

(3) A person, other than one described in subsection (4), who has or has access to information described in paragraph (1)(*d*) shall, on request, provide it to the trustee or the receiver, as the case may be.

Obligation d'assistance

(3) Sur demande, toute personne, autre que celle qui est visée au paragraphe (4), qui est en possession de renseignements visés à l'alinéa

(1)*d*) ou a accès à de tels renseignements est tenue de les communiquer au syndic ou au séquestre, selon le cas.

Duty to assist — payroll contractors

(4) In the case of a person who is dealing at arm's length with and providing payroll services to a bankrupt or insolvent person, they shall provide a description of the information that they do not have access to, an estimate of the cost of providing the information that they have and an estimate of the cost of providing the information that they only have access to.

(4) Sur demande, toute personne qui est en possession de renseignements visés à l'alinéa (1)*d*) ou a accès à de tels renseignements et qui fournit un service de la paie à un failli ou à une personne insolvable avec qui elle n'a aucun lien de dépendance est tenue d'indiquer au syndic ou au séquestre, selon le cas, les renseignements auxquels elle n'a pas accès et de lui fournir une estimation des frais liés à la fourniture des renseignements qu'elle a en sa possession et une estimation des frais liés à la fourniture de ceux auxquels elle a accès.

Obligation d'assistance — service de la paie

Fees and expenses

22. (1) The trustee's or receiver's fees and expenses, in relation to the performance of their duties under this Act, are to be paid out of the estate of the bankrupt employer or the property of the insolvent employer, as the case may be.

22. (1) Les honoraires et les dépenses entraînés par l'accomplissement des fonctions du syndic ou du séquestre en application de la présente loi sont à payer sur l'actif de l'employeur en faillite ou sur les biens de l'employeur insolvable, selon le cas.

Honoraires et dépenses

Minister to pay fees and expenses

(2) The Minister shall, in the circumstances prescribed by regulation, pay the fees or expenses that are prescribed by regulation.

(2) Dans les circonstances réglementaires, le ministre acquitte les honoraires et les dépenses réglementaires du syndic et du séquestre.

Paiement par le ministre

90. Section 29 of the Act is replaced by the following:

90. L'article 29 de la même loi est remplacé par ce qui suit :

Social Insurance Number

29. No person may knowingly use, communicate or allow to be communicated a Social Insurance Number that was obtained for a purpose related to an application for a payment under this Act except for the purpose of the administration or enforcement of this Act or the *Income Tax Act*.

29. Nul ne peut sciemment utiliser, communiquer ou permettre que soit communiqué le numéro d'assurance sociale d'une personne qui a été obtenu à une fin liée à une demande de prestations au titre de la présente loi, si ce n'est pour l'application de celle-ci ou de la *Loi de l'impôt sur le revenu*.

Numéro d'assurance sociale

91. Sections 32 and 33 of the Act are replaced by the following:

91. Les articles 32 et 33 de la même loi sont remplacés par ce qui suit :

Determination of overpayment

32. (1) If the Minister determines that an individual received a payment in an amount greater than the amount that they were eligible to receive, the Minister shall send them a notice

(*a*) informing them of the determination; and

(*b*) specifying the amount that they were not eligible to receive.

32. (1) S'il décide qu'une personne a perçu des sommes en trop, le ministre lui fait parvenir un avis écrit :

a) l'informant de sa décision;

b) précisant le montant du trop-perçu.

Trop-perçu

Debt due to Her Majesty

(2) The amount specified in the notice constitutes a debt due to Her Majesty in right of Canada and may be recovered by the Minister of National Revenue.

(2) La somme précisée dans l'avis constitue une créance de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi par le ministre du Revenu national.

Créance de Sa Majesté

Certificate of default

(3) The amount of any debt referred to in subsection (2) that remains unpaid 30 days after the day on which the notice is sent may be certified by the Minister, and registration of the certificate in the Federal Court has the same effect as a judgment of that Court for the amount specified in the certificate and all related registration costs.

Certificat de non-paiement

(3) Le ministre peut établir un certificat de non-paiement pour toute partie de la créance visée au paragraphe (2) qui demeure impayée à l'expiration d'un délai de trente jours après la date d'envoi de l'avis. L'enregistrement à la Cour fédérale confère au certificat la valeur d'un jugement de cette juridiction pour la somme visée et les frais d'enregistrement.

Garnishment

33. If the Minister is of the opinion that a person is or is about to become liable to pay an amount to an individual who is indebted to Her Majesty under section 32, the Minister may, by written notice, order the person to pay to the Receiver General on account of the individual's liability all or part of the amount otherwise payable to the individual.

Saisie-arrêt

33. Le ministre peut, par avis écrit, ordonner à tout tiers qui, selon lui, doit ou est sur le point de devoir verser une somme à une personne qui est débitrice d'une créance au titre de l'article 32 de remettre la somme au receveur général, en acquittement total ou partiel de la créance.

92. Section 34 of the English version of the Act is replaced by the following:

92. L'article 34 de la version anglaise de la même loi est remplacé par ce qui suit :

No payment or partial payment

34. If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did not receive.

No payment or partial payment

34. If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did not receive.

93. Sections 36 to 39 of the Act are replaced by the following:

93. Les articles 36 à 39 de la même loi sont remplacés par ce qui suit :

Subrogation

36. (1) If a payment is made under this Act to an individual in respect of unpaid wages, Her Majesty in right of Canada is, to the extent of the amount of the payment, subrogated to any rights the individual may have in respect of the unpaid wages against

(*a*) the bankrupt or insolvent employer; and

(*b*) if the bankrupt or insolvent employer is a corporation, a director of the corporation.

Subrogation

36. (1) Lorsque des prestations sont versées au titre de la présente loi à une personne qui est titulaire d'une créance salariale, Sa Majesté du chef du Canada est subrogée, jusqu'à concurrence de la somme versée, dans les droits du titulaire de la créance salariale contre les personnes suivantes :

a) l'employeur en faillite ou insolvable;

b) si l'employeur en faillite ou insolvable est une personne morale, les administrateurs de celle-ci.

Maintaining an action

(2) For the purposes of subsection (1), Her Majesty in right of Canada may maintain an action in the name of the individual or Her Majesty in right of Canada.

Actions en justice

(2) Pour l'application du paragraphe (1), Sa Majesté du chef du Canada peut ester en justice sous son propre nom ou celui du titulaire de la créance.

Amount not assignable

37. An amount that is payable under this Act is not capable of being assigned, charged, attached, anticipated or given as security and any transaction appearing to do so is void or, in Quebec, null.

Incessibilité

37. Aucune somme à verser au titre de la présente loi ne peut être cédée, grevée, saisie, ni donnée en garantie ou faire l'objet d'un droit pouvant être exercé par anticipation, et toute opération en ce sens est nulle.

OFFENCES AND PENALTIES

Offences

38. (1) Every person commits an offence who

(*a*) makes a false or misleading entry, or omits to enter a material particular, in any record or book of account that contains information that supports an application under this Act;

(*b*) in relation to an application under this Act, makes a representation that the person knows to be false or misleading;

(*c*) in relation to an application under this Act, makes a declaration that the person knows to be false or misleading because of the nondisclosure of facts;

(*d*) being required under this Act to provide information, does not provide it or makes a representation that the person knows to be false or misleading;

(*e*) obtains a payment under this Act by false pretence;

(*f*) being the payee of any cheque issued as a payment under this Act, knowingly negotiates or attempts to negotiate it knowing that the person is not entitled to the payment or any part of the payment; or

(*g*) participates in, consents to or acquiesces in an act or omission mentioned in any of paragraphs (*a*) to (*f*).

Trustees and receivers

(2) Every person who fails to comply with any of the requirements of subsection 21(1), (3) or (4) commits an offence.

Limitation of prosecutions

(3) A prosecution for an offence under subsection (1) or (2) may be commenced at any time within six years after the day on which the subject matter of the prosecution arose.

Due diligence

(4) No person may be convicted of an offence under subsection (2) if the person establishes that they exercised due diligence to prevent the commission of the offence.

Obstruction

39. (1) Every person commits an offence who delays or obstructs a person in the exercise of their powers or the performance of their duties under this Act.

INFRACTIONS ET PEINES

Infractions

38. (1) Commet une infraction quiconque, selon le cas :

a) fait une inscription fausse ou trompeuse dans les registres ou les livres comptables qui contiennent des renseignements à l'appui d'une demande présentée au titre de la présente loi, ou omet d'y inscrire une précision essentielle;

b) relativement à une demande présentée au titre de la présente loi, fait une déclaration qu'il sait être fausse ou trompeuse;

c) relativement à une demande présentée au titre de la présente loi, fait une déclaration qu'il sait être fausse ou trompeuse en raison de la dissimulation de certains faits;

d) étant requis en vertu de la présente loi de fournir des renseignements, ne les fournit pas ou fait une déclaration qu'il sait être fausse ou trompeuse;

e) obtient des prestations au titre de la présente loi par de faux-semblants;

f) sciemment négocie ou tente de négocier un chèque établi à son nom pour le paiement de prestations au titre de la présente loi sachant qu'il n'y a pas droit ou n'a droit qu'à une partie de celles-ci;

g) participe, consent ou acquiesce à la perpétration d'une infraction visée à l'un ou l'autre des alinéas *a*) à *f*).

Infraction

(2) Commet une infraction quiconque omet de se conformer aux exigences des paragraphes 21(1), (3) ou (4).

Prescription

(3) Les poursuites pour toute infraction visée aux paragraphes (1) ou (2) se prescrivent par six ans à compter de la date du fait reproché.

Disculpation

(4) Nul ne peut être déclaré coupable d'une infraction visée au paragraphe (2) s'il établit qu'il a fait preuve de la diligence voulue pour l'empêcher.

Obstruction

39. (1) Commet une infraction quiconque retarde ou entrave l'action d'une personne dans l'exercice des attributions conférées à celle-ci sous le régime de la présente loi.

Limitation of prosecutions

(2) A prosecution for an offence under subsection (1) may be commenced at any time within two years after the day on which the subject matter of the prosecution arose.

94. Section 41 of the Act is replaced by the following:

Regulations

41. The Governor in Council may make regulations generally for carrying out the purposes of this Act, including regulations

(*a*) prescribing amounts for the purposes of subsection 2(1);

(*b*) prescribing the circumstances in which employment terminated for the purposes of paragraph 5(*a*);

(*c*) defining "controlling interest" and "managerial position" for the purposes of section 6;

(*d*) prescribing amounts for the purposes of subsections 7(1) and (2);

(*e*) respecting the allocation of payments to the different components of wages for the purposes of subsection 7(3);

(*f*) respecting the period during which and the manner in which applications for payments are to be made under section 8;

(*g*) respecting the period during which and the manner in which a review may be requested under section 11 or an appeal may be made under section 14;

(*h*) prescribing the classes of individuals that the trustee or receiver is not required to inform under paragraph 21(1)(*c*) or to whom they are not required to provide information under paragraph 21(1)(*d*);

(*i*) prescribing the information that is to be provided by trustees and receivers to the Minister and to individuals for the purposes of paragraph 21(1)(*d*) and the period during which and the manner in which that information is to be provided;

(*j*) respecting the period during which and the manner in which the information referred to in paragraph 21(1)(*c*) and subsections 21(3) and (4) is to be provided; and

Prescription

(2) Les poursuites pour toute infraction visée au paragraphe (1) se prescrivent par deux ans à compter de la date du fait reproché.

94. L'article 41 de la même loi est remplacé par ce qui suit :

Règlements

41. Le gouverneur en conseil peut prendre des règlements pour l'application de la présente loi, notamment pour :

a) prévoir des sommes pour l'application du paragraphe 2(1);

b) régir les circonstances dans lesquelles un emploi prend fin pour l'application de l'alinéa 5*a*);

c) définir les termes « participation assurant le contrôle » et « poste de cadre » pour l'application de l'article 6;

d) prévoir des sommes à défalquer pour l'application des paragraphes 7(1) et (2);

e) régir l'affectation des prestations versées aux différents éléments du salaire pour l'application du paragraphe 7(3);

f) régir les modalités — de temps et autres — applicables à la présentation des demandes de prestations visée à l'article 8;

g) régir les modalités — de temps et autres — applicables aux demandes de révision visées à l'article 11 et à la formation des appels visés à l'article 14;

h) prévoir les catégories de personnes que le syndic ou le séquestre est dispensé d'informer en application de l'alinéa 21(1)*c*) et celles à qui il est dispensé de transmettre les renseignements visés à l'alinéa 21(1)*d*);

i) préciser les renseignements que le syndic ou le séquestre est tenu de transmettre au ministre et à la personne pour l'application de l'alinéa 21(1)*d*), ainsi que régir les modalités — de temps et autres — applicables à leur fourniture;

j) régir les modalités — de temps et autres — applicables à la fourniture des renseignements visés à l'alinéa 21(1)*c*) et aux paragraphes 21(3) et (4);

(*k*) prescribing fees and expenses for the purposes of subsection 22(2) and the circumstances in which they are to be paid.

k) prévoir les honoraires et dépenses visés au paragraphe 22(2) et les circonstances dans lesquelles ils doivent être acquittés.

2005, c. 47

CHAPTER 47 OF THE STATUTES OF CANADA, 2005

95. Subsection 20(3) of chapter 47 of the Statutes of Canada, 2005 is repealed.

96. Subsection 30(2) of the Act is repealed.

97. Subsection 31(3) of the Act is repealed.

98. Section 37 of the Act is repealed.

99. Subsection 39(2) of the Act is amended by adding the following after the enacted subsection (1.6):

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

100. Section 103 of the Act is replaced by the following:

103. Section 170.1 of the Act is replaced by the following:

Mediation required — paragraphs 173(1)(*m*) and (*n*)

170.1 (1) If the discharge of a bankrupt individual is opposed by a creditor or the trustee solely on grounds referred to in either one or both of paragraphs 173(1)(*m*) and (*n*), the trustee shall send an application for mediation, in the prescribed form, to the official receiver within five days after the day on which the bankrupt would have been automatically discharged had the opposition not been filed or within any further time after that day that the official receiver may allow.

Mediation procedure

(2) A mediation is to be in accordance with prescribed procedures.

Court hearing

(3) If the issues submitted to mediation are not resolved by the mediation or the bankrupt failed to comply with conditions that were established as a result of the mediation, the trustee shall without delay apply to the court for

2005, ch. 47

CHAPITRE 47 DES LOIS DU CANADA (2005)

95. Le paragraphe 20(3) du chapitre 47 des Lois du Canada (2005) est abrogé.

96. Le paragraphe 30(2) de la même loi est abrogé.

97. Le paragraphe 31(3) de la même loi est abrogé.

98. L'article 37 de la même loi est abrogé.

99. Le paragraphe 39(2) de la même loi est modifié par adjonction, après le paragraphe (1.6) qui y est édicté, de ce qui suit :

Paiement d'une réclamation relative à des capitaux propres

(1.7) Le tribunal ne peut approuver la proposition qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

100. L'article 103 de la même loi est remplacé par ce qui suit :

103. L'article 170.1 de la même loi est remplacé par ce qui suit :

Transmission d'une demande par le syndic

170.1 (1) Lorsqu'une opposition fondée uniquement sur les motifs mentionnés aux alinéas 173(1)*m*) ou *n*) est déposée par un créancier ou le syndic, ce dernier transmet une demande de médiation, en la forme prescrite, au séquestre officiel dans les cinq jours — ou dans le délai supérieur fixé par le séquestre officiel — suivant la date où la personne physique en faillite aurait été libérée d'office n'eût été l'opposition.

Procédure

(2) La procédure de médiation est fixée par les Règles générales.

Convocation par le tribunal

(3) En cas d'échec de la médiation ou de manquement du failli aux conditions prévues par l'entente consécutive à la médiation, le syndic demande sans délai au tribunal de fixer une date d'audience à tenir dans les trente jours

an appointment for the hearing of the matter — and the provisions of this Part relating to applications to the court in relation to the discharge of a bankrupt apply, with any modifications that the circumstances require, in respect of an application to the court under this subsection — which hearing is to be held

(*a*) within 30 days after the day on which the appointment is made; or

(*b*) at a later time that is fixed by the court.

suivant la date de convocation ou à la date postérieure que le tribunal peut fixer, les dispositions de la présente partie relatives aux demandes de libération s'appliquant avec les adaptations nécessaires.

Certificate of discharge

(4) If the bankrupt complies with the conditions that were established as a result of the mediation, the trustee shall without delay

(*a*) issue to the bankrupt a certificate of discharge in the prescribed form releasing the bankrupt from their debts other than those referred to in subsection 178(1); and

(*b*) send a copy of the certificate of discharge to the Superintendent.

(4) Le syndic transmet au failli, dès que celui-ci a rempli les conditions prévues par l'entente consécutive à la médiation, un certificat, en la forme prescrite, attestant qu'il est libéré de toutes ses dettes, à l'exception de celles mentionnées au paragraphe 178(1), et il en remet un double au surintendant.

Certificat de libération

File

(5) Documents contained in a file on the mediation of a matter form part of the records referred to in subsection 11.1(2).

(5) Les documents constituant le dossier de médiation font partie des dossiers visés au paragraphe 11.1(2).

Dossier

101. Subsection 104(3) of the Act is repealed.

101. Le paragraphe 104(3) de la même loi est abrogé.

102. Section 106 of the Act is repealed.

102. L'article 106 de la même loi est abrogé.

103. Section 116 of the Act is repealed.

103. L'article 116 de la même loi est abrogé.

104. Subsection 120(2) of the Act is repealed.

104. Le paragraphe 120(2) de la même loi est abrogé.

105. Subsection 124(3) of the Act is amended by adding the following in alphabetical order to the enacted definitions:

105. Le paragraphe 124(3) de la même loi est modifié par adjonction, selon l'ordre alphabétique, aux définitions qui y sont édictées, de ce qui suit :

"equity claim" « *réclamation relative à des capitaux propres* »

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(*a*) a dividend or similar payment,

(*b*) a return of capital,

(*c*) a redemption or retraction obligation,

« intérêt relatif à des capitaux propres »

a) S'agissant d'une compagnie autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

« intérêt relatif à des capitaux propres » "*equity interest*"

(*d*) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(*e*) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);

"equity interest" means

(*a*) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(*b*) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

"equity interest" « *intérêt relatif à des capitaux propres* »

106. Section 126 of the Act is replaced by the following:

126. Section 6 of the Act is replaced by the following:

Compromises to be sanctioned by court

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

(*a*) on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(*b*) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible.

« réclamation relative à des capitaux propres » Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

« réclamation relative à des capitaux propres » "*equity claim*"

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas *a*) à *d*).

106. L'article 126 de la même loi est remplacé par ce qui suit :

126. L'article 6 de la même loi est remplacé par ce qui suit :

Homologation par le tribunal

6. (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

Bankruptcy and Insolvency Act or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(*a*) subsection 224(1.2) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or 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

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) 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 ou 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 ou autres charges afférents, laquelle somme :

(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.

(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 a institué un régime provincial de pensions au sens de ce paragraphe.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Défaut d'effectuer un versement

(4) Lorsqu'une ordonnance comporte une disposition autorisée par l'article 11.09, le tribunal ne peut homologuer la transaction ou l'arrangement si, lors de l'audition de la demande d'homologation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut de la compagnie d'effectuer un versement portant sur une somme visée au paragraphe (3) et qui est devenue exigible après le dépôt de la demande d'ordonnance visée à l'article 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(*a*) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(*d*) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements

Restriction — employés, etc.

(5) Le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit le paiement aux employés actuels et anciens de la compagnie, dès son homologation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)*d*) de la *Loi sur la faillite et l'insolvabilité* si la compagnie avait fait faillite à la date à laquelle des procédures ont été introduites sous le régime de la présente loi à son égard et, d'autre part, au montant des gages, salaires, commissions ou autre rémunération pour services fournis entre la date de l'introduction des procédures et celle de l'homologation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans le cadre de l'exploitation de la compagnie entre ces dates;

properly incurred by them in and about the company's business during the same period; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(*a*) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision,

Restriction — régime de pension

(6) Si la compagnie participe à un régime de pension réglementaire institué pour ses employés, le tribunal ne peut homologuer la transaction ou l'arrangement que si, à la fois :

a) la transaction ou l'arrangement prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension réglementaire régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(iii) dans le cas de tout autre régime de pension réglementaire :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) les sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale;

within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(*b*) the court is satisfied that the company can and will make the payments as required under paragraph (*a*).

b) il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements prévus à l'alinéa *a*).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Non-application du paragraphe (6)

(7) Par dérogation au paragraphe (6), le tribunal peut homologuer la transaction ou l'arrangement qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Paiement d'une réclamation relative à des capitaux propres

(8) Le tribunal ne peut homologuer la transaction ou l'arrangement qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

107. Sections 132 to 134 of the Act are replaced by the following:

107. Les articles 132 à 134 de la même loi sont remplacés par ce qui suit :

Wage Earner Protection Program Act

132. The *Wage Earner Protection Program Act*, as enacted by section 1 of this Act, applies in respect of wages owing by an employer only if

(*a*) the employer becomes bankrupt on or after the day on which that section comes into force; or

(*b*) all or part of the employer's property comes into the possession or under the control of a receiver on or after the day on which that section comes into force.

Loi sur le Programme de protection des salariés

132. La *Loi sur le Programme de protection des salariés*, édictée par l'article 1 de la présente loi, ne s'applique qu'à l'employeur :

***a*) soit qui fait faillite à la date d'entrée en vigueur de cet article ou par la suite;**

***b*) soit dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur de cet article ou par la suite.**

Bankruptcy and Insolvency Act

133. (1) An amendment to the *Bankruptcy and Insolvency Act* that is enacted by any of sections 2 to 5 and 7 to 106, subsection 107(1) and sections 108 to 123 of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(*a*) the person becomes bankrupt;

(*b*) the person files a notice of intention;

Loi sur la faillite et l'insolvabilité

133. (1) Toute modification à la *Loi sur la faillite et l'insolvabilité* édictée par l'un des articles 2 à 5 ou 7 à 106, le paragraphe 107(1) ou l'un des articles 108 à 123 de la présente loi ne s'applique qu'à l'égard des personnes suivantes :

***a*) celles qui deviennent faillis à la date d'entrée en vigueur de la modification ou par la suite;**

(*c*) the person files a proposal without having filed a notice of intention;

(*d*) a proposal is made in respect of the person without the person having filed a notice of intention;

(*e*) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(*f*) all or part of the person's property comes into the possession or under the control of a receiver.

(*b*) celles qui déposent un avis d'intention à la date d'entrée en vigueur de la modification ou par la suite;

(*c*) celles qui déposent une proposition à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

(*d*) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;

(*e*) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire nommé à la date d'entrée en vigueur de la modification ou par la suite;

(*f*) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur de la modification ou par la suite.

Subsection 107(2)

(2) The amendment to the *Bankruptcy and Insolvency Act* that is enacted by subsection 107(2) of this Act applies only to a person who is an undischarged bankrupt on the day on which it comes into force or who becomes bankrupt on or after the day on which it comes into force.

Paragraphe 107(2)

(2) La modification à la *Loi sur la faillite et l'insolvabilité* édictée par le paragraphe 107(2) de la présente loi ne s'applique qu'à l'égard des personnes qui, à la date de son entrée en vigueur, sont des faillis non libérés et de celles qui deviennent des faillis à cette date ou par la suite.

Companies' Creditors Arrangement Act

134. An amendment to the *Companies' Creditors Arrangement Act* that is enacted by any of sections 124 to 131 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

Loi sur les arrangements avec les créanciers des compagnies

134. Toute modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'un des articles 124 à 131 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

108. Sections 137 to 139 of the Act are replaced by the following:

137. Paragraph 23(2)(*b*) of the *Canada Pension Plan* is replaced by the following:

(*b*) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's contributions, employee's contributions, and related interest, penalties or other amounts, subject to sub-

108. Les articles 137 à 139 de la même loi sont remplacés par ce qui suit :

137. L'alinéa 23(2)*b*) du *Régime de pensions du Canada* est remplacé par ce qui suit :

b) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* s'applique aux cotisations d'employeur, aux cotisations d'employé et aux intérêts, pénalités ou autres sommes

sections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*.

afférents, sous réserve des paragraphes 69(1) et 69.1(1) de la *Loi sur la faillite et l'insolvabilité* et de l'article 11.09 de la *Loi sur les arrangements avec les créanciers des compagnies*.

EMPLOYMENT INSURANCE ACT

138. Paragraph 99(*b*) of the *Employment Insurance Act* is replaced by the following:

(*b*) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's premiums, employee's premiums, and related interest, penalties or other amounts, subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*.

LOI SUR L'ASSURANCE-EMPLOI

138. L'alinéa 99*b*) de la *Loi sur l'assurance-emploi* est remplacé par ce qui suit :

b) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* s'applique aux cotisations patronales, aux cotisations ouvrières et aux intérêts, pénalités ou autres sommes afférents, sous réserve des paragraphes 69(1) et 69.1(1) de la *Loi sur la faillite et l'insolvabilité* et de l'article 11.09 de la *Loi sur les arrangements avec les créanciers des compagnies*.

INCOME TAX ACT

139. The portion of subsection 224(1.2) of the *Income Tax Act* before paragraph (*a*) is replaced by the following:

Garnishment

(1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.09 of the *Companies' Creditors Arrangement Act*, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

LOI DE L'IMPÔT SUR LE REVENU

139. Le passage du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* précédant l'alinéa *a*) est remplacé par ce qui suit :

Saisie-arrêt

(1.2) Malgré les autres dispositions de la présente loi, la *Loi sur la faillite et l'insolvabilité*, tout autre texte législatif fédéral ou provincial et toute règle de droit, mais sous réserve des paragraphes 69(1) et 69.1(1) de la *Loi sur la faillite et l'insolvabilité* et de l'article 11.09 de la *Loi sur les arrangements avec les créanciers des compagnies*, s'il sait ou soupçonne qu'une personne donnée est ou deviendra, dans les douze mois, débiteur d'une somme :

109. Section 141 of the Act is replaced by the following:

Order in council

141. Sections 1 to 131 and 136 to 139 come into force on a day or days to be fixed by order of the Governor in Council.

109. L'article 141 de la même loi est remplacé par ce qui suit :

Décret

141. Les articles 1 à 131 et 136 à 139 entrent en vigueur à la date ou aux dates fixées par décret.

TRANSITIONAL PROVISIONS

Bankruptcy and Insolvency Act

110. An amendment to the *Bankruptcy and Insolvency Act* that is enacted by any of subsections 1(1) and (5) to (7), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 25, 31, 34, 35, 37, 42, 44, 46 to 48 and 50,

DISPOSITIONS TRANSITOIRES

Loi sur la faillite et l'insolvabilité

110. Toute modification à la *Loi sur la faillite et l'insolvabilité* édictée par l'un des paragraphes 1(1) et (5) à (7), les articles 3 ou 6, le paragraphe 9(3), les articles 12 ou 13, les paragraphes 14(2) ou (3), 15(2) ou (3), 16(2) ou (3) ou 17(2), l'un des articles 19 à 22, 25, 31, 34, 35, 37, 42, 44, 46 à 48 et 50, le

subsection 51(1), sections 55 to 57 and subsection 58(2) of this Act applies only to a person who, on or after the day on which the amendment comes into force, is described in one of the following paragraphs:

(*a*) the person becomes bankrupt;

(*b*) the person files a notice of intention;

(*c*) the person files a proposal without having filed a notice of intention;

(*d*) a proposal is made in respect of the person without the person having filed a notice of intention;

(*e*) an interim receiver is appointed in respect of the person's property and all or part of the person's property comes into the possession or under the control of the interim receiver; or

(*f*) all or part of the person's property comes into the possession or under the control of a receiver.

paragraphe 51(1), l'un des articles 55 à 57 ou le paragraphe 58(2) de la présente loi ne s'applique qu'à l'égard des personnes suivantes :

***a*) celles qui deviennent faillis à la date d'entrée en vigueur de la modification ou par la suite;**

***b*) celles qui déposent un avis d'intention à la date d'entrée en vigueur de la modification ou par la suite;**

***c*) celles qui déposent une proposition à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;**

***d*) celles à l'égard desquelles une proposition est déposée à la date d'entrée en vigueur de la modification ou par la suite alors qu'elles n'avaient pas déposé d'avis d'intention;**

***e*) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre intérimaire nommé à la date d'entrée en vigueur de la modification ou par la suite;**

***f*) celles dont la totalité ou une partie des biens est mise en la possession ou sous la responsabilité d'un séquestre à la date d'entrée en vigueur de la modification ou par la suite.**

Companies' Creditors Arrangement Act

111. The amendment to the *Companies' Creditors Arrangement Act* that is enacted by section 67 of this Act applies only to a debtor company in respect of whom proceedings commence under that Act on or after the day on which the amendment comes into force.

Loi sur les arrangements avec les créanciers des compagnies

111. La modification à la *Loi sur les arrangements avec les créanciers des compagnies* édictée par l'article 67 de la présente loi ne s'applique qu'aux compagnies débitrices à l'égard desquelles une procédure est intentée sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* à la date d'entrée en vigueur de la modification ou par la suite.

COORDINATING AMENDMENTS

DISPOSITIONS DE COORDINATION

Bill C-52

112. (1) Subsections (2) to (25) apply if Bill C-52, introduced in the 1st session of the 39th Parliament and entitled the *Budget Implementation Act, 2007* (the "other Act"), receives royal assent.

Projet de loi C-52

112. (1) Les paragraphes (2) à (25) s'appliquent en cas de sanction du projet de loi C-52, déposé au cours de la 1re session de la 39e législature et intitulé *Loi d'exécution du budget de 2007* (appelé « autre loi » au présent article).

(2) If subsection 94(1) of the other Act comes into force before section 25 of this Act, then section 25 of this Act is repealed.

(3) If subsection 94(1) of the other Act comes into force on the same day as section 25 of this Act, then section 25 of this Act is deemed to have come into force before subsection 94(1) of the other Act.

(4) On the later of the day on which subsection 94(1) of the other Act comes into force and the day on which section 26 of this Act comes into force — or, if those days are the same day, then on that day — paragraph 65.11(10)(*a*) of the *Bankruptcy and Insolvency Act*, as enacted by section 44 of chapter 47 of the Statutes of Canada, 2005, as that section 44 is amended by that section 26, is replaced by the following:

(*a*) an eligible financial contract;

(5) If section 26 of this Act comes into force before section 95 of the other Act, then section 95 of the other Act is deemed never to have had its effects and is repealed.

(6) If section 95 of the other Act comes into force on the same day as section 26 of this Act, then section 95 of the other Act is deemed to have come into force before section 26 of this Act.

(7) If section 96 of the other Act comes into force before section 31 of this Act, then section 31 of this Act is repealed.

(8) If section 31 of this Act comes into force before section 96 of the other Act, then

(*a*) section 96 of the other Act is deemed never to have had its effects and is repealed; and

(*b*) subsections 66.34(8) and (9) of the *Bankruptcy and Insolvency Act* are replaced by the following:

Permitted actions

(8) Despite section 69.2, the following actions are permitted in respect of an eligible financial contract that is entered into before the filing of a consumer proposal and is terminated on or after that filing, but only in accordance with the provisions of that contract:

(2) Si le paragraphe 94(1) de l'autre loi entre en vigueur avant l'article 25 de la présente loi, cet article 25 est abrogé.

(3) Si l'entrée en vigueur du paragraphe 94(1) de l'autre loi et celle de l'article 25 de la présente loi sont concomitantes, l'article 25 de la présente loi est réputé être entré en vigueur avant le paragraphe 94(1) de l'autre loi.

(4) À la date d'entrée en vigueur du paragraphe 94(1) de l'autre loi ou, si elle est postérieure, à celle de l'article 26 de la présente loi, l'alinéa 65.11(10)*a*) de la *Loi sur la faillite et l'insolvabilité*, édicté par l'article 44 du chapitre 47 des Lois du Canada (2005), lui-même modifié par cet article 26, est remplacé par ce qui suit :

a) les contrats financiers admissibles;

(5) Si l'article 26 de la présente loi entre en vigueur avant l'article 95 de l'autre loi, cet article 95 est réputé ne pas avoir produit ses effets et est abrogé.

(6) Si l'entrée en vigueur de l'article 95 de l'autre loi et celle de l'article 26 de la présente loi sont concomitantes, l'article 95 de l'autre loi est réputé être entré en vigueur avant l'article 26 de la présente loi.

(7) Si l'article 96 de l'autre loi entre en vigueur avant l'article 31 de la présente loi, cet article 31 est abrogé.

(8) Si l'article 31 de la présente loi entre en vigueur avant l'article 96 de l'autre loi :

***a*) cet article 96 est réputé ne pas avoir produit ses effets et est abrogé;**

***b*) les paragraphes 66.34(8) et (9) de la *Loi sur la faillite et l'insolvabilité* sont remplacés par ce qui suit :**

Opérations permises

(8) Malgré l'article 69.2, si le contrat financier admissible conclu avant le dépôt d'une proposition de consommateur est résilié lors de ce dépôt ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

(*a*) the netting or setting off or compensation of obligations between the consumer debtor and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

a) la compensation des obligations entre le débiteur consommateur et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Net termination values

(9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the consumer debtor to another party to the eligible financial contract, that other party is deemed, for the purposes of subsection 69.2(1), to be a creditor of the consumer debtor with a claim provable in bankruptcy in respect of those net termination values.

Valeurs nettes dues à la date de résiliation

(9) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par le débiteur consommateur à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée, pour l'application du paragraphe 69.2(1), être un créancier du débiteur consommateur et avoir une réclamation prouvable en matière de faillite relativement à ces sommes.

(9) If section 96 of the other Act and section 31 of this Act come into force on the same day, then section 31 of this Act is deemed to have come into force before section 96 of the other Act and subsection (8) applies.

(9) Si l'entrée en vigueur de l'article 96 de l'autre loi et celle de l'article 31 de la présente loi sont concomitantes, l'article 31 de la présente loi est réputé être entré en vigueur avant l'article 96 de l'autre loi et le paragraphe (8) s'applique.

(10) If section 100 of the other Act comes into force before section 40 of this Act, then

(10) Si l'article 100 de l'autre loi entre en vigueur avant l'article 40 de la présente loi :

(*a*) section 40 of this Act is deemed never to have had its effects and is repealed; and

(*a*) cet article 40 est réputé ne pas avoir produit ses effets et est abrogé;

(*b*) sections 84.1 and 84.2 of the *Bankruptcy and Insolvency Act*, as enacted by section 68 of chapter 47 of the Statutes of Canada, 2005, as that section 68 is amended by that section 100, are replaced by the following:

(*b*) les articles 84.1 et 84.2 de la *Loi sur la faillite et l'insolvabilité*, édictés par l'article 68 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 100 de l'autre loi, sont remplacés par ce qui suit :

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.

Cessions

84.1 (1) Sur demande du syndic et sur préavis à toutes les parties à un contrat, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations du failli découlant du contrat.

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.

Personne physique

(2) Toutefois, lorsque le failli est une personne physique, la demande de cession ne peut être présentée que si celui-ci exploite une entreprise et, le cas échéant, seuls les droits et obligations découlant de contrats relatifs à l'entreprise peuvent être cédés.

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.

Exceptions

(3) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date de la faillite ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

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.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

b) l'opportunité de lui céder les droits et obligations.

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.

Restriction

(5) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la personne a fait faillite, est insolvable ou ne s'est pas conformée à une obligation non pécuniaire.

Copy of order

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

Copie de l'ordonnance

(6) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

Certain rights limited

84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

Limitation de certains droits

84.2 (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec un failli qui est une personne physique, ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif qu'il a fait faillite ou est insolvable.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, the lease by reason only of the bankruptcy or insolvency or of the fact that the bankrupt has not paid rent in respect of any period before the time of the bankruptcy.

Baux

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où le failli n'a pas payé son loyer à l'égard d'une période antérieure au moment de la faillite.

Public utilities

(3) No public utility may discontinue service to a bankrupt individual by reason only of the individual's bankruptcy or insolvency or of the fact that the bankrupt individual has not paid for services rendered or material provided before the time of the bankruptcy.

Entreprise de service public

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'un failli qui est une personne physique au seul motif qu'il a fait faillite, qu'il est insolvable ou qu'il n'a pas payé certains services ou du matériel fournis avant le moment de la faillite.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the time of the bankruptcy; or

(*b*) requiring the further advance of money or credit.

Exceptions

(4) Le présent article n'a pas pour effet :

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après le moment de la faillite;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

Powers of court

(6) On application by a party to an agreement or by a public utility, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Pouvoirs du tribunal

(6) À la demande de l'une des parties à un contrat ou d'une entreprise de service public, le tribunal peut déclarer le présent article inapplicable, ou applicable uniquement dans la mesure qu'il précise, s'il est établi par le demandeur que son application lui causerait vraisemblablement de sérieuses difficultés financières.

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une personne insolvable, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'association.

Permitted actions

(8) Despite section 69.3, the following actions are permitted in respect of an eligible financial contract that is entered into before the time of the bankruptcy, and is terminated on or after that time, but only in accordance with the provisions of that contract:

Opérations permises

(8) Malgré l'article 69.3, si le contrat financier admissible conclu avant le moment de la faillite est résilié au moment de celle-ci ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre le failli qui est une personne physique et les autres parties au contrat;

(*a*) the netting or setting off or compensation of obligations between the individual bankrupt and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Net termination values

(9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the individual bankrupt to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(*a*) and 69.1(1)(*a*), to be a creditor of the individual bankrupt with a claim provable in bankruptcy in respect of those net termination values.

Valeurs nettes dues à la date de résiliation

(9) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par le failli qui est une personne physique à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée, pour l'application des alinéas 69(1)*a*) et 69.1(1)*a*), être un créancier du failli et avoir une réclamation prouvable en matière de faillite relativement à ces sommes.

(11) If section 40 of this Act comes into force before section 100 of the other Act, then

(*a*) section 100 of the other Act is deemed never to have had its effects and is repealed;

(*b*) subsection 84.1(3) of the *Bankruptcy and Insolvency Act*, as enacted by section 68 of chapter 47 of the Statutes of Canada, 2005, as that section 68 is amended by that section 40, is replaced by the following:

(11) Si l'article 40 de la présente loi entre en vigueur avant l'article 100 de l'autre loi :

***a*) cet article 100 est réputé ne pas avoir produit ses effets et est abrogé;**

***b*) le paragraphe 84.1(3) de la *Loi sur la faillite et l'insolvabilité*, édicté par l'article 68 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 40 de la présente loi, est remplacé par ce qui suit :**

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.

Exceptions

(3) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date de la faillite ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

(*c*) subsection 84.2(7) of the *Bankruptcy and Insolvency Act*, as enacted by section 68 of chapter 47 of the Statutes of Canada, 2005, as that section 68 is amended by that section 40, is replaced by the following:

***c*) le paragraphe 84.2(7) de la *Loi sur la faillite et l'insolvabilité*, édicté par l'article 68 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 40 de la présente loi, est remplacé par ce qui suit :**

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une personne insolvable, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'association.

Permitted actions

(8) Despite section 69.3, the following actions are permitted in respect of an eligible financial contract that is entered into before the time of the bankruptcy, and is terminated on or after that time, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the individual bankrupt and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Opérations permises

(8) Malgré l'article 69.3, si le contrat financier admissible conclu avant le moment de la faillite est résilié au moment de celle-ci ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre le failli qui est une personne physique et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Net termination values

(9) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the individual bankrupt to another party to the eligible financial contract, that other party is deemed, for the purposes of paragraphs 69(1)(*a*) and 69.1(1)(*a*), to be a creditor of the individual bankrupt with a claim provable in bankruptcy in respect of those net termination values.

Valeurs nettes dues à la date de résiliation

(9) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par le failli qui est une personne physique à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée, pour l'application des alinéas 69(1)*a*) et 69.1(1)*a*), être un créancier du failli et avoir une réclamation prouvable en matière de faillite relativement à ces sommes.

(12) If section 100 of the other Act and section 40 of this Act come into force on the same day, then section 100 of the other Act is deemed to have come into force before section 40 of this Act and subsection (10) applies.

(12) Si l'entrée en vigueur de l'article 100 de l'autre loi et celle de l'article 40 de la présente loi sont concomitantes, l'article 100 de l'autre loi est réputé être entré en vigueur avant l'article 40 de la présente loi et le paragraphe (10) s'applique.

(13) If subsection (10) or (11) applies, then section 99 of the other Act is deemed never to have had its effects and is repealed.

(13) En cas d'application des paragraphes (10) ou (11), l'article 99 de l'autre loi est réputé ne pas avoir produit ses effets et est abrogé.

(14) On the later of the day on which section 102 of the other Act comes into force and the day on which section 42 of this Act comes into force — or, if those days are the same day, then on that day — subsection 95(2.1) of the *Bankruptcy and Insolvency Act* is replaced by the following:

(14) À la date d'entrée en vigueur de l'article 102 de l'autre loi ou, si elle est postérieure, à celle de l'article 42 de la présente loi, le paragraphe 95(2.1) de la *Loi sur la faillite et l'insolvabilité* est remplacé par ce qui suit :

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(*a*) a margin deposit made by a clearing member with a clearing house; or

(*b*) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Exception

(2.1) Le paragraphe (2) ne s'applique pas aux opérations ci-après et les parties à celles-ci sont réputées n'avoir aucun lien de dépendance :

a) un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre;

b) un transfert, un paiement ou une charge qui se rapporte à une garantie financière et s'inscrit dans le cadre d'un contrat financier admissible.

(15) If section 107 of the other Act comes into force before section 63 of this Act, then section 63 of this Act is deemed never to have had its effects and is repealed.

(15) Si l'article 107 de l'autre loi entre en vigueur avant l'article 63 de la présente loi, cet article 63 est réputé ne pas avoir produit ses effets et est abrogé.

(16) If section 107 of the other Act and section 63 of this Act come into force on the same day, then section 63 of this Act is deemed to have come into force before section 107 of the other Act.

(16) Si l'entrée en vigueur de l'article 107 de l'autre loi et celle de l'article 63 de la présente loi sont concomitantes, l'article 63 de la présente loi est réputé être entré en vigueur avant l'article 107 de l'autre loi.

(17) If section 109 of the other Act comes into force before section 65 of this Act, then subsection 11.3(2) of the *Companies' Creditors Arrangement Act*, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, as that section 128 is amended by that section 65, is replaced by the following:

(17) Si l'article 109 de l'autre loi entre en vigueur avant l'article 65 de la présente loi, le paragraphe 11.3(2) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 128 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 65 de la présente loi, est remplacé par ce qui suit :

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

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

(*c*) a collective agreement.

(18) If section 65 of this Act comes into force before section 109 of the other Act, then

(*a*) section 109 of the other Act is deemed never to have had its effects and is repealed; and

(*b*) subsection 11.3(2) of the *Companies' Creditors Arrangement Act*, as enacted by section 128 of chapter 47 of the Statutes of Canada, 2005, as that section 128 is amended by that section 65, is replaced by the following:

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.

(19) If section 109 of the other Act and section 65 of this Act come into force on the same day, then section 109 of the other Act is deemed to have come into force before section 65 of this Act and subsection (17) applies.

(20) If section 110 of the other Act comes into force before section 76 of this Act, then paragraph 32(9)(*a*) of the *Companies' Creditors Arrangement Act*, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, as that section 131 is amended by that section 76, is replaced by the following:

(*a*) an eligible financial contract;

(21) If section 76 of this Act comes into force before section 110 of the other Act, then

(*a*) section 110 of the other Act is deemed never to have had its effects and is repealed; and

(*b*) paragraph 32(9)(*a*) of the *Companies' Creditors Arrangement Act*, as enacted by section 131 of chapter 47 of the Statutes of

(18) Si l'article 65 de la présente loi entre en vigueur avant l'article 109 de l'autre loi :

***a*) l'article 109 de l'autre loi est réputé ne pas avoir produit ses effets et est abrogé;**

***b*) le paragraphe 11.3(2) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 128 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 65 de la présente loi, est remplacé par ce qui suit :**

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

(19) Si l'entrée en vigueur de l'article 109 de l'autre loi et celle de l'article 65 de la présente loi sont concomitantes, l'article 109 de l'autre loi est réputé être entré en vigueur avant l'article 65 de la présente loi et le paragraphe (17) s'applique.

(20) Si l'article 110 de l'autre loi entre en vigueur avant l'article 76 de la présente loi, l'alinéa 32(9)*a*) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 76 de la présente loi, est remplacé par ce qui suit :

a) les contrats financiers admissibles;

(21) Si l'article 76 de la présente loi entre en vigueur avant l'article 110 de l'autre loi :

***a*) l'article 110 de l'autre loi est réputé ne pas avoir produit ses effets et est abrogé;**

***b*) l'alinéa 32(9)*a*) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 76 de la présente loi, est remplacé par ce qui suit :**

Canada, 2005, as that section 131 is amended by that section 76, is replaced by the following:

(*a*) an eligible financial contract;

(22) If section 110 of the other Act and section 76 of this Act come into force on the same day, then section 110 of the other Act is deemed to have come into force before section 76 of this Act and subsection (20) applies.

(23) If section 111 of the other Act comes into force before section 77 of this Act, then subsection 34(7) of the *Companies' Creditors Arrangement Act*, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, as that section 131 is amended by that section 77, is replaced by the following:

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

a) les contrats financiers admissibles;

(22) Si l'entrée en vigueur de l'article 110 de l'autre loi et celle de l'article 76 de la présente loi sont concomitantes, l'article 110 de l'autre loi est réputé être entré en vigueur avant l'article 76 de la présente loi et le paragraphe (20) s'applique.

(23) Si l'article 111 de l'autre loi entre en vigueur avant l'article 77 de la présente loi, le paragraphe 34(7) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 77 de la présente loi, est remplacé par ce qui suit :

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'association.

Opérations permises

(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

(24) If section 77 of this Act comes into force before section 111 of the other Act, then

(*a*) section 111 of the other Act is deemed never to have had its effects and is repealed; and

(*b*) subsection 34(7) of the *Companies' Creditors Arrangement Act*, as enacted by section 131 of chapter 47 of the Statutes of Canada, 2005, as that section 131 is amended by that section 77, is replaced by the following:

(24) Si l'article 77 de la présente loi entre en vigueur avant l'article 111 de l'autre loi :

***a*) l'article 111 de l'autre loi est réputé ne pas avoir produit ses effets et est abrogé;**

***b*) le paragraphe 34(7) de la *Loi sur les arrangements avec les créanciers des compagnies*, édicté par l'article 131 du chapitre 47 des Lois du Canada (2005), lui-même modifié par l'article 77 de la présente loi, est remplacé par ce qui suit :**

Eligible financial contracts

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the by-laws and rules of that Association.

Contrats financiers admissibles

(7) Le paragraphe (1) ne s'applique pas aux contrats financiers admissibles et n'a pas pour effet d'empêcher un membre de l'Association canadienne des paiements de cesser d'agir, pour une compagnie, à titre d'agent de compensation ou d'adhérent correspondant de groupe conformément à la *Loi canadienne sur les paiements* et aux règles et règlements administratifs de l'association.

Permitted actions

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

Opérations permises

(8) Si le contrat financier admissible conclu avant qu'une procédure soit intentée sous le régime de la présente loi à l'égard de la compagnie est résilié à la date d'introduction

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

Restriction

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

Net termination values

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

Priority

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

(25) If section 111 of the other Act and section 77 of this Act come into force on the same day, then section 111 of the other Act is deemed to have come into force before section 77 of this Act and subsection (23) applies.

COMING INTO FORCE

Order in council

113. Subsections 1(1) and (5) to (7), sections 3 and 6, subsection 9(3), sections 12 and 13, subsections 14(2) and (3), 15(2) and (3), 16(2) and (3) and 17(2), sections 19 to 22, 25, 31, 34, 35, 37, 42, 44, 46 to 48 and 50, subsection 51(1), sections 55 to 57, subsection 58(2) and section 67 come into force on a day or days to be fixed by order of the Governor in Council.

de la procédure ou par la suite, il est permis d'effectuer les opérations ci-après en conformité avec le contrat :

a) la compensation des obligations entre la compagnie et les autres parties au contrat;

b) toute opération à l'égard de la garantie financière afférente, notamment :

(i) la vente, la demande en forclusion ou, dans la province de Québec, la demande en délaissement,

(ii) la compensation, ou l'affectation de son produit ou de sa valeur.

Restriction

(9) Aucune ordonnance rendue au titre de la présente loi ne peut avoir pour effet de suspendre ou de restreindre le droit d'effectuer les opérations visées au paragraphe (8).

Valeurs nettes dues à la date de résiliation

(10) Si, aux termes du contrat financier admissible visé au paragraphe (8), des sommes sont dues par la compagnie à une autre partie au contrat au titre de valeurs nettes dues à la date de résiliation, cette autre partie est réputée être un créancier de la compagnie relativement à ces sommes.

Rang

(11) Il ne peut être rendu, au titre de la présente loi, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

(25) Si l'entrée en vigueur de l'article 111 de l'autre loi et celle de l'article 77 de la présente loi sont concomitantes, l'article 111 de l'autre loi est réputé être entré en vigueur avant l'article 77 de la présente loi et le paragraphe (23) s'applique.

ENTRÉE EN VIGUEUR

Décret

113. Les paragraphes 1(1) et (5) à (7), les articles 3 et 6, le paragraphe 9(3), les articles 12 et 13, les paragraphes 14(2) et (3), 15(2) et (3), 16(2) et (3) et 17(2), les articles 19 à 22, 25, 31, 34, 35, 37, 42, 44, 46 à 48 et 50, le paragraphe 51(1), les articles 55 à 57, le paragraphe 58(2) et l'article 67 entrent en vigueur à la date ou aux dates fixées par décret.

Published under authority of the Speaker of the House of Commons

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Bill C-12: Clause by Clause Analysis—Clauses 71–80

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An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

Amendments to the *Bankruptcy and Insolvency Act* (BIA)	**Clauses of Bill C-12**	**Sections**
Voting by Equity Claimants	71	s. (section)22.1
Voting by Related Parties	71	s. (section)22
Duties and Functions of Monitors	72	s. (section)23(1)
Compilation of Information	73	s. (section)26(3)
Rights during Investigations	74	s. (section)29(2)
Subpoena or Summons	75	s. (section)30(3)
Disclaimer of Agreements	76	s. (section)32
Ipso Facto Clauses	77	s. (section)34

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BIA (Bankruptcy and Insolvency Act) Provisions	78	s. (section)36.1
Sale of Assets	78	s. (section)36
Crown Securities	79	s. (section)39(1)
Forms of Cooperation	80	s. (section)52(3)

Bill Clause No. (Number) 71
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)22.1
Topic: Voting by Equity Claimants

Proposed Wording

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

Rationale

The amendment is one of several made with the intention of clarifying that equity claims are to be subordinate to other claims. Equity claims are ownership interests and, as such, should be subject to the risks of insolvency. It is possible, however, that in some restructurings it would be appropriate for the equity claimants to have a vote – for example, where they are the only creditors – and therefore judicial discretion is provided to the court to allow this to happen in the appropriate circumstances.

Section 22.1 is added to clarify that unless the court orders otherwise, holders of equity claims should be in the same class in respect of those claims and should be prevented from voting those claims at any meeting.

Present Law

None.

Bill Clause No. (Number) 71
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)22
Topic: Voting by Related Parties

Proposed Wording

22.(1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or an arrangement relating to **the** company and, if it does so, it **is to** apply to the court for approval of the division before **the** meeting is held.

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests **or rights** are sufficiently similar to give them a commonality of interest, taking into account

(*a*) the nature of the debts, liabilities or obligations giving rise to their claims;

(*b*) the nature and rank of any security in respect of their claims;

(*c*) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which

the creditors would recover their claims by exercising those remedies; and

(*d*) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

(3) **A creditor who is related to the debtor company may vote against, but not for, a compromise or an arrangement relating to the company**.

Rationale

Section 22 sets out the rules regarding the division of creditors into classes for the purpose of voting at a meeting of creditors.

Subsections (1) and (2) have been amended for readability.

Subsection (3) has been added to parallel the voting system in the BIA (Bankruptcy and Insolvency Act) proposal provisions. Parties related to the debtor company will no longer be entitled to vote in favour of a plan, only against it. This should reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties.

Present Law

As enacted by Chapter 47, Clause 131:

22.(1) Subject to subsection (3), a debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or an arrangement relating to a company and, if it does so, it must apply to the court for approval of the division before any meeting is held.

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account

(*a*) the nature of the debts, liabilities or obligations giving rise to their claims;

(*b*) the nature and rank of any security in respect of their claims;

(*c*) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(*d*) any further criteria, consistent with those set out in paragraphs (*a*) to (*c*), that are prescribed.

(3) Creditors having a claim against a debtor company arising from the rescission of a purchase or sale of a share or unit of the company — or a claim for damages arising from the purchase or sale of a share or unit of the company — must be in the same class of creditors in relation to those claims and may not, as members of that class, vote at a meeting to be held under section 4 in respect of a compromise or an arrangement relating to the company.

Bill Clause No. (Number) 72
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)23(1)
Topic: Duties and Functions of Monitors

Proposed Wording

23.(1)(*a*)(ii) within five days after the **day on which the** order is made,

(**A**) make the order publicly available in the prescribed manner,

(**B**) send, **in the prescribed manner**, a **notice** to every known creditor who has a claim against the company of more than $1,000 **advising them that the order is publicly available**, and

(**C**) **prepare** a list, showing the **names** and **addresses** of those creditors **and the estimated amounts of those claims, and make it** publicly available in the prescribed manner;

[...]

(*d*) file a report with the court on the state of the company's business and financial affairs — containing **the** prescribed information, **if any** —

(i) without delay after ascertaining **a** material adverse change in the company's projected cash-flow or financial circumstances,

(**ii**) not later than 45 days, or any longer period that the court may specify, after the **day on which** each of the company's fiscal quarters **ends**, and

(**iii**) at any other **time** that the court may order;

(*d.1*) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or an arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d*.***1***);

(*f*) file with the Superintendent of Bankruptcy, **in the prescribed manner and at the prescribed time**, a copy of the documents specified **in** the regulations;

(*f.1*) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

[...]

(*j*) make the **prescribed** documents publicly available in the prescribed manner **and at the prescribed time** and provide the company's creditors with information as to how they may access those documents; and [.....]

[...]

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (***d.1***), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Rationale

Paragraph (*a*) is amended to clarify that only a notice of the initial application order must be provided to creditors. Chapter 47 inadvertently stated that the order itself needed to be sent to each creditor. Further, the paragraph is amended to require that the estimated amount of each creditor's claim be listed. The list is intended to assist creditors as they prepare for creditors' meetings. Without information relating to the amounts, the list will be of limited value since creditors' votes at meetings are based on their claims.

Paragraph (*d*) is amended in order to clarify that even in the absence of prescribed information in the regulations, the monitor must nevertheless file a report on the state of the company's business and financial affairs with the court. In addition, subparagraph (1)(d)(ii) of Chapter 47 has been removed and added to paragraph (*d.1*).

Paragraph (*d.1*) specifies the information that the monitor must report to the court. The intention of the paragraph is to ensure that creditors receive the notice and information in a timely manner for them to be in a position to make an informed decision at the meeting.

The change in paragraph (*e*) is a technical amendment to correct cross-referencing as a result of the addition of paragraph (*d.1*) to the section.

Paragraph (*f*) is amended to clarify that the documents should be filed as prescribed by regulations.

Paragraph (*f.1*) is added to clarify the rationale for the fee.

Paragraph (*j*) is amended to clarify that the time for filing of prescribed documents may be prescribed by regulations.

Subsection (2) is amended to correct cross-referencing.

Present Law

As enacted by Chapter 47, Clause 131:

23.(1)(a)(ii) within five days after the order is made,

> (A) send a copy of the order to every known creditor who has a claim against the company of more than $1,000, and
>
> (B) make a list showing the name and address of those creditors publicly available in the prescribed manner;

[...]

(*d*) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) without delay after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5,

(iii) not later than 45 days, or any longer period that the court may specify, after the end of each of the company's fiscal quarters, and

(iv) at any other times that the court may order;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d*);

(*f*) file with the Superintendent of Bankruptcy a copy of the documents specified by the regulations and pay the prescribed filing fee;

[...]

(*j*) unless the court otherwise orders, make publicly available, in the prescribed manner, all documents filed with the court, and all court decisions, relating to proceedings held under this Act in respect of the company and provide the company's creditors with information as to how they may access those documents and decisions; and

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Bill Clause No. (Number) 73
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)26(3)
Topic: Compilation of Information

Proposed Wording

26.(3) The Superintendent of Bankruptcy may enter into an agreement to provide a compilation of all or part of the information that is contained in the public record.

Rationale

The amendment clarifies that the Superintendent of Bankruptcy has the authority to enter into agreements to provide compilations of information maintained in the public record to third parties.

Present Law

None.

Bill Clause No. (Number) 74
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)29(2)
Topic: Rights During Investigations

Proposed Wording

29.(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

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(*a*) shall have access to and the right to examine and make copies of **the** books, records, data, documents **or** papers — including **those** in electronic form — in the possession or under the control of a monitor under this Act; and

(*b*) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, documents **or** papers — including **those** in electronic form — relating to any compromise or arrangement **in respect of** which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

French version only:

29.(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif dont il estime le concours utile **à** l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues **à** ces personnes sont, une fois certifiées par le surintendant, **imputables** sur les crédits affectés à son bureau.

Rationale

Subsection (2) is amended to correct a drafting error created by Chapter 47, which could be interpreted to mean that only electronic "data" were to be subject to a production order, while electronic books, records and papers were not. The amendment clarifies the policy intention to include all materials under a production order, including those in electronic form.

Subsection (3) of the French version of the Act is amended by replacing the word "payables" with "imputables" as it more accurately reflects the concept of payment from an appropriation.

Present Law

As enacted by Chapter 47, Clause 131:

29.(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(*a*) shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers in the possession or under the control of a monitor under this Act; and

(*b*) may, with the leave of the court granted on an *ex parte* application, examine the books, records, data, including data in electronic form, documents and papers relating to any compromise or arrangement to which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

French version only:

(3) Le surintendant des faillites peut retenir les services des experts ou autres personnes et du personnel administratif, dont il estime le concours utile pour l'investigation ou l'enquête et fixer leurs fonctions et leurs conditions d'emploi. La rémunération et les indemnités dues de ces personnes sont, une fois certifiées par le surintendant, payables sur les crédits affectés à son bureau.

Bill Clause No. (Number) 75
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)30(3)

Topic: Subpoena or Summons

Proposed Wording

30.(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a summons requiring **the** person named in it

(*a*) to appear at the time and place mentioned in it;

(*b*) to testify to all matters within **their** knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and

(*c*) to bring and produce any books, records, data, documents or papers — including **those** in electronic form — in **their** possession or under **their** control relative to the subject matter of the inquiry or investigation.

(4) A person may be summoned from any part of Canada by virtue of a summons issued under subsection (3).

Rationale

Subsection (3) is amended to correct a drafting error created by Chapter 47, which could be interpreted to mean that only electronic "data" were to be subject to a production order, while electronic books, records and papers were not. The amendment clarifies the policy intention to include all materials under a production order, including those in electronic form.

Subsection (4) is amended to correct a divergence between the French term (assignations) and the English terms (subpoena, other request or summons) by modernizing the English version to limit the English version to "summons".

Present Law

As enacted by Chapter 47, Clause 131:

30.(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a subpoena or other request or summons, requiring and commanding any person named in it

(*a*) to appear at the time and place mentioned in it;

(*b*) to testify to all matters within his or her knowledge relative to the subject matter of the inquiry or investigation into the conduct of the monitor; and

(*c*) to bring and produce any books, records, data, including data in electronic form, documents or papers in the person's possession or under the control of the person relative to the subject matter of the inquiry or investigation.

(4) A person may be summoned from any part of Canada by virtue of a subpoena, request or summons issued under subsection (3).

Bill Clause No. (Number) 76
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)32
Topic: Disclaimer of Agreements

Proposed Wording

32.(1) Subject to **subsections (2) and** (3), a debtor company may — **on** notice **given** in the prescribed **form** and manner to the other parties to the agreement **and the monitor** — disclaim or resiliate any agreement to

which **the company** is a party on the day **on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.**

(**2**) Within 15 days after **the day on which the company gives** notice **under subsection (1)**, a party to the agreement may, on notice to **the other** parties **to the agreement and the monitor**, apply to **a** court for **an order** that the agreement **is not to be disclaimed or resiliated**.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

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

(*a*) whether the monitor approved the proposed disclaimer or resiliation;

(*b*) whether the disclaimer or resiliation **would enhance the prospects of** a viable compromise or arrangement **being** made in respect of the company; and

(*c*) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

(5) An agreement is disclaimed or resiliated

(*a*) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(*b*) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives

notice under subsection (1) or on any later day fixed by the court; or

(*c*) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

(**6**) If the company has granted **a right to** use intellectual property to a party to **an** agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — **including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as** long as **the** party continues to perform its obligations **under the agreement** in relation to the use of the intellectual property.

(**7**) If an agreement is disclaimed or resiliated, **a** party to the agreement **who suffers a loss in relation to the disclaimer or resiliation** is **considered** to have a **provable** claim.

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

(**9**) **This section** does not apply in respect of

(*a*) an eligible financial contract;

(*b*) a collective agreement;

(*c*) a financing agreement if the **company** is the borrower; **or**

(*d*) a lease of real property or **of** an immovable if the **company** is the lessor.

Rationale

Prior to Chapter 47, the CCAA (Companies' Creditors Arrangement Act) was silent on the ability of a debtor to disclaim an agreement. A judicial practice developed, however, based on inherent jurisdiction that allowed the disclaimer of most kinds of agreements.

The rationale for allowing disclaimers is to facilitate restructurings by granting debtors the ability to repudiate agreements that would threaten its viability if they continued to be bound by them. At the same time, codification of the current practice makes the process more transparent by providing both parties with a better understanding of the rules that apply when considering a disclaimer. The amendments are designed to ensure that the process occurs in an open, fair and expeditious manner.

Subsection (1) is amended to require that notice of a disclaimer only be given if the monitor approves the disclaimer. In addition, notice of disclaimers must be given to the monitor. Approval of the monitor is required to prevent a strategic debtor from using the provision to assist related parties by disclaiming agreements that are profitable for the debtor at their expense. Moreover, because disclaimers will not require court approval unless there is opposition, it is necessary to protect against potential abuse.

Subsection (2) is amended to clarify that notice to have a disclaimer set aside be given to the monitor and other parties to the agreement, if any. The language in Chapter 47 currently could be interpreted to exclude the need for notice to these interested parties.

Subsection (3) is added to provide a debtor with the opportunity to appeal to the courts if a monitor refuses to approve a disclaimer. The provision is needed as monitor approval is required to effect a disclaimer.

Subsection (4) amends the test to be applied by the court in determining whether a disclaimer should be granted. Chapter 47 relied upon a difficult to interpret test that may have created greater uncertainty. In fact, the test, which was drawn from the commercial lease disclaimer section of the BIA (Bankruptcy and Insolvency Act), has been judicially interpreted in an inconsistent manner. By providing the court with legislative guidance, the provision should ensure better transparency and fairness. Further, the guidance ensures that the court will consider the effect on all parties, not just the debtor as the commercial disclaimer section requires.

Subsection (5) has been amended to clarify that the counterparties to a disclaimed agreement are provided with at least 30 days notice of a disclaimer so that they may prepare for the event regardless of how the disclaimer becomes effective, i.e., court order or monitor approval.

The amendment to subsection (6) is to clarify that certain rights to use intellectual property granted under a disclaimed agreement – including rights to exclusive use and to as-of-right extensions – continue to be available to the disclaimed party provided that that party continues to perform its obligations under the agreement.

Subsection (7) has been amended to clarify that a party to a disclaimed agreement who suffers a loss has a provable claim in the proceeding. The subsection was also amended to ensure that the disclaimer does not serve to reduce the priority, if any, enjoyed by the party.

Subsection (8) has been added to ensure that a party receiving the subsection (1) notice of intention to disclaim an agreement is able to obtain, within five days, a written explanation from the debtor as to why the debtor is seeking to end the agreement so that it may make an informed decision as to whether to commence a subsection (3) court application to oppose the disclaimer.

By virtue of Clauses 104(1) and 105 of *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007*, which received Royal Assent on June 22, 2007 (Chapter 29), the definition of eligible financial contract referred to in subsection (9)(*a*) is now to be found in s. (section)2 rather than in s. (section)11.05(3). Clause 112(20) of this Act amends subparagraph (9)(a) of Clause 26 to remove reference to the old location of the definition.

Present Law

As enacted by Chapter 47, Clause 131 and amended by Chapter 29:

32.(1) Subject to subsection (3), a debtor company may disclaim or resiliate any agreement to which it is a party on the day of the filing of the initial application in respect of the company by giving 30 days notice to the other parties to the agreement in the prescribed manner.

(2) Subsection (1) does not apply in respect of

(*a*) an eligible financial contract;

(*b*) a collective agreement;

(*c*) a financing agreement if the debtor is the borrower; and

(*d*) a lease of real property or an immovable if the debtor is the lessor.

(3) Within 15 days after being given notice of the disclaimer or resiliation, a party to the agreement may apply to the court for a declaration that subsection (1) does not apply in respect of the agreement, and the court, on notice to any parties that it may direct, shall, subject to subsection (4), make that declaration.

(4) No declaration under subsection (3) shall be made if the court is satisfied that a viable compromise or arrangement could not be made in respect of the company without the disclaimer or resiliation of the agreement and all other agreements that the company has disclaimed or resiliated under subsection (1).

(5) If the company has, in any agreement, granted the use of any intellectual property to a party to the agreement, the disclaimer or resiliation of the agreement does not affect the party's right to use the intellectual property so long as that party continues to perform its obligations in relation to the use of the intellectual property.

(6) If an agreement is disclaimed or resiliated by a company, every other party to the agreement is deemed to have a claim for damages as an unsecured creditor.

Bill Clause No. (Number) 77
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)34
Topic: Ipso Facto Clauses

Proposed Wording

34.(1) No person may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement, including a security agreement, with a debtor company by reason only that **proceedings commenced** under this Act **or that the company is insolvent**.

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that **proceedings commenced** under this Act, **that the company is insolvent** or that the company has not paid rent in respect of any period before the **commencement of those proceedings**.

(3) No public utility may discontinue service to a company by reason only that **proceedings commenced** under this Act, **that the company is insolvent** or that the company has not paid for services rendered or goods provided before the **commencement of those proceedings**.

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the **commencement** of **proceedings under this Act**;

(*b*) requiring the further advance of money or credit; or

(*c*) preventing a lessor of aircraft objects under an agreement with the company from taking possession of the aircraft objects

(i) if, after proceedings commence under this Act, the company defaults in protecting or maintaining the aircraft objects in accordance with the agreement,

(ii) 60 days after the day on which proceedings commence under this Act unless, during that period, the company

(A) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(B) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until the proceedings under this Act end, and

(C) agreed to perform all of the obligations arising under the agreement after the proceedings under this Act end, or

(iii) if, during the period that begins on the expiry of the 60-day period and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) On application by a party to an agreement **or by a public utility**, the court may declare that this section does not apply — or applies only to the extent declared by the court — if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the bylaws and rules of that Association.

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(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

Rationale

Chapter 47 introduced this section to the CCAA (Companies' Creditors Arrangement Act) to deal with *ipso facto* clauses, which are common in commercial agreements. An *ipso facto* clause states that an insolvency or a filing under insolvency legislation by a party to the agreement is a breach of the agreement. The section is mirrored in the BIA (Bankruptcy and Insolvency Act) proposals section 65.1. Parties should be entitled to rely on agreements regardless of an insolvency filing provided that they comply with all other terms of the agreement.

Subsection (1) is amended to clarify that insolvency cannot be used as a reason to terminate an agreement. This matches the provision under proposals. Chapter 47 inadvertently left out the words "or that the company is insolvent".

Subsection (2) is amended to match the exclusions set forward in subsection (1). The intention is to ensure consistent treatment regardless of the type of agreement. In addition, the words "or that the company is insolvent" are added as described above.

Subsection (3) is amended to add the words "or that the company is insolvent" as described above.

Subsection (4) is amended to implement the obligations under *An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*. Chapter 47 inadvertently omitted inclusion of this specific language in this section.

Subsection (6) is amended to add the words "or public utility" to clarify that the provision applies to those entities as well.

Subsection (7) is added to match the provision under BIA (Bankruptcy and Insolvency Act) proposals. Chapter 47 inadvertently omitted this subsection.

Also, by virtue of Clauses 104(1) and 105 of *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007*, which received Royal Assent on June 22, 2007 (Chapter 29), the definition of eligible financial contract referred to in subparagraph (7)(*a*) is now to be found in s. (section)2 rather than in ss. (subsection)11.05(3). To ensure that this Act is compatible with this change, Clause 112(23) provides the new wording for s. (section)34(7).

Further, Clause 112(23) also repeats the wording of new subparagraphs (8) and (9), which were added by Chapter 29, to ensure that this Act does not inadvertently repeal those new subparagraphs.

Present Law

As enacted by Chapter 47, Clause 131 and amended by Chapter 29:

34.(1) No person may terminate or amend any agreement, including a security agreement, with a debtor company, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with a debtor company by reason only that an order has been made under this Act in respect of the company.

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that an order has been made under this Act in respect of the company or that the company has not paid rent in respect of any period before the filing of the initial application in respect of the company.

(3) No public utility may discontinue service to a debtor company by reason only that an order has been made under this Act in respect of the company or that the company has not paid for services rendered, or for goods provided, before the filing of the initial application in respect of the company.

(4) Nothing in this section is to be construed as

(*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the date of the filing of initial application in respect of the company; or

(*b*) requiring the further advance of money or credit.

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) The court may, on application by a party to an agreement, declare that this section does not apply, or applies only to the extent declared by the court, if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

(7) Subsection (1) does not apply

(*a*) in respect of an eligible financial contract; or

(*b*) to prevent a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* and the bylaws and rules of that Association.

(8) The following actions are permitted in respect of an eligible financial contract that is entered into before proceedings under this Act are commenced in respect of the company and is terminated on or after that day, but only in accordance with the provisions of that contract:

(*a*) the netting or setting off or compensation of obligations between the company and the other parties to the eligible financial contract; and

(*b*) any dealing with financial collateral including

(i) the sale or foreclosure or, in the Province of Quebec, the surrender of financial collateral, and

(ii) the setting off or compensation of financial collateral or the application of the proceeds or value of financial collateral.

(9) No order may be made under this Act if the order would have the effect of staying or restraining the actions permitted under subsection (8).

(10) If net termination values determined in accordance with an eligible financial contract referred to in subsection (8) are owed by the company to another party to the eligible financial contract, that other party is deemed to be a creditor of the company with a claim against the company in respect of those net termination values.

(11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

Bill Clause No. (Number) 78
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)36.1

Topic: *Bankruptcy and Insolvency Act* Provisions

Proposed Wording

36.1(1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(*a*) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(*b*) to "trustee" is to be read as a reference to "monitor"; and

(*c*) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

Rationale

Subsection (1) is added in order to ensure that the provisions of the BIA (Bankruptcy and Insolvency Act) relating to preferences and transfer at undervalue would apply in CCAA (Companies' Creditors Arrangement Act) matters. The purpose is to prevent forum shopping, where the debtor would choose the CCAA (Companies' Creditors Arrangement Act) because preferences and transfer at undervalue transactions could not be attacked.

Subsection (2) is added to provide clarification that the BIA (Bankruptcy and Insolvency Act) terminology is to be read in the CCAA (Companies' Creditors Arrangement Act) context.

Present Law

None.

Bill Clause No. (Number) 78
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)36
Topic: Sale of Assets

Proposed Wording

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

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

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

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

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

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

creditors than **a** sale or **disposition** under **a bankruptcy**;

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

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

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

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

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

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

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

(*a*) a director or an officer of the company;

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

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

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

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

Rationale

Chapter 47 intended to provide debtors with the ability to deal with their assets outside of the ordinary course of business while restructuring, subject to certain safeguards to protect the interests of creditors.

Subsection (1) is amended to clarify that the ability of the debtor company to dispose of its assets should not be restricted by a requirement that shareholder approval be obtained.

Paragraph (3)(*c*) is amended to clarify that the disposition must be more beneficial to the creditors than a disposition under a bankruptcy scenario. The language in Chapter 47 referred to a disposition under the BIA (Bankruptcy and Insolvency Act). As the BIA (Bankruptcy and Insolvency Act) contains provisions relating to bankruptcies, proposals and receiverships, it would be difficult for a court to interpret with any certainty.

Paragraph (4)(*b*) is amended to address concerns that the offer that the court considers must be a legitimate offer. As such, the court is directed to judge the offer only against the consideration that would be received in other offers made in accordance with the bidding process, and not against offers never formalized.

Subsection (5) is amended to clarify that the charge may be granted over either the proceeds from the sale or disposition or, in the alternative, over other assets. Chapter 47 inadvertently limited the court by restricting it to

providing a charge on the proceeds. In some circumstances, it may be beneficial to provide the court with flexibility to determine the appropriate property to charge.

Due to drafting errors in Chapter 47, the explanation of related parties was incomplete. Subsection (6) is therefore amended to correct the explanation of who is a person related to a debtor company by including those individuals that have or had direct or indirect control of the debtor company and by clarifying that it includes persons related to those described in paragraphs (*a*) and (*b*).

Subsection (7) is added to ensure that the interests of wage earners are protected, as are the interests of other creditors. By requiring the court to consider the effect of any sale on the rights of those claimants, the risk that a debtor company will engage in a liquidating plan (i.e., a restructuring run with the intention of disposing of all assets) will be removed.

Present Law

As enacted by Chapter 47, Clause 131:

36.(1) A debtor company in respect of which an order has been made under this Act may not sell or dispose of any of its assets outside the ordinary course of its business unless authorized to do so by a court.

(2) A company that applies to the court for the authorization must give notice of the application to all secured creditors who are likely to be affected by the proposed sale or disposal of the assets to which the application relates.

(3) In deciding whether to grant the authorization, the court must consider, among other things,

(*a*) whether the process leading to the proposed sale or disposal of the assets to which the application relates was reasonable in the circumstances;

(*b*) whether the monitor approved the process leading to the proposed sale or disposal of the assets;

(*c*) whether the monitor has filed with the court a report stating that in his or her opinion the sale or disposal of the assets would be more beneficial to the creditors than if the sale or disposal took place under the *Bankruptcy and Insolvency Act*;

(*d*) the extent to which the creditors were consulted in respect of the proposed sale or disposal of the assets;

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

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

(4) In addition to taking the factors referred to in subsection (3) into account, if the proposed sale or disposal of the assets is to a person who is related to the company, the court may grant the authorization only if it is satisfied that

(*a*) good faith efforts were made to sell or dispose of the assets to persons who are not related to the company or who are neither directors or officers of the company nor individuals who control it; and

(*b*) the consideration to be received is superior to the consideration that would be received under all other offers actually received in respect of the assets.

(5) In granting an authorization for the sale or disposal of assets, the court may order that the assets may be sold or disposed of free and clear of any security, charge or other restriction, but if it so orders, it shall also order that the proceeds realized from the sale or disposal of the assets are subject to a security, charge or other restriction in favour of the creditors whose security, charges or other restrictions are affected by the order.

(6) For the purpose of this section, a person who is related to the debtor company includes a person who controls the company, a director or an officer of the company and a person who is related to a director or an officer of the company.

Bill Clause No. (Number) 79
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)39(1)
Topic: Crown Securities

Proposed Wording

39.(1) In relation to **proceedings** under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if, before the **day on which proceedings commence**, the security is registered under **a** system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Rationale

The section is amended to reflect a change in terminology regarding the timing of proceedings.

Present Law

As enacted by Chapter 47, Clause 131:

39.(1) In relation to a proceeding under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if the security is registered before the date of the filing of the initial application in respect of the company under any system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

Bill Clause No. (Number) 80
Section No. (Number) CCAA (Companies' Creditors Arrangement Act) s. (section)52(3)
Topic: Forms of Cooperation

Proposed Wording

52.(3) For the purpose of this section, cooperation may be provided by any appropriate means, including

(*a*) the appointment of a person to act at the direction of the court;

(*b*) the communication of information by any means considered appropriate by the court;

(*c*) the coordination of the administration and supervision of the debtor company's assets and affairs;

(*d*) the approval or implementation by courts of agreements concerning the coordination of proceedings; and

(*e*) the coordination of concurrent proceedings regarding the same debtor company.

Rationale

Chapter 47 amended the Act by including the principles of the United Nations Commission on International Trade Law's *Model Law on Insolvency*. In cross-border insolvency situations, Canadian courts often cooperate with foreign courts. The amendment clarifies that Canadian courts should continue that practice by listing, from the *Model Law*, the forms of cooperation that courts should consider.

Present Law

None.

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Date modified:
2015-03-23

Summary of Legislative Changes

Summary of Key Legislative Changes in Chapter 47 of the *Statutes of Canada*, 2005, and Chapter 36 of the *Statutes of Canada*, 2007

Both the *Bankruptcy and Insolvency Act* (BIA (Bankruptcy and Insolvency Act)) and the *Companies' Creditors Arrangement Act* (CCAA (Companies' Creditors Arrangement Act)) are amended by Chapter 47 of the *Statutes of Canada*, 2005, and Chapter 36 of the *Statutes of Canada*, 2007 (c. (chapter)47 and c. (chapter)36 respectively). The legislative amendments are broad ranging and significant, and are intended to achieve the following main goals:

1. To encourage restructuring of viable businesses as an alternative to bankruptcy. In this regard, the CCAA (Companies' Creditors Arrangement Act) has been significantly modified to provide increased predictability and consistency while preserving its flexibility.
2. To improve protection for workers in bankruptcy. The amendments also create the legislative framework for the Wage Earner Protection Program (WEPP), which ensures that workers whose employers are bankrupt or subject to a receivership receive compensation for their claims in a timely manner.
3. To make the insolvency system fairer and to reduce the potential for abuse. Inequities in the treatment of personal bankruptcies are addressed and the scope for abuse is curbed, while respecting the fundamental objective of providing a fresh start to the honest, but unfortunate, debtor.

On July 7, 2008, the *Wage Earner Protection Program Act*, along with a few amendments to the *Bankruptcy and Insolvency Act*, came into force. These amendments to the BIA (Bankruptcy and Insolvency Act) include, but are not limited, to the following: (1) the creation of super-priorities (enhanced or higher ranking priorities) for wages and unremitted pension contributions; (2) changes to the definition of "date of the initial bankruptcy event"; (3) a reduction in the student loan debt discharge period; (4) protection of Registered Retirement Savings Plans (RRSPs); (5) the treatment of pre- and post-bankruptcy income tax refunds as part of the property of the estate; (6) the ability for creditors to realize against the property of the bankrupt without leave of the court once the Licensed Insolvency Trustee (LIT) is discharged; and (7) the treatment of leased aircraft objects consistent with the *Convention on International Interests in Mobile Equipment* (Aircraft Equipment).

The balance of the legislative changes in c. (chapter) 47 and c. (chapter) 36 came into force on September 18, 2009.

A. Summary of Key Legislative Changes in Force as of July 7, 2008

Wage Earner Protection Program Act

The *Wage Earner Protection Program Act* (WEPPA) creates the Wage Earner Protection Program (WEPP), a program run by the Department of Human Resources and Skills Development Canada. The WEPP (Wage Earner Protection Program) provides for payment of outstanding wages (up to the greater of $3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act*) to individuals whose employment is terminated as a result of the bankruptcy or placement into receivership of their employer. The term "wages" is defined to include salary, commissions, compensation for service rendered and vacation pay. The definition of

"wages" under the WEPPA (Wage Earner Protection Program Act) was expanded effective January 26, 2009, to include severance pay and termination pay. Employee claims are reduced by any amount paid to them by the receiver or the LIT.

LITs and receivers are required to perform numerous duties to support the operation of the program. WEPPA (Wage Earner Protection Program Act) provisions allow the program to cover insolvency professionals' fees in certain cases and under certain conditions where there are insufficient assets to cover the costs of carrying out those duties related to the operation of the WEPP (Wage Earner Protection Program). A due diligence defence is available to LITs and receivers.

Wage Claims

In bankruptcies and receiverships, the claims of workers are secured against current assets (cash, accounts receivable and inventory) to the extent of $2000 per employee under the BIA (Bankruptcy and Insolvency Act). This limited super-priority secures unpaid wages, salaries, commissions and compensation for services rendered during the period of six months before the date of the initial bankruptcy event to the date of bankruptcy or during the six months before the receivership. Compensation includes vacation pay, but not severance pay or termination pay.

The limited super-priority over current assets ranks above secured creditors but below the rights of unpaid suppliers to repossess goods (s. (section) 81.1 of the BIA (Bankruptcy and Insolvency Act)) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. (section) 81.2 of the BIA

(Bankruptcy and Insolvency Act)). The limited super-priority also ranks behind unremitted income tax, Employment Insurance and Canada Pension Plan deductions deemed to be held in trust.

Under the WEPPA (Wage Earner Protection Program Act), the Government of Canada is, to the extent of the amount paid, subrogated to the rights the individual has in respect of unpaid wages. The limited super-priority of $2000 applies against current assets. Where current assets are insufficient to cover the amount owing up to $2000, the creditor has a preferred claim for the outstanding amount under section 136(1)(d) of the BIA (Bankruptcy and Insolvency Act).

Officers and directors are precluded from having a secured claim for wages. They will, however, continue to have a preferred claim under section 136(1)(d).

New provisions also preclude persons who were not dealing at arm's length with the bankrupt from having a secured claim for wages unless the LIT/receiver determines it is appropriate in the circumstances.

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 4(5), s. (section) 81.3 and s. (section) 81.4 and Form 31

Pension Protection

Provisions have been added to provide a priority over all assets of the debtor for the payment of normal pre-filing pension contributions, not including any unfunded pension liabilities, in bankruptcies and receiverships. Normal pre-filing contributions are amounts deducted from employees' remuneration for contribution to the pension plan and all unpaid employer's contributions. This priority does not apply to special payments ordered by a pension regulator to liquidate an unfunded liability and to claims related to such unfunded liability.

The limited super-priority ranks below the rights of unpaid suppliers to repossess goods (s. (section) 81.1 of the BIA (Bankruptcy and Insolvency Act)) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. (section) 81.2 of the BIA (Bankruptcy and Insolvency Act)), deemed trusts for source deductions and the wage claim priority.

BIA s. (Bankruptcy and Insolvency Act section) 81.5 and s. (section) 81.6 and Bankruptcy and Insolvency General Rules s. (section) 59.1 and Form 31

Date of the Initial Bankruptcy Event

The definition of "date of the initial bankruptcy event" has been amended to include the commencement of proceedings under the CCAA (Companies' Creditors Arrangement Act).

BIA s. (Bankruptcy and Insolvency Act section) 2

Student Loans

The waiting period before which a student loan under the *Canada Student Loans Act*, the *Student Financial Assistance Act* and provincial enactments that provide for student loans may be discharged is reduced from 10 years to 7 years after the bankrupt ceases to be a full- or part-time student. The period before which an application may be made to the court to request a discharge on the basis of hardship is reduced from 10 years to 5 years.

The new time frame of seven years applies to all those who filed for bankruptcy on or after July 7, 2008, and to undischarged bankrupts on that date, i.e. (id est (That is)), student-loan borrowers who were bankrupt but not yet discharged as of that date.

Relief under section 178(1.1) ("the hardship provision") is available to all bankrupts, including those who were discharged prior to July 7, 2008.

BIA s. (Bankruptcy and Insolvency Act section) 178

RRSP (Registered Retirement Savings Plans) Exemptions

Amounts held in RRSP (Registered Retirement Savings Plans)s are exempt from seizure in bankruptcy, subject to a possible clawback for contributions made in the 12 months preceding bankruptcy. Where provincial legislation exempts RRSP (Registered Retirement Savings Plans)s from execution, the provincial legislation applies. Where provincial legislation does not provide for the exemption of RRSP (Registered Retirement Savings Plans)s, the exemption in the BIA (Bankruptcy and Insolvency Act) applies, subject to the possible clawback referred to above.

BIA s. (Bankruptcy and Insolvency Act section) 67(1)(b.3) and Bankruptcy and Insolvency General Rules s. (section) 59.2

Income Tax Refunds

Income tax refunds for both the pre- and post-bankruptcy period form part of the estate of the bankrupt. Where the bankrupt is a judgment debtor under the *Family Orders and Agreement Enforcement Assistance Act*, a carve out exists for the portion of the income tax refund that is garnishable money under a summons for child and/or spousal support.

BIA s. (Bankruptcy and Insolvency Act section) 67(1)(c)

Action against Undischarged Bankrupts

Creditors may realize on the property of the bankrupt without leave of the court once the LIT has been discharged — even if the bankrupt remains undischarged.

BIA s. (Bankruptcy and Insolvency Act section) 69.3(1.1)

Aircraft Objects

Provisions have been added regarding the treatment of aircraft objects in Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases.

BIA s. (Bankruptcy and Insolvency Act section) 65.1(4), s. (section) 69(2)(d), s. (section) 69.1(2)(d) and s. (section) 69.3(3); CCAA s. (Companies' Creditors Arrangement Act section) 11.07 and s. (section) 34

B. Summary of Key Legislative Amendments in Force as of September 18, 2009

Commercial issues

Wage Claims

Division I proposals under the BIA (Bankruptcy and Insolvency Act) and plans of compromise or arrangement under the CCAA (Companies' Creditors Arrangement Act) must provide for payment immediately after court approval/sanction of the proposal/plan to employees (and former employees) of at least what they would be qualified to receive if the employer had become bankrupt.

BIA s. (Bankruptcy and Insolvency Act section) 60(1.3); CCAA s. (Companies' Creditors Arrangement Act section) 6(5)

Pension Protection

Division I proposals and CCAA (Companies' Creditors Arrangement Act) plans that do not provide for the payments of unpaid pension contributions are not to be approved by the court unless the parties to the pension plan have entered into an agreement approved by the relevant pension regulator respecting payment of those amounts.

BIA (Bankruptcy and Insolvency Act)s. 60(1.5), s. (section) 60(1.6); CCAA s. (Companies' Creditors Arrangement Act section) 6 and Companies' Creditors Arrangement Regulations s. (section) 3

Collective Agreements

Any collective agreement between an employer and a union shall remain in force on its terms unless the agreement is amended by agreement of the parties. Upon application by an insolvent person, the court may make an order authorizing the insolvent person to serve a notice to bargain on the union pursuant to the labour legislation of the relevant jurisdiction. If the court-ordered bargaining fails, there is no provision for the court to disclaim, terminate or revise the collective agreement. If the collective agreement is amended by agreement of the parties, the union has a claim as an unsecured creditor for the value of concessions granted.

BIA s. (Bankruptcy and Insolvency Act section) 65.12; CCAA s. (Companies' Creditors Arrangement Act section) 33

Liability of Licensed Insolvency Trustees

LITs, interim receivers, receivers and monitors who carry on the business of the debtor will not be personally liable for claims that existed or are calculated by reference to a period before their appointment, explicitly including liability as a "successor employer."

BIA s. (Bankruptcy and Insolvency Act section) 14.06(1.2) and s. (section) 14.06(1.3); CCAA s. (Companies' Creditors Arrangement Act section) 11.8

Monitors

Monitors under the CCAA (Companies' Creditors Arrangement Act) must be an LIT and the company's auditor may not be the monitor except with permission of the court.

CCAA s. (Companies' Creditors Arrangement Act section) 11.7

Interim Receivers

Time limits regarding the duration of interim receiverships have been established and restrictions have been introduced relating to the powers that may be granted to interim receivers.

The powers that may be granted to the interim receiver are as follows:

a. to take possession of all or part of the debtor's property mentioned in the appointment;

b. to exercise such control over that property, and over the debtor's business, as the court considers advisable;

c. to take conservatory measures;

d. to summarily dispose of property that is perishable or likely to depreciate rapidly in value.

Interim receivers appointed under section 47.1 of the BIA (Bankruptcy and Insolvency Act) may be granted the same powers listed above with the addition of the power to carry out the duties set out in subsections 50(10) or 50.4(7) of the BIA (Bankruptcy and Insolvency Act), in substitution for the LIT referred to in those subsections.

The application for the appointment of an interim receiver is to be filed in the "locality of the debtor."

The interim receiver's appointment ends on the earliest of the following:

a. the taking possession by a receiver under section 243(2) of the BIA (Bankruptcy and Insolvency Act) of the property over which the interim receiver was appointed;

b. the taking possession by an LIT of the property over which the interim receiver was appointed;

c. the expiry of 30 days after the day on which the interim receiver was appointed, or of any period specified by the court (in the case of an appointment under section 47 of the BIA (Bankruptcy and Insolvency Act)); or the date of court approval of the proposal (in the case of an appointment under section 47.1 of the BIA (Bankruptcy and Insolvency Act)).

BIA s. (Bankruptcy and Insolvency Act section) 46(4), s. (section) 47(1), s. (section) 47(4) and s. (section) 47.1(4)

National Receivers

Judges exercising their powers under the BIA (Bankruptcy and Insolvency Act) may, on application of a secured creditor, appoint a "national" receiver under section 243 of the BIA (Bankruptcy and Insolvency Act) if it is "just or convenient to do so". A receiver appointed under section 243 of the BIA (Bankruptcy and Insolvency Act) will have the authority to act throughout Canada. Such an appointment eliminates the need to obtain separate appointments in every province/territory where the debtor has assets.

Receivers so appointed must be LITs, and they have the same protections as LITs against personal liability for pre-appointment environmental damage and other claims. The application for the appointment of a receiver is to be filed in the "locality of the debtor".

If a notice to enforce security is to be sent under section 244(1) of the BIA (Bankruptcy and Insolvency Act), the court may not appoint a receiver until the 10-day notice period has expired unless the debtor consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

The court may also grant a charge over the debtor's assets to secure the fees and disbursements of a receiver appointed under section 243 of the BIA (Bankruptcy and Insolvency Act) and such charge may rank in priority to secured creditors. Secured creditors must be given notice and the opportunity to make representations before the court makes such an order.

BIA s. (Bankruptcy and Insolvency Act section) 243

Stay of Proceedings — Regulatory Body

The new provisions define what is to be considered a "regulatory body." Essentially, any body charged with enforcing or administering an Act of Parliament or the legislation of a province is considered to be such a body. In addition, there is the ability to prescribe by regulation other bodies that can obtain the same benefits provided by the section. For example, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada are prescribed regulatory bodies.

Under the new provisions, the automatic stay of proceedings initiated on filing a proposal or notice of intention does not affect regulatory bodies that are acting strictly in their role as regulators. A regulatory body is entitled to continue to investigate or prosecute a debtor company for failings under the relevant regulations. A regulatory body is, however, stayed (precluded) from attempting to enforce a debt or monetary obligation owing to it in its capacity as a creditor, for example, in respect of a fine previously imposed.

BIA s. (Bankruptcy and Insolvency Act section) 69.6 and Bankruptcy and Insolvency General Rules s. (section) 103.1; CCAA s. (Companies' Creditors Arrangement Act section) 11.1 and Companies' Creditors Arrangement Regulations s. (section) 5

Interim Financing

The court has the power to order that all or part of the debtor's property is subject to a security or charge in favour of a person lending money to the debtor. Notice is required to be given to secured creditors who are likely to be affected by the order.

The court may grant the lender a priority over existing security, but the order may not secure pre-existing debts.

The provisions specify the factors for the court to consider on an application for interim financing.

BIA s. (Bankruptcy and Insolvency Act section) 50.6; CCAA s. (Companies' Creditors Arrangement Act section) 11.2

Disclaimer and Assignment of Agreements

Disclaimers

Agreements (commonly referred to as "executory contracts"), other than certain specified agreements, may be disclaimed in a Division I proposal or under a CCAA (Companies' Creditors Arrangement Act) filing. If the LIT or monitor does not approve the proposed disclaimer, the reorganizing debtor must apply to the court in order to disclaim the agreement.

The co-party to the agreement may seek a declaration that the agreement not be disclaimed. In deciding whether to make an order disclaiming the agreement, the court must consider a list of factors. If the disclaimer is not

opposed or is approved by the court, the co-party may file a proof of claim in the reorganization as an unsecured creditor for any damages suffered.

Where the agreement relates to intellectual property, the disclaimer does not affect the co-party's right to use the intellectual property, nor the right to enforce an exclusive right to use the intellectual property, as long as the co-party continues to perform its obligations under the agreement.

The disclaimer provisions do not apply to eligible financial contracts, collective agreements, financing agreements if the company is the borrower, and leases of real property where the debtor is the lessor. Disclaimers of real property leases where the debtor is the lessee are already dealt with in section 65.2 of the BIA (Bankruptcy and Insolvency Act).

Assignments

A debtor may apply to court for an order assigning rights and obligations under an agreement to another person.

Agreements may be assigned, subject to the proposed assignee meeting certain requirements and provided any financial defaults under the agreement are remedied. Factors for the court to consider in determining whether to make an order assigning an agreement are specified and include whether the LIT/monitor approved the proposed assignment.

The following is a list of the types of agreements that cannot be assigned: commercial leases, eligible financial contracts, collective agreements and agreements that are not assignable by reason of their nature (e.g. (example given), personal service contract).

BIA s. (Bankruptcy and Insolvency Act section) 65.11, s. (section) 66(1.1), s. (section) 84.1 and s. (section) 146 and Bankruptcy and Insolvency General Rules s. (section) 94.1 and s. (section) 95 and Form 44.1; CCAA s. (Companies' Creditors

Arrangement Act section) 11.3 and s. (section) 32 and Companies' Creditors Arrangement Regulations s. (section) 13 and Form 4

Asset Sales

Summary and Ordinary Administration Bankruptcy

The sale of assets in an ordinary administration bankruptcy to "related parties" requires court approval. The court must consider factors set out in the legislation before granting an order to sell the property.

In summary administration bankruptcies, court authorization of the sale of assets to a "related party" is only required if the creditors request it.

Proposals and the CCAA (Companies' Creditors Arrangement Act)

In Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases, assets may not be sold outside of the ordinary course of business unless the sale is approved by the court on notice to all secured creditors likely to be affected by the sale. Factors for the court to consider are specified. Where the proposed sale is to a "related party," the court must be satisfied that additional conditions are met.

BIA s. (Bankruptcy and Insolvency Act section) 30(4), s. (section) 65.13 and s. (section) 155(k); CCAA s. (Companies' Creditors Arrangement Act section) 36

Ipso Facto Clauses

The protection afforded to debtors under consumer proposals and Division I proposals against the impact of "ipso facto" clauses (clauses purporting to entitle a party to terminate an agreement on the basis of another party filing a proposal even if the other party is not otherwise in default of the terms of the agreement) is extended to bankruptcies and CCAA (Companies' Creditors Arrangement Act) filings.

Eligible financial contracts are excluded from the application of these provisions.

BIA s. (Bankruptcy and Insolvency Act section) 65.1 and s. (section) 84.2; CCAA s. (Companies' Creditors Arrangement Act section) 34

Transfers at Undervalue and Preferences

Transfers at Undervalue

Settlements and reviewable transactions have been replaced with a single cause of action — "transfer at undervalue" or "TUV." It is a question of fact for the court to determine (1) whether the transfer was at undervalue, and (2) whether the parties were or were not dealing with each other at arm's length. Persons who are related to each other are deemed not to deal at arm's length unless there is evidence to the contrary.

TUV (transfer at undervalue) to Non-Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the other party was not at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if (1) the transfer took place within one year before the date of the initial bankruptcy event or (2) the transfer took place within one to five years before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer or intended to defeat the interests of creditors.

TUV (transfer at undervalue) to Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the parties were dealing with each other at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if the transfer took place within one year before the

date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer and the debtor intended to defeat the interests of creditors.

Preferences

Preference to Non–Arm's Length Creditor

If the preference was made to a non–arm's length creditor within one year, no intention test is required. The LIT only needs to show the transaction had the effect of preferring the creditor.

Preference to Arm's Length Creditor

If the preference was made to an arm's length creditor within three months, the LIT must establish that there was an intention to prefer that creditor over another. Where the transaction had the effect of preferring the arm's length creditor, a rebuttable presumption arises of an intention to prefer.

The BIA (Bankruptcy and Insolvency Act)'s transfer at undervalue and preference provisions are incorporated into the CCAA (Companies' Creditors Arrangement Act) by reference. LITs and monitors will now have to report on the reasonableness of a decision to exclude the application of the TUV (transfer at undervalue) and preference provisions from a proposal or a compromise or arrangement (i.e. (id est (That is)), not to go after the preference or the TUV (transfer at undervalue) transaction).

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 4(5), s. (section) 50(10)(b), s. (section) 95, s. (section) 96 and s. (section) 101.1; CCAA s. (Companies' Creditors Arrangement Act section) 23(1)(d.1) and s. (section) 36.1

Directors

The court may order that the director or person acting in such capacity be removed if the court is satisfied that the director may unreasonably impair the insolvent person's ability to complete a viable proposal/plan. The court is also authorized to fill any vacancy that is created. The court may grant a priority charge against the assets of the insolvent person in favour of the directors for an amount reasonably necessary to indemnify them against obligations and liabilities they may incur following the date of the filing and ending at the completion of the proceeding. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order granting the charge.

BIA s. (Bankruptcy and Insolvency Act section) 64 and s. (section) 64.1; CCAA s. (Companies' Creditors Arrangement Act section) 11.5 and s. (section) 11.51

Payment of Professional Costs

In Division I proposals and CCAA (Companies' Creditors Arrangement Act) cases, the court may make an order providing that the property of the debtor is subject to a charge to pay the expenses of professional advisers of any interested party if the court is satisfied that the order is necessary for the effective participation of the interested party. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

BIA s. (Bankruptcy and Insolvency Act section) 64.2; CCAA s. (Companies' Creditors Arrangement Act section) 11.52

Critical Suppliers

In CCAA (Companies' Creditors Arrangement Act) filings only, the court may make an order declaring a person to be a critical supplier and may make an order requiring continued supply on terms and conditions consistent with the supply relationship or on any basis the court considers appropriate.

Critical suppliers must be given security by the court over the property of the debtor and such security may be given priority over any existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

CCAA s. (Companies' Creditors Arrangement Act section) 11.4

Unpaid Suppliers' Rights

Unpaid suppliers have 15 days after the date of bankruptcy or the appointment of a receiver to submit a written demand for goods delivered to the purchaser or the purchaser's agent (e.g. (example given), third-party warehouse) within 30 days before the bankruptcy or appointment of the receiver.

BIA s. (Bankruptcy and Insolvency Act section) 81.1

Shareholder Approval

The court may authorize, as part of a proposal or a compromise or arrangement, a change to the debtor's constating documents (e.g. (example given), articles of incorporation for a corporation or trust documents for an income trust) that would otherwise require approval of the shareholders or unitholders, as the case may be.

The court may also order the sale of assets outside of the ordinary course of business even if shareholder approval was not obtained.

BIA s. (Bankruptcy and Insolvency Act section) 59(4) and s. (section) 65.13(1); CCAA s. (Companies' Creditors Arrangement Act section) 6(2) and s. (section) 36(1)

Plan Approval

The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

CCAA s. (Companies' Creditors Arrangement Act section) 12

Treatment of Equity Claims

Claims arising from the purchase or sale of equity of the bankrupt or debtor company are subordinated to all other claims. The class of creditors having equity claims may not vote at any meeting unless the court orders otherwise. Creditors with equity claims are not entitled to a dividend until all other claims are satisfied. No proposal or compromise or arrangement that provides for payment of an equity claim is to be approved/sanctioned by the court unless all other claims are to be paid in full.

BIA s. (Bankruptcy and Insolvency Act section) 2, s. (section) 54(2)(d), s. (section) 54.1, s. (section) 60(1.7) and s. (section) 140.1; CCAA s. (Companies' Creditors Arrangement Act section) 2, s. (section) 6(1), s. (section) 6(8) and s. (section) 22.1

Income Trusts

Provisions have been added to deal with the insolvency of an income trust.

BIA s. (Bankruptcy and Insolvency Act section) 2 and Bankruptcy and Insolvency General Rules s. (section) 1.1 and s. (section) 103.1; CCAA s. (Companies' Creditors Arrangement Act section) 2 and Companies' Creditors Arrangement Regulations s. (section) 2 and s. (section) 5

Eligible Financial Contracts

The following changes were effected by the *Budget Implementation Act, 2007* (S.C. (Superior Court) 2007, c. (chapter)29): (a) the definition of "EFC (eligible financial contract)" (EFC) was updated and moved to regulations to provide greater flexibility with respect to future updates; (b) the carve out for EFC (eligible financial contract)s from the application of the stay provisions was

clarified; and (c) the ability of parties to terminate EFC (eligible financial contract)s post-insolvency filing (i.e. (id est (That is)), impact of the ipso facto provision) does not apply to EFC (eligible financial contract)s.

BIA s. (Bankruptcy and Insolvency Act section) 65.1 and s. (section) 84.2; CCAA s. (Companies' Creditors Arrangement Act section) 11.05(1); Budget Implementation Act, 2007 (S.C. 2007, c. (chapter) 29) Part 9.

UNCITRAL (United Nations Commission on International Trade La)

The principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency have been adopted.

BIA s. (Bankruptcy and Insolvency Act section) 267–284 and Bankruptcy and Insolvency General Rules s. (section) 138; CCAA s. (Companies' Creditors Arrangement Act section) 44-61 and Companies' Creditors Arrangement Regulations s. (section) 14

CCAA (Companies' Creditors Arrangement Act) Oversight

The Office of the Superintendent of Bankruptcy will maintain a public registry of CCAA (Companies' Creditors Arrangement Act) filings, will receive and keep a record of all complaints regarding the conduct of monitors, and will have supervisory powers in relation to the conduct of monitors under the CCAA (Companies' Creditors Arrangement Act).

CCAA s. (Companies' Creditors Arrangement Act section) 26–31 and Companies' Creditors Arrangement Regulations s. (section) 11–12

CCAA (Companies' Creditors Arrangement Act) Process

Provisions have been introduced with a view to making the process under the CCAA (Companies' Creditors Arrangement Act) more transparent (e.g. (example given), notice provisions, cash-flow statements on a weekly basis,

etc. (et cetera)).

CCAA s. (Companies' Creditors Arrangement Act section) 23 and Companies' Creditors Arrangement Regulations s. (section) 6–10 and Forms 1, 2 and 3

Consumer Issues

Bankrupts with High Income Tax Debt

Bankrupts with personal income tax debt in an amount exceeding $200,000, representing 75 percent or more of their total unsecured proven claims, are not eligible for an automatic discharge.

"Personal income tax debt" includes interest, penalties or fines imposed under the *Income Tax Act* or equivalent provincial legislation, but does not include an amount payable by the individual in their capacity as a director of a corporation.

BIA s. (Bankruptcy and Insolvency Act section) 172.1

Surplus Income

First-time bankrupts who have surplus income are required to contribute a portion of the surplus to their estate for the benefit of their creditors for 21 months, and second-time bankrupts are required to contribute for 36 months, subject in both cases to a change in circumstances that impacts on the obligation to pay surplus income.

BIA s. (Bankruptcy and Insolvency Act section) 168.1 and Forms 65, 82 and 84 and Directive No. (Number) 11R2

Definition of Income

The definition of "total income" has been amended to include amounts received by the bankrupt between the date of bankruptcy and the date of discharge, including amounts for wrongful dismissal, pay-equity

settlements or workers' compensation, but not including amounts received during the same time period as a gift, inheritance or other windfall.

A requirement to pay surplus income is enforceable against income that would otherwise be exempt, and income earned but not yet received is included in the definition of "total income."

BIA s. (Bankruptcy and Insolvency Act section) 68

Post-Discharge Payment Agreements

Agreements regarding the payment of LIT's fees and expenses are permissible and enforceable after the bankrupt's discharge, provided (1) the bankrupt's income is below the level where a surplus income obligation would arise, (2) the amount to be paid under the terms of the agreement does not exceed a prescribed amount (currently set at $1,800), and (3) the payments do not extend beyond 12 months following discharge.

BIA s. (Bankruptcy and Insolvency Act section) 156.1 and Bankruptcy and Insolvency General Rules s. (section) 58.1

Definition of Consumer Debtor

A consumer proposal may be filed by someone with up to $250,000 in debts, excluding debts secured by their principal residence.

BIA s. (Bankruptcy and Insolvency Act section) 66.11

Discharge of Second-Time Bankrupts

Second-time bankrupts without surplus income are eligible for an automatic discharge after 24 months.

Second-time bankrupts with surplus income are eligible for an automatic discharge after 36 months.

BIA s. (Bankruptcy and Insolvency Act section) 168.1(b)

Consumer Proposal Default

Administrators of consumer proposals have discretion to "revive" a consumer proposal that would otherwise be deemed annulled. Creditors retain the right to object to the revival of the consumer proposal. Courts have the power to make an order reviving the consumer proposal on any terms the court considers appropriate. An application to court for an order reviving a consumer proposal that has been deemed annulled may be made at any time.

BIA s. (Bankruptcy and Insolvency Act section) 66.31 and Forms 54.2, 55.1, 56 and 93–96

Avoiding the Inadvertent Discharge of Otherwise Undischargeable Debts

Debts set out in section 178 of the BIA (Bankruptcy and Insolvency Act) or section 18(2) of the CCAA (Companies' Creditors Arrangement Act) are not discharged in a proposal or in a plan of compromise or arrangement except if the proposal/plan explicitly provides for the compromise of those claims and the creditors vote in favour of the proposal/plan.

BIA s. (Bankruptcy and Insolvency Act section) 62(2.1); CCAA s. (Companies' Creditors Arrangement Act section) 19(2)

Debts Not Released by Order of Discharge

Debts for services obtained through false pretenses or fraudulent misrepresentations, together with debts for property obtained in such circumstances, are included as undischargeable debts.

BIA s. (Bankruptcy and Insolvency Act section) 178(1)(e); CCAA s. (Companies' Creditors Arrangement Act section) 19(2)(d)

Mandatory Counselling

Debtors making a consumer proposal must undergo mandatory counselling in order to receive a certificate of full performance. Bankrupts who have refused to attend mandatory counselling are not eligible for an automatic discharge.

BIA s. (Bankruptcy and Insolvency Act section) 66.38(2) and s. (section) 157.1(3)

Statement of Affairs in Proposals

A statement of affairs is required to be completed in all proposals.

BIA s. (Bankruptcy and Insolvency Act section) 50(2) and s. (section) 62(1) and Forms 78 and 79

Section 170 Report

The amendment to subsection 170(1) of the BIA (Bankruptcy and Insolvency Act) limits the circumstances in which a report ("section 170 report") must be prepared. The section 170 report is required where the bankrupt has surplus income, when an opposition to the bankrupt's discharge has been filed, when the bankrupt has been bankrupt on a previous occasion, or when there is any reason that would require a court hearing of the discharge. Rule 121.1 also sets out the timelines regarding the preparation of the section 170 report.

BIA s. (Bankruptcy and Insolvency Act section) 170(1) and Bankruptcy and Insolvency General Rules s. (section) 121.1 and Form 82

Asset Limit for Summary Administration Bankruptcy

The asset limit for summary administration bankruptcy estates has been raised from $10,000 to $15,000.

BIA s. (Bankruptcy and Insolvency Act section) 49(6) and s. (section) 49(8) and Bankruptcy and Insolvency General Rules s. (section) 130

Costs and Taxation

The cap on the amount that LITs may pay for legal services without first having to be taxed is increased from $1,000 to $2,500.

Bankruptcy and Insolvency General Rules s. (section) 18(2)

Undischarged Bankrupt — Credit

Undischarged bankrupts must disclose their status when they obtain credit of $1,000 or more from any person. The threshold amount is increased from $500 to $1,000.

BIA s. (Bankruptcy and Insolvency Act section) 199(2)

Disposal of Unrealizable Assets

Any property of a bankrupt that is listed in the statement of affairs or otherwise disclosed to the LIT before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the LIT's application for discharge. If inspectors have been appointed, the LIT may do so only with their permission.

BIA s. (Bankruptcy and Insolvency Act section) 40(1)

Other Issues

Voting Issues / Non-Arm's Length Voting Rights

If the outcome of a vote at a meeting of creditors is determined by the vote of one or more persons who did not deal with the debtor at arm's length within the one-year period before bankruptcy, the chair re-determines the outcome not taking the vote of those creditors into account. This then becomes the outcome of the vote unless an application is made to court within 10 days and the court determines another outcome. In an application to revoke or vary a decision regarding the outcome of a vote, the court may suspend the effect of the vote.

BIA s. (Bankruptcy and Insolvency Act section) 109(6) and s. (section) 115.1

Professional Conduct Provisions

Amendments were made to the professional conduct provisions that add clarity to issues that have arisen in various court proceedings.

BIA s. (Bankruptcy and Insolvency Act section) 14.01

Legal Opinion

In order for an LIT of an estate to act for a secured creditor in realizing on its security, the LIT must obtain a written opinion from independent legal counsel that the security is valid and enforceable against the estate.

BIA s. (Bankruptcy and Insolvency Act section) 13.4

Orderly Payment of Debts

Provinces that have chosen to "opt in" to the Orderly Payment of Debts (OPD) provisions may also "opt out." This amendment ensures that the legislation provides explicit authority for provinces to "opt out" of operating the OPD program.

BIA s. (Bankruptcy and Insolvency Act section) 242

Date modified:
2015-03-23

Court of Appeal File No. COA-24-OM-0248
Court File No. CV-23-00696017-00CL

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 LOYALTYONE, CO.

COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE MOVING PARTIES
(MOTION FOR LEAVE TO APPEAL)

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