Court of Appeal File No. COA-24-CV-0468
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

FACTUM OF THE APPELLANT
KSV RESTRUCTURING INC. (IN ITS CAPACITY AS PROPOSAL TRUSTEE)

April 29, 2024

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PART I - OVERVIEW

1. This case is about whether the Profit-Share Claim (as defined below) of the respondent, Maria Athanasoulis, is a "provable claim" under the *Bankruptcy and Insolvency Act*[1] (the "***BIA***"). Contrary to the analysis of the motion judge, it is not about whether the Profit-Share Claim is an "equity claim" as defined in the *BIA*.[2] Determining whether the Profit-Share Claim is a provable claim turns on whether the Claim sounds in debt. It does not and cannot.

2. The motion judge fundamentally erred by holding that the definition of "equity claim" in the *BIA* is exhaustive and that if a claim is not an "equity claim", then it must be a "provable claim" without engaging in the contextual analysis required by the jurisprudence to determine whether the Profit-Share Claim was in substance in the nature of debt rather than equity. The motion judge's reasoning on this core issue was incorrect, and contradicts decades of precedent.

3. In arriving at her conclusion, the motion judge also erred in law by: (i) holding that there is no such thing as a claim in *BIA* proceedings that is in substance in the nature of equity; (ii) refusing to follow this Court's binding precedent in *Schnier v. Canada (Attorney General)*;[3] and (iii) misapplying the common law of wrongful dismissal damages.

4. The decision of the motion judge departs from well-established law and should be corrected by this Court.

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1 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 121 and 135 [*BIA*].

2 *Ibid*, s. 2.

3 *Schnier v. Canada (Attorney General)*, 2016 ONCA 5 [*Schnier*] [Appellant's Book of Authorities ("**ABOA**"), Tab 23].

PART II - THE FACTS

A. THE PARTIES

5. YG Limited Partnership and YSL Residences Inc. (together, "**YSL**") commenced the underlying proceeding pursuant to s. 50.4(1) of the *BIA* by filing a Notice of Intention to Make a Proposal (the "**NOI**").[4] The appellant, KSV Restructuring Inc., was appointed as the "**Trustee**" in this proceeding.

6. Ms. Athanasoulis was the Chief Operating Officer of the Cresford organization ("**Cresford**") and the second highest ranking executive at Cresford. Cresford was the real estate development group that ultimately owned YSL. Ms. Athanasoulis filed two claims in this proceeding totalling $19 million:

(a) a $1 million claim for wrongful dismissal damages;[5] and

(b) an $18 million claim for breach of an oral profit-share agreement (the "**PSA**") that gave her a 20% interest in the profit ultimately earned by Cresford on the YSL Project (the "**Profit-Share Claim**").[6] The Claim is derivative of the equity interest of Cresford in the YSL Project.

7. The Trustee accepted Ms. Athanasoulis's wrongful dismissal claim in the amount of $880,000 based on her entitlement to a 24-month reasonable notice period (the "**Wrongful**

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4 Sixth Report of the Proposal Trustee, s. 1.0(1) [Appeal Book and Compendium ("**ABCO**"), Tab 9, p. 286].

5 Athanasoulis Statement of Claim, paras. 1 and 103 [ABCO, Tab 5, pp. 124 and 151-152].

6 Sixth Report of the Proposal Trustee, s. 5.1(1) [ABCO, Tab 9, p. 295].

Dismissal Claim"). Ms. Athanasoulis accepts the Trustee's determination of her Wrongful Dismissal Claim.[7]

8. The Profit-Share Claim is by far the largest unsecured claim made against YSL. At the claimed value of $18 million, the Profit-Share Claim will reduce anticipated unsecured creditor recoveries from 100% to approximately 70%, and eliminate any recovery that third party limited partners of YSL (the "**LPs**") might have obtained after all creditors had been paid in full.[8]

9. The LPs hold Class A units of the YSL partnership and are unrelated to Cresford. Cresford holds Class B units of the YSL partnership. Absent the Profit-Share Claim, the Trustee estimates that the LPs will recover approximately $13.8 million of their initial $14.8 million investment after all of the claims of unsecured creditors – including the Wrongful Dismissal Claim – are paid in full.[9] Under any scenario, Cresford will receive nothing from the estate.

B. THE YSL PROJECT

10. YSL was established in 2016 for the sole purpose of developing a condominium tower at the corner of Yonge Street and Gerrard Street in downtown Toronto. The development was envisioned to be a mixed-use office, retail, and residential development of more than 85 floors with 1,100 residential units, 190,000 square feet of commercial or retail space, and 242 underground parking spaces (the "**YSL Project**").[10]

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7 *Re YG Limited Partnership and YSL Residences Inc.*, 2024 ONSC 1617, para. 5 ("**Motion Decision**") [ABCO, Tab 3, p. 28].

8 Eighth Report of the Proposal Trustee, s. 4.0(9) [ABCO, Tab 10, p. 410].

9 Eighth Report of the Proposal Trustee, s. 4.0(9) [ABCO, Tab 10, p. 410].

10 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, paras. 3-5 [*Dunphy Decision*] [ABOA, Tab 27]; First Report of the Proposal Trustee, s. 2.0(2) [ABCO, Tab 6, p. 159].

11. YSL obtained zoning approval for the YSL Project in August 2018.[11] Excavation at the site, however, did not start until October 2019.[12] The construction schedule for the YSL Project as of October 2019 contemplated that the Project would not be completed until 2025 at the earliest.[13]

(i) The Insolvency of Cresford and YSL

12. In addition to the YSL Project, in 2019, Cresford was developing three other condominium projects: The Residences of 33 Yorkville ("**33 Yorkville**"), Halo Residences on Yonge ("**Halo**"), and The Clover on Yonge ("**Clover**").[14] By late 2019, Cresford was in dire financial straits and required additional funding. During Cresford's financial crisis, Ms. Athanasoulis had a falling out with the principal of Cresford, Dan Casey. She was constructively dismissed in December 2019.[15]

13. After her dismissal, Ms. Athanasoulis forged and sent two letters in the name of Cresford's Chief Financial Officer to Cresford's principal lenders in January 2020.[16] These letters alleged that Mr. Casey was misleading lenders, Cresford's projects were over-budget, and immediate financing was needed to avoid insolvency.[17] Ms. Athanasoulis now admits that she forged these letters, but maintains that the allegations of impropriety and financial calamity set out in them were true.[18]

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11 Athanasoulis Arbitration Direct Examination, 174:5-16 [ABCO, Tab 13, p. 788].

12 Athanasoulis Discovery Examination, qq. 189-190 [ABCO, Tab 11, pp. 557-558].

13 YSL *Pro Forma* dated October 2019 [ABCO, Tab 24, p. 1279]; Athanasoulis Discovery Examination, at q. 243 [ABCO, Tab 11, p. 561].

14 Horton Partial Award, para. 38 [ABCO, Tab 4, pp. 63-64].

15 Horton Partial Award, para. 191(d) [ABCO, Tab 4, p. 101].

16 *10390160 Canada Ltd. v. Casey*, 2022 ONSC 628, paras. 17-20 [*Penny Decision*] [ABOA, Tab 2].

17 Forged Letters to Otera Capital and Quadreal [ABCO, Tabs 17-18, pp. 1141-1143].

18 Athanasoulis Arbitration Cross-Examination, 363:2-371:21 [ABCO, Tab 14, pp. 977-985].

Ms. Athanasoulis then issued a statement of claim against Cresford alleging extensive improprieties.[19]

14. Unsurprisingly, Cresford's lenders immediately withdrew their support. As a result, in March 2020, 33 Yorkville, Halo, and Clover became subject to insolvency proceedings and were ultimately sold to third parties through separate insolvency processes that are unrelated to the underlying proceeding.[20] At the time they were sold, construction in respect of each of 33 Yorkville, Halo, and Clover was far more advanced than the YSL Project was.[21]

15. With the advent of the COVID-19 pandemic and the collapse of Cresford's financing, the YSL Project eventually shared the same fate as Cresford's other projects. At the time that YSL filed its NOI on April 30, 2021, the YSL Project was still in the excavation stage.[22] The YSL Project has only just recently begun above-ground construction under new, unrelated ownership.

(ii) The Acquisition of the YSL Project by Concord

16. The sponsor of YSL's proposal under the *BIA* was Concord Properties Developments Corp. (the "**Concord**").[23] Concord is a significant third party property developer that is unrelated to Cresford.

17. In Amended Reasons for Decision dated July 2, 2021, Justice Dunphy found as fact that YSL was burdened with at least $260 million in secured debt and approximately $20 to $25 million

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19 Athanasoulis Statement of Claim [ABCO, Tab 5, p. 122].

20 Horton Partial Award, para. 38 [ABCO, Tab 4, pp. 63-64].

21 Athanasoulis Arbitration Cross-Examination, 302:24-308:12 [ABCO, Tab 14, pp. 916-922].

22 Second Report of the Proposal Trustee, s. 2.0(6) [ABCO, Tab 7, p. 186].

23 Second Report of the Proposal Trustee, s. 2.0(7) [ABCO, Tab 7, p. 186].

in unsecured debt (excluding the Profit-Share Claim of Ms. Athanasoulis).[24] With regard to the claim of Ms. Athanasoulis, Justice Dunphy held as follows:

> There are also various litigation claims outstanding the largest of which is from a former officer claiming that the limited partnership was a common employer and seeking, among other things, to enforce oral profit-sharing agreements. I have reviewed the Trustee's report and in particular the Trustee's reasoned conclusion that these claims are too contingent to be considered valid for voting purposes. I concur in that assessment.[25]

18. Justice Dunphy endorsed the acquisition of the YSL Project by Concord on July 16, 2021. His Honour held that "there can be no question of the insolvency of the debtors",[26] and that "[t]his is a real bankruptcy. There is nothing artificial about it".[27] Justice Dunphy found that "this Proposal provides a superior outcome for all classes of creditors under every conceivable scenario and addresses all of the concerns raised in my reasons of July 2, 2021 constructively and substantively".[28]

19. Concord acquired YSL in exchange for two principal forms of consideration: (i) Concord would assume 100% liability for all secured creditor claims and construction lien claims; and (ii) Concord would pay to the Trustee a pool of cash of $30.9 million to be distributed to unsecured creditors with proven claims (the "**Cash Pool**"). Amounts remaining in the Cash Pool, if any, would be distributed pursuant to YSL's limited partnership agreement ("**LPA**").[29]

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24 *Dunphy Decision*, *supra* note 10, paras. 8-9 and 11 [ABOA, Tab 27].

25 *Ibid*, para. 9 [ABOA, Tab 27].

26 *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206, para. 17(c) [*Dunphy Decision #2*] [ABOA, Tab 28].

27 *Ibid*, para. 30 [ABOA, Tab 28].

28 *Ibid*, para. 15 [ABOA, Tab 28].

29 *Ibid*, para. 9 [ABOA, Tab 28].

20. Under the LPA, the LPs – as holders of Class A units – are entitled to a repayment of their initial $14.8 million investment plus a 100% return on that investment (for a total of $29.6 million) before Cresford – as holder of Class B units – is entitled to any profit from the YSL Project.[30]

21. Concord acquired the YSL Project shortly after receiving approval from Justice Dunphy.[31] Consequently, neither Cresford nor YSL owns the YSL Project, nor will they ever complete the Project. Moreover, no distributions from the Cash Pool will be made to any Cresford entity because the LPs will not, under any scenario, receive a full return of their initial investment.

C. THE PROFIT-SHARE CLAIM OF MARIA ATHANASOULIS

22. The $18 million Profit-Share Claim flows from Ms. Athanasoulis's argument that if she was not dismissed in late 2019, Cresford would have eventually earned a profit from the YSL Project of at least $90 million and that she would have been entitled to 20% of that profit.[32]

23. The dismissal of Ms. Athanasoulis and her claims under the PSA are also at the heart of Ms. Athanasoulis's parallel litigation against Cresford.[33]

24. Given that Ms. Athanasoulis was asserting entitlements under an oral PSA that were denied by Cresford, and the inevitability of drawn out court processes resulting from any determination made by the Trustee, the Trustee and Ms. Athanasoulis agreed arbitrate her claim. All interested stakeholders, including Cresford, the LPs, and Concord were aware of the arbitration. The Trustee and Ms. Athanasoulis agreed to bifurcate the arbitration such that phase one would address whether an enforceable PSA existed and phase two would address whether any damages were owing.

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30 Limited Partnership Agreement, s. 6.3 [ABCO, Tab 19, p. 1169].

31 Fifth Report of the Trustee, s. 3.0(2) [ABCO, Tab 8, p. 220].

32 Athanasoulis Affidavit dated June 21, 2021, paras. 5-6 [ABCO, Tab 20, p. 1195].

33 Athanasoulis Statement of Claim, para. 1 [ABCO, Tab 5, p. 124].

(i) Phase One of the Arbitration

25. Phase one of the arbitration was held in February 2022. The PSA was oral in nature and its terms were skeletal. However, Ms. Athanasoulis admitted two important points. First, she testified that the profit-share interest was payable "at the end of a project when it's complete".[34] Second, she conceded that her profit-share amount would be calculated *after equity investments were returned from the YSL Project to the LPs*.[35] In other words, the Profit-Share Claim is derivative of the profit that flows to Cresford as Class B unitholder (after all repayments to the LPs). Indeed, in her affidavit of May 5, 2023, Ms. Athanasoulis deposes that "[r]epayments to the LPs were treated as expenses that would be repaid prior to the calculation of [her profit-share]"[36] (emphasis added).

26. The arbitrator held that the PSA entitled Ms. Athanasoulis to 20% of the profits earned on all current and future Cresford projects, including the YSL Project.[37] He held that the key terms of the PSA as they pertain to the YSL Project were as follows:

(a) "Profits were to be calculated, on a good faith basis, based on the *pro forma* budgets prepared by Cresford with respect to each project", and "would ultimately have to be accounted for with third party investors";

(b) "Profits were to be shared when earned, usually at the completion of a project"; and

(c) "There was no requirement that [Ms.] Athanasoulis remain employed at the time that a profit was earned".[38]

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34 Athanasoulis Arbitration Direct Examination, 160:23-161:2 [ABCO, Tab 13, pp. 774-775].

35 Athanasoulis Arbitration Cross-Examination, 276:3-25 [ABCO, Tab 14, p. 890].

36 Athanasoulis Affidavit dated May 5, 2023, para. 88 [ABCO, Tab 21, p. 1233].

37 Horton Partial Award, para. 191(a) [ABCO, Tab 4, p. 101].

38 *Ibid*, paras. 147 and 191(b)(ii)-(v) [ABCO, Tab 4, pp. 87 and 101].

27. Finally, the arbitrator held that Ms. Athanasoulis was constructively dismissed in December 2019. But he made no finding as to whether YSL breached the PSA.[39]

(ii) Phase Two of the Arbitration and the Funding Motion

28. Following the conclusion of phase one of the arbitration, the LPs and Concord objected to the arbitral process. On November 1, 2022, the motion judge directed that phase two of the arbitration would not continue. Instead, the Proposal Trustee was to determine whether Ms. Athanasoulis had a "provable claim" in this *BIA* proceeding.[40]

D. THE DETERMINATION OF THE CLAIMS OF MARIA ATHANASOULIS

29. On March 30, 2023, the Trustee accepted the Wrongful Dismissal Claim in the amount of $880,000. On August 10, 2023, the Trustee disallowed the Profit-Share Claim on the basis that it was in substance a claim in the nature of equity (rather than a debt claim as required under the *BIA*) and in any event too remote or speculative to be a provable claim under the *BIA*.[41]

(i) The Treatment of the Profit-Share Claim in Other Court Proceedings

30. As noted above, Justice Dunphy held that the Profit-Share Claim was "too contingent" for voting purposes in prior stages of this *BIA* proceeding. His Honour's assessment was shared by other judges who presided over insolvency proceedings of other Cresford projects. For example, Ms. Athanasoulis advanced the same Profit-Share Claim in the Clover insolvency proceeding. Justice Hainey dismissed the Claim as follows:

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39 *Ibid*, paras. 164 and 191(d) [ABCO, Tab 4, p. 91 and 101]; Motion Decision, para. 71 [ABCO, Tab 3, p. 40].

40 *YG Limited Partnership (Re)*, 2022 ONSC 6138, para. 7 [ABOA, Tab 26].

41 Notice of Disallowance [ABCO, Tab 22, pp. 1235-1241].

> I accept that the proper date to value Maria's claim is when the Receiver was appointed on March 27, 2020. There was no profit from the Clover on Yonge Project that could be shared with Maria.[42]

31. Justice Hainey rejected Ms. Athanasoulis's theory of damages crystallization on the basis that it was "far too remote and speculative and lacks an air of reality".[43] His Honour further "declare[d] that Maria's claim cannot be valued at more than $1 million (the wrongful dismissal portion of the claim)".[44]

E. THE MOTION BELOW

32. On March 19, 2024, the motion judge allowed Ms. Athanasoulis's appeal of the Notice of Disallowance. The motion judge declared the Profit-Share Claim to be a provable claim under sections 121 and 135 of the *BIA* for two reasons.

33. First, the motion judge held that the Profit-Share Claim is not an equity claim because it does not fall within the statutory definition of equity claims in the *BIA*. The motion judge further held that there is no such thing as an equity claim "in substance", with the result that any claim that does not fall within the statutory definition of an equity claim is necessarily a debt claim.[45]

34. Second, the motion judge found that the PSA was an integral part of Ms. Athanasoulis's oral employment agreement.[46] Consequently, the motion judge held that the PSA was breached as part of the wrongful dismissal of Ms. Athanasoulis. However, the motion judge held that Profit-

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42 *Re Clover on Yonge Inc.*, CV-20-00642928, dated January 8, 2021 (unreported), para. 4 [*Hainey Decision*] [ABOA, Tab 12].

43 *Ibid*, para. 7 [ABOA, Tab 12].

44 *Ibid*, para. 12 [ABOA, Tab 12].

45 Motion Decision, paras. 51-67 [ABCO, Tab 3, pp. 37-40].

46 *Infra* note 93.

Share Claim is not limited by the common law reasonable notice period. Instead, the motion judge held that the Profit-Share Claim operates indefinitely. She therefore held that the Profit-Share Claim was not too remote or speculative to be a provable claim under section 121 of the *BIA*.[47]

PART III - ISSUES

35. The overarching question on this appeal concerns whether the Profit-Share Claim is a "provable claim" under sections 121 and 135 of the *BIA*. There are three issues embedded within this central question, and which are raised on this appeal:

(a) whether the Trustee may disallow claims that are in substance in the nature of equity rather than debt;

(b) whether the Trustee is obligated to accept claims that are at the nascent stages of intense litigation as provable claims under sections 121 and 135 of the *BIA*; and

(c) whether the Trustee is entitled to take into account the common law reasonable notice period in assessing whether claims for breaches of oral employment agreements are provable claims under sections 121 and 135 of the *BIA*.

36. Contrary to the decision of the motion judge, the Trustee submits that the court: (i) must assess whether claims are in substance in the nature of debt; (ii) was entitled to disallow a claim as too remote or speculative when it is subject to uncertain parallel litigation; and (iii) was required to apply the common law reasonable notice period to the Profit-Share Claim in assessing whether it is a provable claim.

(i) The Standard of Review Is Correctness

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47 Motion Decision, paras. 68-94 and 97-103 [ABCO, Tab 3, pp. 40-47].

37. The motion judge held that the Trustee's disallowance of the Profit-Share Claim flowed from what she concluded to be extricable errors of law.[48] As the motion judge rendered her decision explicitly on the basis of questions of law, her decision is reviewable by this Court for correctness.[49]

PART IV - LAW AND ARGUMENT

A. THE STATUTORY FRAMEWORK

38. Only creditors with provable claims are entitled to have their claim valued, and then to receive a *pro rata* distribution from the assets of the estate. Claimants who do not present a provable claim are not entitled to any distribution from an estate.

39. Section 2 of the *BIA* describes a "provable claim" as "any claim or liability provable in proceedings under this Act by a creditor". The statute further provides that the word "creditor" "means a person having a claim provable as a claim under this Act".

40. A "claim provable" (*i.e.*, "provable claim") is further defined in section 121 of the *BIA*:

> **Claims provable**
>
> (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 the bankrupt may become subject before the bankrupt's discharge…
>
> **Contingent and unliquidated claims**
>
> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> [Underlining added.]

41. Section 135 of the *BIA* provides in relevant part as follows:

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48 Motion Decision, paras. 66, 75, 92, and 103 [ABCO, Tab 3, pp. 39-41, 45, and 47].

49 *Housen v. Nilokaisen*, 2002 SCC 33, para. 8 [ABOA, Tab 5].

> **Determination of provable claims**
>
> (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim…
>
> [Underlining added.]

42. Sections 121 and 135 of the *BIA* indicate there are two principal prerequisites for a provable claim.

43. First, the claim must be for debts and liabilities. Although the word "liability" read in isolation could have an expansive meaning that includes claims that are in substance equity claims, binding case law interprets these sections of the *BIA* to mirror the common law in that claims in the nature of equity and not debt against an estate are not provable claims.[50]

44. Second, if a claim for debts and liabilities is contingent or unliquidated, such as a litigation claim, the trustee shall determine whether it is a provable claim. The test is whether the *event* that must occur to crystallize the contingent or unliquidated claim is "too remote or speculative".[51]

45. Notably, sections 121 and 135 do not refer to the statutory definitions of "equity claim" or "equity interest" in section 2 of the *BIA*:

> **equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) dividend or similar payment…
>
> **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…

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50 *Infra*, paras. 52-65.

51 *Infra*, para. 73. This inquiry is distinct from the concept of remoteness in the quantification of damages, which focusses on whether the type of damages claimed was within the reasonable contemplation of the parties upon the execution of a contract.

[Underlining added.]

46. Parliament's deliberate choice to refrain from importing the defined term "equity claim" into sections 121 and 135 of the *BIA* indicates its intention that the assessment of provable claims should not be constrained by the statutory definition of "equity claims". Parliament did not intend to include within the meaning of "provable claim" all claims in the nature of equity that do not meet the statutory definition of "equity claim".

B. THE MOTION JUDGE ERRED IN HOLDING THAT THERE IS NO SUCH THING AS AN EQUITY CLAIM "IN SUBSTANCE"

47. The motion judge held that the statutory definitions of "equity interest" and "equity claims" in the *BIA* exhaustively describe the types of equity claims that are not provable claims under section 121 of the *BIA*:

> An equity claim is not a debt or liability and is not a provable claim under the BIA.
>
> […]
>
> The concept of an equity claim "in substance" was introduced into the Notice of Disallowance by the Proposal Trustee. **There is no concept of an equity claim "in substance" under the BIA**, even giving the definition of equity claim an expansive meaning.
>
> **The Proposal Trustee made an extricable error in law by expanding the definition of "equity claim" under the BIA** to a claim that is not in respect of an equity interest (shares or the right to acquire shares or an ownership interest in YSL) within the meaning of s. 2 of the BIA. This determination is reviewable on the standard of correctness.
>
> Having regard to the definitions of "equity claim" and "equity interest" under the BIA, I find that the Profit Share Claim is not an equity claim within the meaning of the BIA.[52]
>
> [Emphasis added.]

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52 Motion Decision, paras. 51-67 [ABCO, Tab 3, pp. 37-40].

48. The motion judge erred in law in deciding that: (i) "[t]here is no concept of an equity claim 'in substance' under the BIA"; and (ii) the "[t]rustee made an extricable error in law by expanding the definition of 'equity claim'".

49. The definitions of "equity claim" and "equity interest" were added to the *BIA* by way of statutory amendments that came into force in 2009 (the "**Amendments**").[53] The intention of the amendments was to harmonize Canadian bankruptcy law with U.S. bankruptcy law.[54]

50. Contrary to the decision of the motion judge, the Amendments were not an attempt by Parliament to exhaustively delineate the types of claims that are and are not provable claims. Rather, the assessment of provable claims – both before and after the Amendments came into force – is informed by the common law.

51. Until the decision below, bankruptcy and appellate courts across Canada have consistently assessed whether a claim is in the nature of equity – *i.e.*, an equity claim in substance. In fact, courts have explicitly rejected the argument that the Amendments are exhaustive and operate to limit the scope of disallowable claims to those that strictly fit within the statutory definitions of "equity interest" and "equity claims".[55]

(i) Trustees Are Required to Determine Whether a Claim is in the Nature of Equity

(a) Law in Ontario

52. In what appears to be the first reported decision concerning the Amendments, Justice Pepall (as she then was) held in *Re Nelson Financial Group Ltd.* that the Amendments reflected the

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53 Bill C-12, S.C. 2007, c. 36.

54 Standing Senate Committee on Banking, Trade and Commerce Report dated November 2003, pp. 158-159 [ABOA, Tab 29].

55 *Infra*, note 61.

historical position that claims in the nature of equity rank after debt claims in the bankruptcy process.[56] Notwithstanding the new statutory definitions, Justice Pepall continued to apply the common law to ascertain whether the claim was in the nature of equity as opposed to a provable claim for debt.[57] Following a multifactor analysis, she concluded that "[t]he substance of the arrangement between the preferred shareholders and [the bankrupt] was a relationship based on equity and not debt"[58] (emphasis added).

53. Justice Morawetz (as he then was) expressed a similar view in *Re Sino-Forest Corp*. In that case, the auditors of the company asserted that their contractual indemnification claims against the bankrupt were provable claims because they did not fall within the new statutory definition for "equity claims". Justice Morawetz rejected the auditors' argument and explained that the "[A]mendments were made with the intention of clarifying that equity claims are subordinated to other claims" (emphasis added) rather than with the intention of supplanting the common law. He also explained that the correct inquiry "focuses on the substance of the claim"[59] (emphasis added).

54. This Court upheld Justice Morawetz's decision and held explicitly that the words "in respect of" in the statutory definition are to be given the broadest possible meaning, and that "'[e]quity claim' is not confined by its definition, or by the definition of 'claim', to a claim

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56 *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229, para. 27 [*Nelson*] [ABOA, Tab 14].

57 *Ibid*, paras. 28-33 [ABOA, Tab 14].

58 *Ibid*, para. 32 [ABOA, Tab 14]. Cited with approval in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018 [ABOA, Tab 22] and *Re Dexior Financial Inc.*, 2011 BCSC 348 [ABOA, Tab 13].

59 *Re Sino-Forest Corp.*, 2012 ONSC 4377, paras. 85-90, affirmed 2012 ONCA 816 [ABOA, Tab 15].

advanced by the holder of an equity interest"[60] (emphasis added). As such, this Court explicitly rejected the reasoning of the motion judge that the Profit-Share Claim must be a provable claim because it does not meet the definition of an equity claim. This Court confirmed that a trustee must focus on the substantive nature of the claim.

55. Justice Wilton-Siegel reached a similar conclusion in *Re U.S. Steel Canada Inc*. That case concerned whether claims for the repayment of loans advanced by the sole shareholder of the bankrupt were provable claims or claims in the nature of equity. The sole shareholder argued that its claims must be provable claims because its claims did not fall within the statutory definition of "equity interest" or "equity claim".

56. Justice Wilton-Siegel held that the statutory definitions of "equity interest" and "equity claim" do not delineate exhaustively claims that are not provable claims because doing so ignores "reality" and leads to "unreasonable" conclusions.[61] Instead, the Court applied a contextual analysis focussed on the objective intent of the parties in entering into the transaction.[62] In other words, the *substance* of the claim – rather than its form – governs whether the claim is a provable claim or in reality one of equity.

57. Following a contextual analysis focussed on the substance of the claims presented, Justice Wilton-Siegel concluded that the vast majority of the shareholder's claims for repayment were in substance provable claims for debt rather than claims in the nature of equity.[63]

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60 *Re Sino-Forest Corp.*, 2012 ONCA 816, para. 46 [*Sino-Forest*] [ABOA, Tab 16]. See also *Ibid*, paras. 39-45 for a general discussion regarding the expansive scope of the definition of "equity claim".

61 *Re U.S. Steel Canada Inc.*, 2016 ONSC 569, para. 153, affirmed 2016 ONCA 662 [*U.S. Steel*] [ABOA, Tab 19].

62 *Ibid*, paras. 182-271 [ABOA, Tab 19].

63 *Ibid*, paras. 333 and 421 [ABOA, Tab 19].

58. The motion judge erred in holding that *U.S. Steel* stands for the proposition that a loan repayment claim advanced by a sole shareholder is an equity claim, and erred in suggesting that the Trustee advanced *U.S. Steel* for that proposition.[64] The Trustee raised *U.S. Steel* only as an example where the Court addressed how a claim that is formally styled as a debt claim can be an equity claim in substance, depending on the facts and circumstances.[65]

(b) Law from Other Provinces

59. In 2014, the British Columbia Supreme Court adopted the reasoning in *Nelson* and *Sino-Forest* in *Re Bul River Mineral Corp*. The Court held that the Amendments did not affect "the ability of the court to analyze the substance of the claims"[66] in the provable claims analysis.

60. *Bul River* was followed in *Re All Canadian Investment Corporation*. In that case, the British Columbia Supreme Court stated that "the focus of the inquiry is to determine whether in substance the […] claims are debt or equity. They cannot be both"[67] (emphasis added).

61. Furthermore, in *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, the British Columbia Supreme Court expressly held that the statutory definitions of "equity claim" and "equity interest" do not exhaustively prescribe the types of claims that are not provable in bankruptcy. As the Court explained, the statutory definitions are limited to shares in corporations and units in income trusts, and so they do not account for "an equity claim that arises out of other

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64 Motion Decision, para. 57(d) [ABCO, Tab 3, p. 38].

65 Trustee's Responding Factum, footnote 54 [ABCO, Tab 23, p. 1262]; and *U.S. Steel*, *supra* note 61, para. 183 [ABOA, Tab 19].

66 *Re Bul River Mineral Corp.*, 2014 BCSC 1732, para. 85 [ABOA, Tab 11].

67 *Re All Canadian Investment Corporation*, 2019 BCSC 1488, para. 70 [ABOA, Tab 10].

business arrangements". [68] Except for those circumstances expressly contemplated by the Amendments, the Court explained that pre-existing common law on the assessment of provable claims remains in force.[69]

62. In Quebec, courts have similarly held that trustees are required to assess contextually whether a claim is a provable claim or in substance an equity claim. As the Quebec Court of Appeal held in *Avis d'intention de Cryogénique inc.*:

> …the judge's characterization of the nature of the claim was not a purely technical exercise; **it required her to consider the circumstances of the matter at hand in order to seek out the true nature of the transaction** […] This approach is all the more necessary as it has been noted that distinguishing equity from unsecured claims may be difficult at times because corporations are finding new mechanisms that can narrow the gap between these two categories.
>
> […]
>
> …**the Court cannot accept the appellants' argument that the definition of "equity claim" presupposes that, at the time of the notice of intention, they had to hold a share in the respondent, or a warrant, an option or other such right.** Not only would adding such a condition run counter to the broad and liberal interpretation of this definition and depart from the legislature's intent to subordinate the protection of holders of an equity interest to that of creditors – as already discussed above – but **the very wording of the definition does not suggest it**…
>
> …**an analysis of the nature of the claim rather than the nature of the claimant indicates that the claim is in respect of an equity interest**.[70]
>
> [Emphasis added.]

63. In *Syndic de Société de vélo en libre service*, the Quebec Court of Appeal explicitly adopted the contextual analysis set out by Justice Wilton-Siegel in *U.S. Steel* in assessing whether claims

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68 *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607, para. 533 [*Panorama*] [ABOA, Tab 1].

69 *Ibid*, para. 534 [ABOA, Tab 1].

70 *Avis d'intention de Cryogénique inc.*, 2022 QCCA 1387, paras. 28-31 [ABOA, Tab 4].

are in the nature of equity. The Court held that the lower court judge erred in reversing the trustee's determination that the shareholder's claim for the repayment of a loan was in substance an equity claim and not a provable claim. The Court explained that the trustee was entitled to assess all of the surrounding circumstances in coming to its conclusion as to the nature of the shareholder loan claim, *and that the lower court judge was required to show deference to the trustee's decision*.[71]

64. In artificially limiting her analysis of the Profit-Share Claim to the narrow statutory definitions of "equity claim" and "equity interest", and mistakenly concluding that "[t]here is no concept of an equity claim 'in substance'", the motion judge ran afoul of the entire cannon of jurisprudence reviewed above.[72] The Trustee has not found any reported case endorsing the motion judge's view of how the Amendments purportedly restrict the provable claims analysis under section 121 of the *BIA*.

(ii) The Profit-Share Claim is in the Nature of Equity

65. Prior to the motion below in this very same *BIA* proceeding, Justice Dunphy applied a context-based test to determine that claims for the repayment of intercompany loans advanced by related parties to YSL were equity claims in substance and therefore not provable claims. Notably, his analysis did not depend upon whether the related parties held shares in YSL.[73] He summarized the factors that inform the contextual assessment of whether claims are in substance equity claims as follows:

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71 *Syndic de Société de vélo en libre service*, 2023 QCCA 368, paras. 57-67 [ABOA, Tab 24].

72 See also *Re Tudor Sales Ltd.*, 2017 BCSC 119, para. 35 [ABOA, Tab 18]; *Alberta Energy Regulator v. Lexin Resources Ltd.*, 2018 ABQB 590, para. 37 [ABOA, Tab 3]; *Trakopolis SaaS Corp. (2007996 Alberta Ltd.), Re*, 2020 ABQB 643, paras. 37-39 and 52-56 [ABOA, Tab 25].

73 *Dunphy Decision*, *supra* note 10, paras. 44-48 [ABOA, Tab 27].

(a) the manner in which an agreement is implemented and the economic reality of the surrounding circumstances;

(b) the existence of an intent to repay principal or interest;

(c) the presence of fixed maturity dates, payment schedules, and prescribed interest;

(d) the source of repayments, including whether payments would depend solely on the success of the debtor's business;

(e) the existence of security; and

(f) whether contributions were used to acquire capital assets or fund working capital needs.[74]

66. Justice Dunphy held that the intercompany loans were in substance equity claims because they were unwritten, had no defined payment date, and were intended to be paid from the profits of Cresford *after* the LPs had been repaid.[75] The Trustee concluded that the Profit-Share Claim was in the nature of equity for substantially identical reasons.

67. First, the oral PSA did not require regular payments be made to Ms. Athanasoulis. Rather, the PSA only required payment from the profits earned by Cresford on a project upon the profitable completion by Cresford of that project. The evidence was that Ms. Athanasoulis had never been paid any amount under the PSA in respect of any project completed by Cresford over the many years that it was supposedly in force.[76] Nor had any other employee of Cresford ever been paid a

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74 *Ibid*, para. 41 [ABOA, Tab 27].

75 *Ibid*, paras. 45-47 [ABOA, Tab 27].

76 Athanasoulis Arbitration Cross-Examination, 255:16-23 [ABCO, Tab 14, p. 869]; and Athanasoulis Discovery Transcript, qq. 154-158 [ABCO, Tab 11, pp. 554-555].

profit-share for that matter.[77] The flexible manner in which the PSA was implemented, and the lack of regular payment obligations militated towards a finding that the Profit-Share Claim was in the nature of equity.

68. Second, it is undisputed that the Profit-Share Claim flows solely from the profits (or lack of profits) generated by Cresford on the YSL Project. As such, the Claim is tied entirely to the success of the business. A claim to a share of profits is quintessentially in the nature of equity. As Justice Wilton-Siegel held in *U.S. Steel*:

> At its heart, the **difference between equity and debt lies in the fundamental nature of their respective claims on the assets and cash flow of the company**. […] **In contrast to debt, an equity claim entitles the holder to a share of the company's profits and residual cash flows after the company has made all the contractually required debt service payments.** That is, the debt ranks senior to the equity with respect to the company's cash flows.[78]
>
> [Emphasis added.]

69. Because the economic reality of the Profit-Share Claim is that it is dependent entirely on the profits of Cresford, it necessarily takes on the nature of that equity interest in the *BIA* proceeding and it is irrelevant that Ms. Athanasoulis did not own shares of YSL. The Trustee determined that the Profit-Share Claim was not a provable claim because – based on a proper contextual assessment required by the case law – the Claim was in substance an equity claim. Just like in *Sino-Forest* where this Court disallowed the auditors' claims on the basis that they were *in respect of* the shareholders' equity interest in the bankrupt, the Trustee disallowed the Profit-Share Claim because the Claim is *in respect of* Cresford's equity interest in YSL.

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77 Athanasoulis Discovery Transcript, qq. 326-327 [ABCO, Tab 11, p. 568].

78 *U.S. Steel*, *supra* note 61, para. 183 [ABOA, Tab 19].

70. Finally, just as Justice Dunphy held in respect of the intercompany loans, the Trustee determined that the Profit-Share Claim was in the nature of equity because Ms. Athanasoulis agreed that the Profit-Share Claim was to be paid out of the profits of Cresford, which are only calculated *after* the LPs are paid their principal and 100% return.[79] The motion judge, however, concluded that even though payments under the PSA would be made after all payments to the LPs, the Profit-Share Claim was still not an equity claim.[80] This conclusion cannot be reasonably reconciled with Justice Dunphy's prior decision in this proceeding.

71. The motion judge's strained reasoning stems from her mistaken conclusion that the law relating to section 121 of the *BIA* forbids the Trustee from assessing contextually whether a claim is in substance in the nature of debt or equity. She erroneously construed the statutory definitions of "equity claim" and "equity interest" as exhaustive of the types of claims that are not provable claims. Her disagreements with the Trustee's analysis of the terms of the PSA pertaining to the timing and source of payments under the PSA were an attempt to justify her original mistaken conclusion that "[t]here is no concept of an equity claim 'in substance'".[81]

72. Had the motion judge properly applied the law that requires a search for the true substance of a transaction, she would not have interfered with the Trustee's determination that the Profit-Share Claim is in the nature of equity and not a provable claim.

C. THE MOTION JUDGE ERRED IN REFUSING TO FOLLOW THIS COURT'S PRECEDENT IN *SCHNIER V. ATTORNEY GENERAL OF CANADA*

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79 *Dunphy Decision*, *supra* note 10, paras. 47-48 [ABOA, Tab 27].

80 Motion Decision, paras. 110-114 [ABCO, Tab 3, pp. 48-49].

81 Motion Decision, para. 65 [ABCO, Tab 3, p. 39].

73. Even if the Profit-Share Claim is *not* in substance an equity claim, the motion judge erred in overturning the Trustee's determination that the Claim was nonetheless too uncertain to constitute a provable claim. Section 135(1.1) of the *BIA* provides that the Trustee has an obligation "to determine whether any contingent claim or unliquidated claim is a provable claim". In *Newfoundland and Labrador v. AbitibiBowater Inc.*, the Supreme Court of Canada held that whether a contingent or unliquidated claim (like the Profit-Share Claim) is a provable claim depends on "whether the event that has not yet occurred is too remote or speculative".[82]

74. The Profit-Share Claim is contingent upon proof of the occurrence of at least the following events:

(a) Cresford will profitably complete the YSL Project;

(b) all of the creditors of the YSL Project and the LPs will be repaid and there will be money leftover for Cresford from the YSL Project; and

(c) Cresford will complete the YSL Project during Ms. Athanasoulis's reasonable notice period.

75. No speculation on the probability of occurrence of these conditions precedent is required in this case. The facts are that: (i) the YSL Project was acquired by Concord and will never be completed by Cresford; (ii) Cresford earned no profit from the sale of the YSL Project to Concord (the court would not have approved a proposal that delivered a profit to Cresford when creditors and LPs have not been paid); (iii) Cresford will receive none of the money paid by Concord to the Trustee to acquire the YSL Project; and (iv) Cresford would never have completed the YSL Project – let alone on a profitable basis – during Ms. Athanasoulis's two-year reasonable notice period

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82 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, para. 36 [ABOA, Tab 8].

from December 2019 to December 2021. On the basis of these undeniable facts, the Trustee determined that the conditions precedent were too remote and speculative because they would never come to pass. The Trustee disallowed the Profit-Share Claim on this basis.

76. Against the reality that Cresford has not and will not earn a profit from the YSL Project, Ms. Athanasoulis asserts that the proper inquiry is not whether the conditions precedent actually transpired or were likely to occur. Rather, she argues that the Trustee must assess whether, *but-for her dismissal in late 2019*, Cresford would have earned a profit from the YSL Project.[83] This argument depends upon the factual findings and conclusions of judges presiding over wholly separate and parallel streams of litigation between Ms. Athanasoulis and Cresford, and between the LPs and Ms. Athanasoulis. Significant allegations of corporate improprieties and executive malfeasance leading to the implosion of the Cresford group are advanced by all parties in those two cases.[84] The adjudication of any claim that the YSL Project would have been profitably completed by Cresford had Ms. Athanasoulis not been dismissed necessarily involves an extensive and wide-ranging investigation into the reasons for Cresford's financial troubles as a whole. The Trustee is in no position to make such determinations.

77. The Trustee cannot pre-empt the courts in those parallel proceedings and pronounce upon the merits of Ms. Athanasoulis's, Cresford's, or the LPs' allegations. The Trustee's task is to administer the claims made directly against YSL – not to adjudicate the claims made against Cresford at large. Yet by claiming that the Trustee must assess whether Cresford would have

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83 Athanasoulis Moving Factum, paras. 94-96 [ABCO, Tab 25, pp. 1328-1329].

84 See, *e.g.*, Athanasoulis Statement of Claim [ABCO, Tab 5, pp. 122-153]; *Penny Decision*, *supra* note 16 [ABOA, Tab 2]; Motion Decision, footnote 3 [ABCO, Tab 3, pp. 40-41].

profitably completed the YSL Project if she had not been dismissed, that is precisely what Ms. Athanasoulis demands of the Trustee.

78. As the Profit-Share Claim depends upon the results of parallel proceedings, the Trustee was entitled to disallow the Claim on the basis that it is too remote or speculative. That is precisely the *ratio* of this Court's decision in *Schnier*. In *Schnier*, this Court was asked to determine whether a claim for tax debt that the taxpayer was disputing in the Tax Court of Canada was a provable claim within the taxpayer's bankruptcy proceeding under section 121 and 135 of the *BIA*. The Court of Appeal held that the registrar in bankruptcy appropriately determined that the tax owing was not a provable claim because it was contingent upon the Crown succeeding through trial at the Tax Court:

> where a taxpayer has appealed an assessment to the Tax Court of Canada, the actual amount of tax that the Minister can compel the taxpayer to pay will not be known until the occurrence of a future event - i.e. the determination of the taxpayer's appeal from the assessment. **This is a hallmark of a contingent claim.**
>
> Further, a creditor's inability to enforce a claim bears directly on the creditor's ability to prove its claim under the *BIA*. In order to be a provable claim within the meaning of *BIA* s. 121, a claim must be one recoverable by legal process…
>
> […]
>
> **Consequently, where amounts of income tax assessed against an individual bankrupt taxpayer remain under appeal at the time of his discharge hearing, the existence of the outstanding appeal <u>entitles</u> the trustee to classify the claim based on the unpaid assessed amounts as a contingent, unprovable one.**[85]
>
> [Boldface and underlining added.]

79. By direct analogy, because the alleged Profit-Share Claim obligation of Cresford remains disputed in parallel court proceedings, the Trustee has the *discretion* to classify the Profit-Share Claim as a contingent, unprovable one.

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85 *Schnier*, *supra* note 3, paras. 48-50 [ABOA, Tab 23].

80. The motion judge erred in law by refusing to apply the *ratio* in *Schnier*. Instead, the motion judge purported to distinguish *Schnier* on the basis that applying *Schnier* leads to the unreasonable result that any claim subject to litigation would never be a provable claim.[86] In doing so, she misinterpreted *Schnier* as setting down a categorical exclusionary rule rather than simply directing judges to defer to a trustee's determination of whether the contingent claim is too remote or speculative in circumstances of parallel litigation.

81. The actual *ratio* in *Schnier* makes perfect sense. If trustees have no discretion to disallow claims subject to parallel litigation (as the motion judge held), it would have the effect of forcing trustees to assume the role of adjudicator over the merits of those parallel proceedings. That would spawn significant risks of: (i) a multiplicity of proceedings; (ii) grinding *BIA* proceedings to a halt in order to resolve potentially complex allegations of wrongdoing between warring stakeholders; and (iii) conflicting decisions.

82. The motion judge also purported to distinguish *Schnier* on the basis that it involves a tax liability.[87] Her Honour's reading of *Schnier* in this restricted manner, however, ignores the cannon of jurisprudence preceding *Schnier*. Many of those precursor cases, applying the same *ratio* adopted in *Schnier*, arise in cases where a claim for ordinary contractual debt is subject to parallel litigation. For example, in *Re Telemark Inc.*, the court held that a claim for contractual debt in the *BIA* proceeding was a provable claim because even though it was subject to parallel litigation, the judge in that parallel proceeding found that the creditor had a "good *prima facie* case". The creditor's chances to obtain an award of damages "recoverable by legal process" was therefore not

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86 Motion Decision, para. 80(b) [ABCO, Tab 3, p. 42].

87 Motion Decision, para. 80(a) [ABCO, Tab 3, p. 42].

too remote or speculative to be a provable claim in the *BIA* proceeding.[88] Similarly, in *Re Wiebe*, the issue was whether a creditor advancing a claim for contractual liability had a provable claim when the claim was subject to ongoing litigation. The court held that "[t]here has to be an element of probability of liability arising from the Court proceedings. If there are too many ifs about the action and the [alleged contractual liability] before a provable claim comes into being, the claim is not a provable claim under [section 121 of the *BIA*]".[89]

83. The case law teaches that the inquiry into whether a contingent claim subject to parallel litigation is too remote or speculative is a factual one. The answer to the question of whether a contingent claim subject to parallel litigation is a provable claim in a *BIA* proceeding depends on an assessment of the merits of the parallel litigation. The motion judge provided no reasons explaining her assessment of how probable it might be that Ms. Athanasoulis could prove her case in the separate litigation involving Cresford and the LPs.[90] Nor did she identify how the Trustee committed a palpable or overriding error in concluding that "there are too many ifs" about the separate litigation and the allegations underpinning those proceedings. Indeed, the motion judge ignored entirely the import of credibility findings made against Ms. Athanasoulis by Justice Penny[91] to the assessment of the contingent nature of the Profit-Share Claim.

84. Ultimately, Ms. Athanasoulis seeks a share of profits from a bankrupt project. It was reasonable for the Trustee to conclude that this was too "remote and speculative" to be a provable claim. Indeed, Justices Hainey and Dunphy shared similars view of Ms. Athanasoulis's Profit-

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88 *Re Telemark Inc.*, 2003 CanLII 29156 (Ont. S.C.), para. 9 [ABOA, Tab 17].

89 *Re Wiebe*, 1995 CanLII 7367 (Ont. S.C.), para. 7 [ABOA, Tab 20].

90 *Supra* note 84.

91 *Penny Decision*, *supra* note 16, para. 19 [ABOA, Tab 2].

Share Claim.[92] These prior judicial determinations, coupled with the uncertainty surrounding Ms. Athanasoulis's litigation against Cresford and the LPs, entirely justify the Trustee's discretionary decision to disallow the Profit-Share Claim.

85. As the Trustee exercised its discretion faithfully and correctly in accordance with *Schnier*, the motion judge was required to identify a palpable and overriding error in the Trustee's factual determinations on the remoteness and speculativeness of the Profit-Share Claim before interfering with the Trustee's decision. Having failed to do so, the motion judge had no basis to allow the motion below. The motion judge's simple disagreement with the Trustee's factual determinations is insufficient.

D. THE MOTION JUDGE ERRED BY REFUSING TO APPLY THE COMMON LAW REASONABLE NOTICE PERIOD

86. If the Profit-Share Claim is in fact a debt claim, then it was a bonus that arises from Ms. Athanasoulis's employment relationship with Cresford. The motion judge repeatedly referred to and reaffirmed characterizations of the PSA as part and parcel of Ms. Athanasoulis's oral employment agreement.[93] Indeed, the motion judge relied upon the employment contract nature of the PSA as a reason for why the Profit-Share Claim was a contractual debt claim rather than a claim in the nature of equity.[94]

87. In *Matthews v. Ocean Nutrition Canada Ltd.*, the Supreme Court explained that upon dismissal without cause, there is an implied obligation in every employment contract to provide the employee with "damages representing the salary, including bonuses, [the employee] would

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92 *Supra* paras. 17 and 30-31.

93 Motion Decision, paras. 14-15, 71, 80(c), 82, 93, and 97 [ABCO, Tab 3, pp. 29-30, 40, 42-43, and 45-46].

94 Motion Decision, paras. 61-62 [ABCO, Tab 3, p. 39].

have earned during the [reasonable notice] period".[95] This common law presumption is not easily displaced. Parties can only contract out of it if the employment contract unambiguously alters the common law right.[96]

88. Having concluded that the oral PSA was part of the oral employment contract, the motion judge was obligated to apply the common law of wrongful dismissal damages in assessing the Profit-Share Claim. Instead, the motion judge mistakenly held that damages flowing from the breach of the PSA were governed by principles applicable to commercial contract law. Her Honour reasoned that because the oral employment agreement between Ms. Athanasoulis and Cresford contained no term temporally restricting her entitlements under the PSA, Ms. Athanasoulis was entitled to claim damages flowing from a breach of the PSA for an indefinite period of time. That conclusion required proof of an unambiguous attempt by Cresford and Ms. Athanasoulis to contract out of the common law reasonable notice period. There was no such evidence, and the motion judge erred in allowing the Profit-Share Claim in the absence of such evidence.

89. Damages for the breach of an indefinite contract of employment do not run indefinitely. They run only for the period of reasonable notice. The Supreme Court highlighted that the assessment of damages for the breach of an employment contract is distinguishable from the assessment of damages for the breach of ordinary commercial contracts because of the "well-established understanding that the contract effectively 'remains alive' for the purposes of assessing the employee's damages, in order to determine what compensation the employee would have been

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95 *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26, para. 49 [*Matthews*] [ABOA, Tab 7].

96 *Ibid*, para. 55 [ABOA, Tab 7].

entitled to but for the dismissal".[97] There was no evidence of an unambiguous contracting out of this cornerstone implied term of employment contracts.

90. The decision of the Alberta Court of Appeal in *Noble v. Principal Consultants Ltd.* that the motion judge relied upon in holding that employment bonuses are provable claims in *BIA* proceedings is entirely inapplicable.[98] In *Noble*, the employee made a claim for bonuses that he would have been paid during his reasonable notice period.[99] Here, the condition precedent for triggering payment of the Profit-Share Claim—profitable completion of the YSL Project—lies years beyond Ms. Athanasoulis's notice period.

91. Ms. Athanasoulis's Profit-Share Claim suffers the same flaws identified by this Court in *Manastersky v. Royal Bank of Canada*. In that case, an executive of RBC claimed a lost profit-share bonus as part of his wrongful dismissal damages. This Court held that he was not entitled to the claimed profit-share bonus because the condition precedent for realizing the bonus would not have occurred during his reasonable notice period.[100]

92. Ms. Athanasoulis was dismissed in December 2019.[101] Her 24-month reasonable notice period[102] expired in December 2021. The most ambitious projections for the YSL Project did not contemplate completion of the Project until 2025 at the earliest.[103] The PSA only entitled Ms.

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97 *Ibid*, para. 54 [ABOA, Tab 7].

98 Motion Decision, para. 61 [ABCO, Tab 3, p. 39].

99 *Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133, paras. 41-42 [ABOA, Tab 9].

100 *Manastersky v. Royal Bank of Canada*, 2021 ONCA 458, paras. 37-40 [ABOA, Tab 6].

101 *Supra* note 39.

102 *Supra* para. 7.

103 *Supra* note 13.

Athanasoulis to a share of the profits earned by Cresford on the YSL Project upon the completion of the Project after all creditors and the LPs were repaid.[104] Assuming the YSL Project could have been profitably completed, it would not have occurred until at least four years after Ms. Athanasoulis's reasonable notice period expired. The Profit-Share Claim is therefore not a provable claim under sections 121 and 135 of the *BIA*.

PART V - ORDER REQUESTED

93. The Trustee requests an order allowing its appeal of the Order of Justice Kimmel dated March 19, 2024 and awarding it costs of this appeal on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2024.

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104 *Supra* note 35.

Court of Appeal File No. _____
Court File No. BK-21-02734090-0031

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, as amended

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

CERTIFICATE

I, Chenyang Li, counsel for the appellant, KSV Restructuring Inc. (in its capacity as Proposal Trustee), certify on behalf of the appellant that:

(i) An order under Rule 61.09(2) is not required;

(ii) The estimated time for the appellant's oral argument is 1.5 hours;

(iii) This factum complies with Rule 61.12(5.1);

(iv) There are 9,175 words in Parts I to V of this factum; and

(v) I am satisfied as to the authenticity of every authority listed in Schedule A.

April 29, 2024

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SCHEDULE "A"

LIST OF AUTHORITIES

	Cases
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2.	*10390160 Canada Ltd. v. Casey*, 2022 ONSC 628
3.	*Alberta Energy Regulator v. Lexin Resources Ltd.*, 2018 ABQB 590
4.	*Avis d'intention de Cryogénique inc.*, 2022 QCCA 1387
5.	*Housen v. Nilokaisen*, 2002 SCC 33
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7.	*Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26
8.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67,
9.	*Noble v. Principal Consultants Ltd. (Trustee of)*, 2000 ABCA 133
10.	*Re All Canadian Investment Corporation*, 2019 BCSC 1488
11.	*Re Bul River Mineral Corp.*, 2014 BCSC 1732
12.	*Re Clover on Yonge Inc.*, CV-20-00642928, dated January 8, 2021 (unreported)
13.	*Re Dexior Financial Inc.*, 2011 BCSC 348
14.	*Re Nelson Financial Group Ltd.*, 2010 ONSC 6229
15.	*Re Sino-Forest Corp.*, 2012 ONSC 4377
16.	*Re Sino-Forest Corp.*, 2012 ONCA 816
17.	*Re Telemark Inc.*, 2003 CanLII 29156
18.	*Re Tudor Sales Ltd.*, 2017 BCSC 119
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	Cases
20.	*Re Wiebe*, 1995 CanLII 7367
21.	*Re YG Limited Partnership and YSL Residences Inc.*, 2024 ONSC 1617
22.	*Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018
23.	*Schnier v. Canada (Attorney General)*, 2016 ONCA 5
24.	*Syndic de Société de vélo en libre service*, 2023 QCCA 368
25.	*Trakopolis SaaS Corp. (2007996 Alberta Ltd.), Re*, 2020 ABQB 643
26.	*YG Limited Partnership (Re)*, 2022 ONSC 6138
27.	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178
28.	*YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 5206

	Secondary Sources
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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3**

Section 2

claim provable in bankruptcy, provable claim or **claim provable** includes any claim or liability provable in proceedings under this Act by a creditor;

creditor means a person having a claim provable as a claim under this Act;

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);

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;

Section 121

Claims provable

(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 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.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Section 135

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Court of Appeal File No. COA-24-CV-0468
Court File No. BK-21-02734090-0031

IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPELLANT, KSV RESTRUCTURING INC. (IN ITS CAPACITY AS PROPOSAL TRUSTEE)

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