

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**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
PCAS PATIENT CARE AUTOMATION SERVICES INC.
AND 2163279 ONTARIO INC. (the "Applicants")**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

BRIEF OF AUTHORITIES OF THE APPLICANTS

June 4, 2012

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INDEX

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

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PCAS PATIENT CARE AUTOMATION SERVICES INC.
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**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

BRIEF OF AUTHORITIES OF THE APPLICANTS

1. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
2. *Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *White Birch Paper Holding Company (Re)*, 2010 QCCS 4915
6. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (S.C.J. [Comm. List])
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765
9. *Profitt v. A.D. Productions Ltd. (Trustee of)* (2002), 32 C.B.R. (4th) 94 (Ont. C.A.)
10. *Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. C.A.)
11. *McKay & Maxwell, Ltd., Re* (1927), 8 C.B.R. 534 (N.S. S.C.)
12. *Christensen, Re* (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.)

13. *Front Iron & Metal Co., Re* (1980), 38 C.B.R. (N.S.) 317 (Ont. S.C., In Bankruptcy)
14. *Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360
15. *Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C.)
16. *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379

TAB 1

INDEX

Case Name:

Nortel Networks Corp. (Re)

**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
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended**

[2009] O.J. No. 3169

55 C.B.R. (5th) 229

2009 CarswellOnt 4467

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: June 29, 2009.

Judgment: June 29, 2009.

Released: July 23, 2009.

(59 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Motion by applicants for approval of bidding procedure and Sale Agreement allowed -- Applicants had been granted CCAA protection and were involved in insolvency procedures in four other countries -- Bidding procedures set deadline for entry and involved auction -- Sale Agreement was for some of applicants' business units -- Neither proposal involved formal plan of compromise with creditors or vote, but CCAA was flexible and could be broadly interpreted to ensure objective of preserving business was met -- Proposal was warranted, beneficial and there was no viable alternative.

Motion by the applicants for the approval of their proposed bidding process and Sale Agreement. The applicants had

been granted CCAA protection and were involved in insolvency proceedings in four other countries. The Monitor approved of the proposal. The bidding process set a deadline for bids and involved an auction. The Sale Agreement was for some of the applicants' business units. The applicants argued the proposal was the best way to preserve jobs and company value. The purchaser was to assume both assets and liabilities. There was no formal plan for compromise with creditors or vote planned.

HELD: Motion allowed. The CCAA was flexible and could be broadly interpreted to ensure that its objectives of preserving the business were achieved. The proposal was warranted and beneficial and there was no viable alternative. A sealing order was also made with respect to Appendix B, which contained commercially sensitive documents.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

Counsel:

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Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor.

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF.

S. Philpott, for the Former Employees.

K. Zych, for Noteholders.

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund.

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Arthur O. Jacques and Tom McRae, for Felske and Sylvain (de facto Continuing Employees' Committee).

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited.

A. Kauffman, for Export Development Canada.

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

- 1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.
- 2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).
- 3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.
- 4 The following are my reasons for granting these orders.
- 5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.
- 6 The Sale Agreement relates to the Code Division Multiple Access ("CDMA") business Long-Term Evolution ("LTE") Access assets.
- 7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

BACKGROUND

- 8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.
- 9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.
- 10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.
- 11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.
- 12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its

CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), at paras. 44, 61, leave to appeal refused, [2008] S.C.C.A. No. 337. ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA

is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

... we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees.

Re PSINet Limited, supra, at para. 3.

39 In *Re Stelco Inc.*, *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc, supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) 1, (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale ... be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership*, 2009 BCCA 319.

46 At paragraphs 24-26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may

grant whenever an insolvent company wishes to undertake a "restructuring" ... Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged ...
26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary ...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision

is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that,

if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

G.B. MORAWETZ J.

cp/e/qlxr/qlpxm/qltl/qlaxw/qlced

TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**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
PCAS PATIENT CARE AUTOMATION SERVICES INC.
AND 2163279 ONTARIO INC. (the "Applicants")**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

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INDEX

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**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
PCAS PATIENT CARE AUTOMATION SERVICES INC.
AND 2163279 ONTARIO INC. (the "Applicants")**

**APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

BRIEF OF AUTHORITIES OF THE APPLICANTS

1. *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Comm. List])
2. *Consumers Packaging Inc. (Re)* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Canwest Publishing Inc. (Re)* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J. [Comm. List])
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *White Birch Paper Holding Company (Re)*, 2010 QCCS 4915
6. *Canwest Global Communications Corp. (Re)*, [2009] O.J. No. 4788 (S.C.J. [Comm. List])
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765
9. *Profitt v. A.D. Productions Ltd. (Trustee of)* (2002), 32 C.B.R. (4th) 94 (Ont. C.A.)
10. *Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. C.A.)
11. *McKay & Maxwell, Ltd., Re* (1927), 8 C.B.R. 534 (N.S. S.C.)
12. *Christensen, Re* (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.)

13. *Front Iron & Metal Co., Re* (1980), 38 C.B.R. (N.S.) 317 (Ont. S.C., In Bankruptcy)
14. *Bank of Montreal v. i Trade Finance Inc.*, [2011] 2 S.C.R. 360
15. *Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C.)
16. *Ted Leroy Trucking [Century Services] Ltd., Re*, [2010] 3 S.C.R. 379

1

Case Name:

Nortel Networks Corp. (Re)

**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
Nortel Networks Corporation, Nortel Networks Limited, Nortel
Networks Global Corporation, Nortel Networks International
Corporation and Nortel Networks Technology Corporation,
Applicants
APPLICATION UNDER the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended**

[2009] O.J. No. 3169

55 C.B.R. (5th) 229

2009 CarswellOnt 4467

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: June 29, 2009.

Judgment: June 29, 2009.

Released: July 23, 2009.

(59 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Motion by applicants for approval of bidding procedure and Sale Agreement allowed -- Applicants had been granted CCAA protection and were involved in insolvency procedures in four other countries -- Bidding procedures set deadline for entry and involved auction -- Sale Agreement was for some of applicants' business units -- Neither proposal involved formal plan of compromise with creditors or vote, but CCAA was flexible and could be broadly interpreted to ensure objective of preserving business was met -- Proposal was warranted, beneficial and there was no viable alternative.

Motion by the applicants for the approval of their proposed bidding process and Sale Agreement. The applicants had

been granted CCAA protection and were involved in insolvency proceedings in four other countries. The Monitor approved of the proposal. The bidding process set a deadline for bids and involved an auction. The Sale Agreement was for some of the applicants' business units. The applicants argued the proposal was the best way to preserve jobs and company value. The purchaser was to assume both assets and liabilities. There was no formal plan for compromise with creditors or vote planned.

HELD: Motion allowed. The CCAA was flexible and could be broadly interpreted to ensure that its objectives of preserving the business were achieved. The proposal was warranted and beneficial and there was no viable alternative. A sealing order was also made with respect to Appendix B, which contained commercially sensitive documents.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4)

Counsel:

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Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor.

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF.

S. Philpott, for the Former Employees.

K. Zych, for Noteholders.

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund.

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Arthur O. Jacques and Tom McRae, for Felske and Sylvain (de facto Continuing Employees' Committee).

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited.

A. Kauffman, for Export Development Canada.

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

- 1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.
- 2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).
- 3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.
- 4 The following are my reasons for granting these orders.
- 5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.
- 6 The Sale Agreement relates to the Code Division Multiple Access ("CDMA") business Long-Term Evolution ("LTE") Access assets.
- 7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is \$650 million.

BACKGROUND

- 8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.
- 9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.
- 10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.
- 11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.
- 12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its

CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

ISSUES AND DISCUSSION

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.), at paras. 44, 61, leave to appeal refused, [2008] S.C.C.A. No. 337. ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Re Residential Warranty Co. of Canada Inc.* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA

is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* (2005) 9 C.B.R. (5th) 315, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* (2008), 45 C.B.R. (5th) 87 and *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.).

36 In *Re Consumers Packaging, supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

... we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Re Canadian Red Cross Society, supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Re Canadian Red Cross Society, supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited, supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

[If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees.

Re PSINet Limited, supra, at para. 3.

39 In *Re Stelco Inc.*, *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc.*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) 1, (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale ... be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership*, 2009 BCCA 319.

46 At paragraphs 24-26 of the *Forest and Marine* decision, Newbury J.A. stated:

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may

grant whenever an insolvent company wishes to undertake a "restructuring" ... Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged ...
26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary ...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole "economic community"?
- (c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision

is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* (1991), 7 C.B.R. (3rd) 1 (Ont. C.A.) at para. 16.

DISPOSITION

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that,

if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

G.B. MORAWETZ J.

cp/c/qllxr/qlpxm/qlldl/qlaxw/qlced

2

Indexed as:
Consumers Packaging Inc. (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
Consumers Packaging Inc., Consumers International Inc. and
64489 Canada Inc.**

[2001] O.J. No. 3908

150 O.A.C. 384

27 C.B.R. (4th) 197

12 C.P.C. (5th) 208

2001 CarswellOnt 3482

108 A.C.W.S. (3d) 765

Docket No. M27743

Ontario Court of Appeal
Toronto, Ontario

McMurtry C.J.O., Finlayson and Austin JJ.A.

Heard: September 27, 2001.

Judgment: October 10, 2001.

(10 paras.)

Bankruptcy -- Companies' Creditors Arrangement Act -- Sale of assets -- Appeals.

Motion by Ardagh PLC for leave to appeal and appeal from a decision that approved a sale of assets of Consumers Packaging Inc. to Owens-Illinois Inc. Consumers filed for protection under the Companies' Creditors Arrangement Act. Consumers was authorized, through an independent restructuring committee and its chief restructuring officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of its business. Ardagh and Owens participated in the bid process. Owens was the preferred bid since it provided more cash to Consumers' creditors, had the least completion risk, was not conditional on financing, was likely to close in a reasonable

period of time, resulted in the continuation of Consumers' business and retained a vast majority of its employees. Ardagh's restructuring proposal was not backed by financing commitments, required further due diligence by its lenders and offered less by way of recovery to Consumers' creditors. It was the unanimous view of the monitor, the Committee and the Officer that Ardagh's proposal was not viable and would, if pursued, result in its liquidation causing a lower return to creditors, the loss of jobs and cessation of business operations. The judge approved Owens' bid on the basis that it was the only presently viable option better than a liquidation with substantially reduced realization of value.

HELD: Motion for leave to appeal dismissed. Granting leave to appeal would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders in light of the significant time and financial constraints faced by Consumers and was contrary to the objectives of the Act. The sale of certain of Consumers' assets to Owens allowed the preservation of its business and was consistent with the purposes of the Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.7.

Appeal From:

On appeal from the order of Justice James M. Farley dated August 31, 2001.

Counsel:

Peter F.C. Howard, Patrick O'Kelly and Craig Martin, for Ardagh PLC.
Robert S. Harrison and Carole J. Hunter, for the Ad Hoc Noteholders Committee.
Daniel V. MacDonald and Paul G. Macdonald, for Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.
L. Joseph Latham and Elizabeth Moore, for the Toronto-Dominion Bank Syndicate.
Lily I. Harmer, for the United Steelworkers of America.
Marc Lavigne, for Anchor Glass Container Corp.
Dale Denis, for Owens-Illinois, Inc.
Terrence J. O'Sullivan, for KPMG Inc.

The following judgment was delivered by

1 THE COURT:-- Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

2 Consumers had filed for protection under the Companies' Creditors Arrangement Act (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be

destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

3 On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23, 2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

4 The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

5 In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc. (Re)*, a judgment of the Ontario Court of Appeal, delivered May 25, 2001, [2001] O.J. No. 1943 at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA. The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

6 The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

7 Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharmaceutical v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 at 238 (C.A.). O'Connor J.A. went on to say at p. 242:

There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands [of] a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

8 The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being ultra vires the CCAA.

9 Finally, while we do not propose to become involved in the merits of the appeal, we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

10 Accordingly, leave to appeal is refused with costs.

McMURTRY C.J.O.

FINLAYSON J.A.

AUSTIN J.A.

cp/e/nc/qlrme

3

Case Name:

Canwest Publishing Inc. (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
Canwest Publishing Inc./Publications Canwest Inc., Canwest
Books Inc., and Canwest (Canada) Inc., Applicants**

[2010] O.J. No. 2190

2010 ONSC 2870

68 C.B.R. (5th) 233

2010 CarswellOnt 3509

Court File No. CV-10-8533-00CL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

May 21, 2010.

(19 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Sanction by court -- Application by limited partners for order authorizing them to enter into asset purchase agreement and related relief allowed -- Through sales and solicitation process, limited partners received offer whereby new limited partnership would acquire assets, assume certain liabilities and offer employment to substantially all employees -- Proposed disposition met statutory requirements, solicitation process was reasonable, sufficient efforts made to attract best possible bid and proposed transaction preferable to bankruptcy -- As senior lenders' CCAA plan was fair and reasonable, statutory requirements complied with, and no available commercial going concern alternatives if sales agreement unable to close, senior lenders' CCAA plan conditionally sanctioned.

Application by limited partners for an order authorizing them to enter into an asset purchase agreement based on a bid from the ad hoc committee of a percentage of senior subordinated noteholders and related relief. The court previously approved a support agreement between the limited partners and administrative agent for the senior lenders and authorized the limited partners to file a senior lenders' plan and commence a sale and investor solicitation process to test the market and obtain an offer that was superior to the terms of the support transaction. The financial advisor

commenced the sales and solicitation process and received qualified bids. The ad hoc committee bid was determined to be the superior offer and the monitor recommended that the bid be accepted. The bid contemplated that a holding company would effect a transaction through a new limited partnership which would acquire substantially all of the financial and operating assets of the limited partners, the shares of the newspaper corporation and assume certain liabilities for a purchase price of \$1.1 billion. In addition, the new limited partnership agreed to offer employment to substantially all of the employees of the limited partners and assume the pension liabilities and other benefits of the employees of the limited partners it employed and retirees. The new limited partnership planned to continue to operate all of the businesses of the limited partners in substantially the same manner they currently operated. The bid allowed for the full payout of debts owed by the limited partners to secured lenders and an additional \$150 million for the unsecured creditors.

HELD: Application allowed. The limited partners were authorized to enter into the agreement as the proposed disposition of assets met the statutory and common law requirements, the process through which the agreement was reached was reasonable, sufficient efforts were made to attract the best possible bid and the proposed transaction was preferable to bankruptcy. As the senior lenders' CCAA plan was fair and reasonable, there had been strict compliance with the statutory requirements, and there was no available commercial going concern alternatives if the sales agreement was unable to close, the senior lenders' CCAA plan was conditionally sanctioned.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 6, s. 6(3), s. 6(5), s. 6(6), s. 11, s. 36

Counsel:

Lyndon Barnes, Alex Cobb and Betsy Putnam, for the Applicant LP Entities.

Mario Forte, for the Special Committee of the Board of Directors.

David Byers and Maria Konyukhova, for the Monitor, FTI Consulting Canada Inc.

Andrew Kent and Hilary Clarke, for the Administrative Agent of the Senior Secured Lenders Syndicate.

M.P. Gottlieb and J.A. Swartz, for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders Robert Chadwick and Logan Willis for 7535538 Canada Inc.

Deborah McPhail, for the Superintendent of Financial Services (FSCO).

Thomas McRae, for Certain Canwest Employees.

Endorsement

S.E. PEPALL J.:--

Relief Requested

1 The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction

concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

AHC Bid

2 Dealing firstly with approval of the AHC Bid, in my Initial Order of January 8, 2010, I approved the Support Agreement between the LP Entities and the Administrative Agent for the Senior Lenders and authorized the LP Entities to file a Senior Lenders' Plan and to commence a sale and investor solicitation process (the SISP). The objective of the SISP was to test the market and obtain an offer that was superior to the terms of the Support Transaction.

3 On January 11, 2010, the Financial Advisor, RBC Capital Markets, commenced the SISP. Qualified Bids (as that term was defined in the SISP) were received and the Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid was a Superior Cash Offer and that none of the other bids was a Superior Offer as those terms were defined in the SISP.

4 The Monitor recommended that the LP Entities pursue the AHC Transaction and the Special Committee of the Board of Directors accepted that recommendation.

5 The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of \$1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional \$150 million in value which will be available for the unsecured creditors of the LP Entities.

6 The purchase price will consist of an amount in cash that is equal to the sum of the Senior Secured Claims Amount (as defined in the AHC Asset Purchase Agreement), a promissory note of \$150 million (to be exchanged for up to 45% of the common shares of Holdco) and the assumption of certain liabilities of the LP Entities.

7 The Ad Hoc Committee has indicated that Holdco has received commitments for \$950 million of funded debt and equity financing to finance the AHC Bid. This includes \$700 million of new senior funded debt to be raised by Opco LP and \$250 million of mezzanine debt and equity to be raised including from the current members of the Ad Hoc Committee.

8 Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

9 The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of \$1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of \$150 million less the

amounts paid to the \$1,000 unsecured creditors. Ultimately, affected unsecured creditors with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

10 The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;
- the AHC Bid contemplates that the transaction will be implemented through a Plan under which \$150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option not to assume certain pension or employee benefits obligations.

11 The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

12 Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank of Canada v. Soundair Corp.*¹ decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

Claims Procedure Order and Meeting Order

14 Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

SISP Amendment

15 It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under section 11 of the CCAA to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

Dual Track and Sanction of Senior Lenders' CCAA Plan

16 In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

17 The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

18 The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' CCAA Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Re: Canadian Airlines Corp.*² has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3), (5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

Conclusion

19 In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole. As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people - creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

S.E. PEPALL J.

cp/e/qlafr/qljxr/qlana

1 [1991] O.J. 1137.

2 2000 ABQB 442, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to S.C.C. refused July 12, 2001,
[2001] S.C.C.A. No. 60.

TAB 4

**Royal Bank of Canada v. Soundair Corp., Canadian Pension
Capital Ltd. and Canadian Insurers Capital Corp.
Indexed as: Royal Bank of Canada v. Soundair Corp.
(C.A.)**

4 O.R. (3d) 1

[1991] O.J. No. 1137

Action No. 318/91

ONTARIO
Court of Appeal for Ontario

Goodman, McKinlay and Galligan JJ.A.

July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a

court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137 Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

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

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

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

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

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

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

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

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

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

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

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

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

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

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

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

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY IN AGREEING TO SELL TO OEL?

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

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

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

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

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

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

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

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust v. Rosenberg*, supra, at p. 112 O.R., p. 551 D.L.R.:

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In *Crown Trust v. Rosenberg*, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkey.), at p. 247:

If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkey.), at p. 243:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkey.), at p. 142, McRae J. expressed a similar view:

The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion

to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for \$6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of \$3,000,000. The OEL offer provided for a payment of \$2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently:

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg*, supra, and *Re Selkirk* (1986, Saunders J.), supra. However, as Saunders J. pointed out in *Re Beauty Counsellors*, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986,

Saunders J.), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987, McRae J.), supra, and *Cameron*, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* (1986), supra, where Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in

some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 O.R., p. 548 D.L.R.:

The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not

understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p.

31 of the reasons]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive \$3,375,000 of the \$6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only \$1,000,000 and the Royal Bank would receive \$5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However,

it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In *British Columbia Development Corp. v. Spun Cast Industries Inc.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately \$50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately \$3,000,000 to \$4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for

the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose

bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be

supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being \$4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June 29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between \$10,000,000 and \$12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of \$3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately \$3,000,000 to \$4,000,000.

In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 C.B.R.:

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 5

Case Name:

White Birch Paper Holding Company (Arrangement relatif à)

**IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:
WHITE BIRCH PAPER HOLDING COMPANY**

and

**WHITE BIRCH PAPER COMPANY, STADACONA GENERAL PARTNER INC.,
BLACK SPRUCE PAPER INC., F.F. SOUCY GENERAL PARTNER INC.,
3120772 NOVA SCOTIA COMPANY, ARRIMAGE DE GROS CACOUNA INC.,
PAPIER MASSON LTÉE, Petitioners**

and

ERNST & YOUNG INC., Monitor

and

**STADACONA LIMITED PARTNERSHIP, F.F. SOUCY LIMITED PARTNERSHIP,
F.F. SOUCY INC. & PARTNERS, LIMITED PARTNERSHIP,**

Mises-en-cause

and

**SERVICE D'IMPARTITION INDUSTRIEL INC., KSH SOLUTIONS INC., BD
WHITE BIRCH INVESTMENT LLC, Intervenant**

and

**SIXTH AVENUE INVESTMENT CO. LLC, DUNE CAPITAL LLC, DUNE
CAPITAL INTERNATIONAL LTD, Opposing parties**

[2010] Q.J. No. 10469

2010 QCCS 4915

2010EXP-3682

J.E. 2010-2002

EYB 2010-180748

No.: 500-11-038474-108

Quebec Superior Court
District of Montreal

The Honourable Robert Mongeon, J.S.C.

Heard: September 24, 2010.
Oral Judgment: September 24, 2010.
Written Judgment: October 15, 2010.

(58 paras.)

Counsel:

No Counsel mentioned.

**REASONS FOR JUDGMENT GIVEN ORALLY ON
SEPTEMBER 24, 2010**

BACKGROUND

- 1 On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.
- 2 On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.
- 3 On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process ("SISP") for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. no one objected to the issuance of the April 29, 2010 order. no appeal was lodged in either jurisdiction.
- 4 The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC ("BDWB"). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:
 - a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);
 - b) pay US\$90 million in cash;
 - c) pay the Reserve Payment Amount (as defined);
 - d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and
 - e) deliver the Wind Down Amount (as defined).the whole for a consideration estimated between \$150 and \$178 million dollars.
- 5 BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:
 - a) the ASA
 - b) BDWB as the stalking horse bidder
 - c) The Bidding Procedures
- 6 On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

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

8 My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010¹.

9 No appeal was lodged with respect to my decision of September 10, 2010.

10 On September 17, 2010, Sixth Avenue Investment Co. LLC ("Sixth Avenue") submitted a qualified bid.

11 On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US\$236,052,825.00.

12 BDWB's bid consists of:

- i) US\$90 million in cash allocated to the current assets of the WB Group;
- ii) \$4.5 million of cash allocated to the fixed assets;
- iii) \$78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;
- iv) miscellaneous additional charges to be assumed by the purchaser.

13 Sixth Avenue's bid was equivalent to the BDWB winning bid less US\$500,000.00, that is to say US\$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of \$78 million whilst Sixth Avenue offered an additional \$78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

14 The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

15 On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

16 As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of \$438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

17 BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also "Majority Lenders" under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to the First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

18 Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not "Majority Lenders" and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process².

19 The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the

winning bidder (BDWB) and the losing bidder³ (Sixth Avenue).

20 In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

21 Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the "Majority Lender" may direct the "Agents" to support such credit bid in favour of such "Majority Lenders". Conversely, this position is not available to the "Minority Lenders". This reasoning has not been seriously challenged before me.

22 The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

23 On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

REASONS (delivered orally on September 24, 2010)

24 I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a "Stalking Horse" bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a "Stalking Horse" bidder. In this context, a Motion to approve the "Stalking Horse" Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

25 I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever by any of the interested stakeholders except for the two construction lien holders KSH⁴ and SIII⁵ who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims).

26 The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

27 Today, the Motion of the Debtors is principally contested by a group which was identified as the "Sixth Avenue" bidders and more particularly, identified in paragraph 20 of the Motion now before me. The "Stalking Horse" bidder, of course, is the Black Diamond group identified as "BD White Birch Investment LLC". The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the "Sixth Avenue" bid which was for a lesser dollar amount (\$500,000.00), for a larger cash amount (approximately \$78,000,000.00 more cash) and for a different allocation of the purchase price.

28 Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the "Black Diamond" winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

29 The main argument of "Sixth Avenue" as averred, sometimes referred to as the "bitter bidder", comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of \$78,000,000.00 in arriving at its total offer of \$236,052,825.00.

30 If I take the comments of "Sixth Avenue", the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the "Black Diamond" bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

"24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent"), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law."

31 The words "and other applicable law" could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec.⁶

32 The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

13. Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

33 I draw from these excerpts that when the "Stalking Horse" bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid⁷.

34 Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

35 Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

36 Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the "Black Diamond" winning bid should prevail and the "Sixth

Avenue" bid, the bitter bidder, should fail.

37 I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

41 The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

42 It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

43 The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US\$500,000.00 less than it will if the winning bid is allowed to stand.

45 I now wish to address the question of Section 36 CCAA.

46 In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

47 Section 36 CCAA reads as follows:

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 officer of the company;

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

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

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

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

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

(added underlining)

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

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

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest* 2002 CarswellOnt 3509, and she writes at paragraph 13:

"The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one "Stalking Horse" bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in

supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words "preferable to a bankruptcy" must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

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

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

53 In *Nortel Networks*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position ([2009] O.J. No. 4487, 2009 CarswellOnt 4838, at paragraph 35):

"The duties of the Court in reviewing a proposed sale of assets are as follows:

- 1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;**
- 2) It should consider the interests of all parties;**
- 3) It should consider the efficacy and integrity of the process by which offers have been obtained;**
- 4) and it should consider whether there has been unfairness in the working out of the process."**

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

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

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

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

58 I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:

I believe, Mister Justice, that KSH and SIII have... ..their satisfaction with the wording. I believe also that Dow Jones, who's present,their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:

Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:

I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

The Court:

Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is **granted**, in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of "Sixth

Avenue" is **dismissed** without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is **granted**, without costs.

ROBERT MONGEON, J.S.C.

cp/e/qlspt/qlana/qlcal/qlmlt

1 See my Order of September 10, 2010.

2 For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

3 Sometimes referred to as the "bitter bidder" or "disgruntled bidder" See Re: *Abitibi Bowater* 2010 QCCS 1742 (Gascon J.)

4 KSH Solutions Inc.

5 Service d'Impartition Industriel Inc.

6 The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows: 689. The purchase price must be paid within five days, at the expiry of which time interest begins to run. Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him. 730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding. When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full. See also Denis Ferland and Benoit Emery, 4ème édition, volume 2 (Éditions Yvon Blais (2003)): "La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot "créance", contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi." See, finally, *Montreal Trust vs Jori Investment Inc.* (J.E. 80-220 (C.S.)), *Eugène Marcoux Inc. v. Côté* [1990] R.J.Q. 1221 (C.A.).

7 The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure. See paragraphs 24, 25 and 26 of BDWB's Intervention. As for the right to credit bid in a sale by

auction under the CCAA, see Re: *Maax Corporation* (QSC. no. 500-11-033561-081, July 10, 2008, Buffoni J.) See also Re: *Brainhunter* (OSC Commercial List, no. 09-8482-00CL, January 22, 2010).

TAB 6

Case Name:

Canwest Global Communications Corp. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement
Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a Proposed Plan of Compromise or
Arrangement of Canwest Global Communications Corp. and
the other applicants listed on Schedule "A"**

[2009] O.J. No. 4788

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

November 12, 2009.

(43 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Applications -- Sanction by court -- Application by a group of debtor companies for approval of an agreement that would enable them to restructure their business affairs, allowed -- Applicants were under the protection of the Companies' Creditors Arrangement Act -- Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair -- Related transaction regarding the transfer of the business and assets of a newspaper that the applicants had an interest in did not require Court approval under s. 36 of the Act because it was an internal corporate reorganization which was in the ordinary course of business -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36.

Application by a group of debtor companies and entities for an order approving a Transition and Reorganization Agreement between them and other related parties. The applicants were granted protection under the Companies' Creditors Arrangement Act on October 6, 2009. They were engaged in the newspaper, digital media and television business. The Agreement pertained to the restructuring of the applicants' business affairs. It was an internal reorganization transaction that was designed to realign shared services and assets within the corporate family that the applicants belonged to. The Agreement was entered into after extensive negotiations between the parties who were affected by it. The Monitor, who was appointed under the Act, concluded that this transaction had several advantages over a liquidation.

HELD: Application allowed. Court approval under s. 36 of the Act was required if a debtor company under the protection of the Act proposed to sell or dispose of assets outside the ordinary course of business. It did not apply to a

transaction regarding the transfer of the assets and business of a newspaper that the applicants had an interest in because it was an internal corporate reorganization which was in the ordinary course of business. The Agreement was approved because it facilitated the restructuring of the applicants to enable them to become viable and competitive industry participants and it was fair. It also allowed a substantial number of the businesses operated by the applicants to continue as going concerns. The Agreement did not prejudice the applicants' major creditors. In the absence of the Agreement the newspaper would have to shut down and most of its employees would lose their employment. The stay that was granted under the Act was extended to enable the applicants to continue to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act,

Bulk Sales Act, R.S.O. 1990, c. B.14,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 2(1), s. 36, s. 36(1), s. 36(4), s. 36(7)

Counsel:

Lyndon Barnes and Jeremy Dacks for the Applicants.

Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett for the Ad Hoc Committee of Noteholders.

Peter J. Osborne for Proposed Management Directors of National Post.

Andrew Kent and Hilary Clarke for Bank of Nova Scotia, Agent for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

Amanda Darroch for Communication Workers of America.

Alena Thoun for Superintendent of Financial Services.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLTP") and The National Post Company/La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Background Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act* ("CCAA") protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;
- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and
- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company

rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their CCAA filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of \$9.3 million in fiscal year ending August 31, 2009 and a net loss of \$0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately \$139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of \$1.5 million and a wind up deficiency of \$1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note -- \$187.3 million

CIT Secured Facility -- \$10.7 million

CMI Senior Unsecured Subordinated Notes -- US\$393.2 million

Irish Holdco Unsecured Note -- \$430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately \$139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately \$1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) \$2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of \$1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds \$6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately \$14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganization and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;
- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;
- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and
- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

- (a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;
- (b) the Transition and Reorganization Agreement should be approved by the Court; and
- (c) the stay should be extended to January 22, 2010.

Discussion

(a) Section 36 of the *CCAA*

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

- (a) a debtor company under *CCAA* protection
- (b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act¹ is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

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

- (2) Notice to creditors -- A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
- (3) Factors to be considered -- In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

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

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

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

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

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

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

- (a) a director or officer of the company;

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

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

- (6) Assets may be disposed of free and clear -- The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
- (7) Restriction -- employers -- The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.²

29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book³ on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."⁴

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act*⁵. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.*⁶, authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context,

namely the *Bulk Sales Act*⁷, courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller⁸. In *Pacific Mobile Corp.*⁹, the Supreme Court of Canada stated:

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons, [1982] C.A. 501, discussing the phrase "ordinary course of business" ...

'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4), which deals with dispositions of assets to a related party, was intended to:

... prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.¹⁰

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.*¹¹, a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Re Stelco Inc.*¹² Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the

court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

S.E. PEPALL J.

cp/c/qlrxg/qljxr/qlced/qlaxw

1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

2 The reference to paragraph 6(4)a should presumably be 6(6)a.

3 Industry Canada "Bill C-55: Clause by Clause Analysis-Bill Clause No. 131-CCAA Section 36".

4 Ibid.

5 *R.S.C. 1985, c. C-36 as amended*.

6 (2003), 47 C.B.R. (4th) 278 at para. 52.

7 R.S.O. 1990, c. B.14, as amended.

8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290.

10 *Supra*, note 3.

11 *Supra*, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

TAB 7

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

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

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

Supreme Court of Canada

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001

Judgment: April 26, 2002

Docket: 28020

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Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada

Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

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Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

The federal government provided a Crown corporation with a \$1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de*

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

la Cour fédérale, 1998, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurier les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

Cases considered by *Iacobucci J.*:

AB Hassle v. Canada (Minister of National Health & Welfare), 1998 CarswellNat 2520, 83 C.P.R. (3d) 428, 161 F.T.R. 15 (Fed. T.D.) — considered

AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to

Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1^{re} inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules*, 1998, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. *Federal Court of Canada, Trial Division, [2000] 2 F.C. 400*

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) *Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is para-

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

mount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) *The General Framework: Herein the Dagenais Principles*

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.)

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

[hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais, supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais, supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick, supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affi-

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davits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fun-

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damental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, per Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra, supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal, supra*, at pp. 1353-1354:

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court*

2002 CarswellNat 822, 2002 SCC 41, 2002 CarswellNat 823, 211 D.L.R. (4th) 193, 287 N.R. 203, 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, REJB 2002-30902, J.E. 2002-803, 93 C.R.R. (2d) 219

Rules, 1998.

Appeal allowed.

Pourvoi accueilli.

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TAB 8

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964



1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

Marzetti v. Marzetti

PEAT MARWICK THORNE INC. (trustee of estate of ARDEN ANTHONY MARZETTI, bankrupt) v. DIRECTOR OF MAINTENANCE ENFORCEMENT, ATTORNEY GENERAL OF CANADA and ATTORNEY GENERAL OF ALBERTA; SUPERINTENDENT OF BANKRUPTCY (intervenor); JACQUELINE JEANNINE MARZETTI v. ARDEN ANTHONY MARZETTI

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: February 2, 1994

Judgment: July 14, 1994

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Counsel: *Michael J. McCabe*, for appellant.

Jeanette Fedorak, for respondent Director of Maintenance Enforcement.

Ingrid C. Hutton, Q.C., and *Robert Moen*, for respondent Attorney General of Canada.

No one appeared for respondent Attorney General of Alberta.

Rick T.G. Reeson, for intervenor.

Subject: Corporate and Commercial; Insolvency; Family; Property

Bankruptcy --- Property of bankrupt — Tax credits or refunds.

Family Law --- Family property on marriage breakdown — Determination of ownership of property — Rights against trustee in bankruptcy.

Family Law --- Support — Spousal support under Divorce Act — Enforcement of award — Garnishment.

Property of bankrupt — Wages — Income tax refund — Husband owing money to Director of Maintenance Enforcement because of arrears accruing under corollary relief order to pay child and spousal support — Director initiating proceedings against husband — Husband making voluntary assignment in bankruptcy and assigning post-bankruptcy income tax refund to trustee — Director issuing notice of continuing attachment against federal Crown and Revenue Canada paying tax refund to Director — Trustee's appeals unsuccessful — Refund properly paid

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

to Director as refund not constituting "property of a bankrupt divisible among his creditors" for purposes of s. 67 of Bankruptcy Act — Assignment of refund to trustee invalid by virtue of s. 67 of Financial Administration Act — Bankruptcy Act, R.S.C. 1985, c. B-3, s. 67 — Financial Administration Act, R.S.C. 1985, c. F-11, s. 67.

A husband was ordered to pay monthly child and spousal support under a corollary relief order. When he fell into arrears, the Director of Maintenance Enforcement initiated proceedings against him. Shortly thereafter, he made a voluntary assignment into bankruptcy and executed an agreement letter in which he purported to assign any post-bankruptcy tax refund to the trustee. Prior to the husband's discharge and the filing of the post-bankruptcy income tax return, the Director issued a notice of continuing attachment against the federal Crown in accordance with the provisions of the *Family Orders and Agreements Enforcement Assistance Act*. Revenue Canada paid the husband's post-bankruptcy tax refund to the Director.

The trustee was successful in obtaining an order from a master requiring the Director to pay the refund to the trustee. The Director's appeal from that order was successful. The trustee's subsequent appeal was dismissed and the trustee appealed to the Supreme Court of Canada.

Held:

The appeal was dismissed.

The definition of "property" in s. 2 of the *Bankruptcy Act* is sufficiently broad to cover the income tax refund even though the income tax return was not filed until after the husband's discharge from bankruptcy. While a taxpayer who makes over-payments has no right to compel a refund prior to filing a return, he or she does have a future and contingent interest in the eventual tax refund. Further, the tax refund could be considered "property" for the purposes of s. 67(c) of the Act and "property of a bankrupt divisible among his creditors" for the purposes of the whole of s. 67, as s. 67(d) in no way limits the scope of s. 67(c). Therefore, normally such a refund would automatically vest in the trustee by virtue of s. 71(2). However, in this case s. 68, which constitutes a complete code controlling a bankrupt's salary, wages, or other remuneration, governed. Because of the application of s. 68, salary, wages and other remuneration cannot be considered property divisible among a bankrupt's creditors for the purposes of s. 67. As the tax refund retained its character as wages for the purposes of s. 68, it did not vest in the trustee.

The letter agreement did not constitute a valid assignment of the refund. It was rendered ineffective by s. 67 of the *Financial Administration Act*, which provides that, except in certain circumstances, "a Crown debt is not assignable". A "Crown debt" is defined as including future debts "due or becoming due". Therefore, the Director had priority.

Cases considered:

Ali, Re (1987), 62 C.B.R. (N.S.) 64, 24 C.C.L.I. 223, 57 O.R. (2d) 685, 34 D.L.R. (4th) 267 (S.C.) — referred to

Beaton, Re (1979), 30 C.B.R. (N.S.) 225, 25 O.R. (2d) 614, 1 P.P.S.A.C. 58, 101 D.L.R. (3d) 338 (C.A.) — not followed

Bertrand, Re, [1980] 2 N.Z.L.R. 72 (C.A.) — distinguished

Dauphin Plains Credit Union Ltd. v. Xylold Industries Ltd., [1980] 1 S.C.R. 1182, 33 C.B.R. (N.S.) 107, [1980] 3 W.W.R. 513, [1980] C.T.C. 247, 3 Man. R. (2d) 283, 108 D.L.R. (3d) 257, 31 N.R. 301, (sub nom. *Dauphin Plains Credit Union Ltd. v. R.*) 80 D.T.C. 6123 — considered

Federal Commissioner of Taxation v. Official Receiver, 95 C.L.R. 300, [1956] A.L.R. 643 (Aus. H.C.) — con-

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

sidered

Giroux, Re (1983), 45 C.B.R. (N.S.) 245, 41 O.R. (2d) 351, 146 D.L.R. (3d) 103 (S.C.) — *referred to*

Goulet, Re (1977), 24 C.B.R. (N.S.) 222 (Ont. S.C.) — *considered*

Hoffer, Re (1980), 34 C.B.R. (N.S.) 222, 4 Man. R. (2d) 1, 113 D.L.R. (3d) 469 (Q.B.) — *not followed*

Hughes v. R., [1991] 1 D.T.C. 5290, (sub nom. *Hughes v. Canada*) [1991] 1 C.T.C. 492, (sub nom. *Hughes v. Minister of National Revenue*) 46 F.T.R. 17 — *referred to*

Industrial Acceptance Corp. v. Lalonde, [1952] 2 S.C.R. 109, 32 C.B.R. 191, [1952] 3 D.L.R. 348 — *considered*

Kellaway, Re (1977), 24 C.B.R. (N.S.) 14 (B.C. S.C.) — *not followed/non suivi*

McCullough, Re (1984), 52 C.B.R. (N.S.) 313 (Ont. S.C.) — *referred to*

Moge v. Moge (1992), [1992] 3 S.C.R. 813, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1, 81 Man. R. (2d) 161, 99 D.L.R. (4th) 456 — *considered*

Munich Reinsurance Co. (Canada Branch) v. Minister of National Revenue (1991), 91 D.T.C. 1137, [1992] 1 C.T.C. 2004 (T.C.C.) — *distinguished*

Northward Airlines Ltd., Re, 37 C.B.R. (N.S.) 137, [1981] 2 W.W.R. 764, 36 A.R. 142 (Q.B.) — *not followed*

Szatmari, Re, [1972] 2 O.R. 348, 18 C.B.R. (N.S.) 309, 25 D.L.R. (3d) 508 (S.C.) — *referred to*

Tailby v. Official Receiver (1888), 13 App. Cas. 523 (H.L.) — *considered*

Vachon v. Canada (Employment & Immigration Commission), [1985] 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 63 N.R. 81, 23 D.L.R. (4th) 641 — *applied*

Walker, Re (1982), 43 C.B.R. (N.S.) 319 (Ont. S.C.) — *referred to*

Statutes considered:

Bankruptcy Act, S.C. 1919, c. 36 —

s. 25

Bankruptcy Act, R.S.C. 1927, c. 11 —

s. 23(ii)

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 2 "property"

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

s. 67

s. 67(c)

s. 67(d)

s. 68

s. 70(1)

s. 71(2)

s. 158

s. 158(l)

s. 158(o)

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

s. 68(1)

s. 68(2)

s. 68(4)

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4 (2nd Supp.) —

s. 23 "garnishable moneys"

s. 24

s. 28

Financial Administration Act, R.S.C. 1985, c. F-11 —

s. 66 "Crown debt"

s. 67

s. 67(a)

s. 67(b)

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

s. 69

s. 70

Income Tax Act, R.S.C. 1952, c. 148 [R.S.C. 1985, c. 1 (5th Supp.)] —

s. 153(3) [R.S.C. 1985, c. 1 (5th Supp.), s. 153(3)]

s. 164(1) [R.S.C. 1985, c. 1 (5th Supp.), s. 164(1)]

Maintenance Enforcement Act, S.A. 1985, c. M-0.5 —

s. 4

Tax Rebate Discounting Act, R.S.C. 1985, c. T-3 —

s. 2(2)

Regulations considered:

Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4 (2nd Supp.) — Family Support Orders and Agreements Garnishment Regulations,

SOR/88-181/DORS/88-181

s. 3(a)

Words and phrases considered:

property — "Is there, then, a proprietary character to tax overpayments? Not surprisingly the *Bankruptcy Act* [R.S.C. 1985, c. B-3] defines the word 'property' in very broad terms. In particular, I note that the definition includes 'every description of property, whether ... legal or equitable', and it specifically mentions 'every description of ... interest ... present or future, vested or contingent, in, arising out of or incident to property': s. 2. Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, surely that taxpayer has at least a future and contingent interest in the ultimate refund."

Appeal from judgment reported at (1992), 14 C.B.R. (3d) 127, 131 A.R. 154, 25 W.A.C. 154, 4 Alta. L.R. (3d) 97, 42 R.F.L. (3d) 76, 94 D.L.R. (4th) 394 (C.A.), affirming judgment reported at (1991), 8 C.B.R. (3d) 238, 123 A.R. 1, 82 Alta. L.R. (2d) 67, 35 R.F.L. (3d) 225 (Q.B.), giving Director of Maintenance Enforcement priority to income tax refund over trustee in bankruptcy, reversing decision reported at (1990), 2 C.B.R. (3d) 109, 112 A.R. 70 (Master).

The judgment of the court was delivered by *Jacobucci J.*:

1 This appeal involves a priority contest, the subject matter of which is a bankrupt's post-bankruptcy income tax refund. The contestants are a trustee in bankruptcy and the Director of Maintenance Enforcement. The appeal has been brought as a test case, with the parties proceeding on an agreed statement of facts.

I. Facts

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

2 In 1986, Arden Anthony Marzetti was ordered to pay monthly child and spousal support pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). He fell into arrears, and a default hearing was held in December 1988. As a consequence, Marzetti was ordered to pay \$250 per month to the Director of Maintenance Enforcement (the "Director"), who is appointed pursuant to s. 4 of the *Maintenance Enforcement Act*, S.A. 1985, c. M-0.5

3 On June 7, 1989, Marzetti filed a voluntary assignment into bankruptcy. On that date, he also executed an "Agreement Letter" as requested by his Trustee in Bankruptcy, Peat Marwick Thorne Inc. The Agreement Letter reads:

I hereby authorize Peat Marwick Limited, as Trustee of my Estate, to complete and file with Revenue Canada-Taxation my post-bankruptcy income tax return for the year 1989. I further authorize that any refund resulting from the post-bankruptcy income tax return be mailed to Peat Marwick Limited as an asset pursuant to Section 47 of the Bankruptcy Act for distribution to my creditors.

4 On February 15, 1990, the Director filed a Notice of Continuing Attachment against the federal Crown under the *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.). The Notice instructed the Crown to pay to the Director specified monies, namely, sums otherwise payable to Marzetti under any Act of Parliament.

5 On March 7, 1990, Marzetti was granted an absolute discharge from bankruptcy.

6 On April 13, 1990, the Department of Justice issued a garnishee summons, thus putting into effect the Notice of Continuing Attachment previously filed.

7 On April 30, 1990, the Trustee filed a post-bankruptcy income tax return for Marzetti. That return summarized Marzetti's tax liability for the period between June 7, 1989 and December 31, 1989. A post-bankruptcy income tax refund totalling \$2,066.90 became payable.

8 Before the refund was paid, the Trustee applied for a declaration that the refund was properly payable to the Trustee rather than the Director. Although the Crown in right of Canada was served with notice of the Trustee's motion, the tax refund was nonetheless paid to the Director in August 1990. Counsel for the Attorney General of Canada acknowledged that this payment was made in error, and that the Minister of National Revenue did not intentionally make payment prior to resolution of the priority dispute.

9 In response to the Trustee's motion, an Alberta Master declared that the refund constitutes property of Marzetti which vested in the Trustee: (1990), 2 C.B.R. (3d) 109, 112 A.R. 70. The Director was ordered to pay the amount of the refund to the Trustee. The Court of Queen's Bench of Alberta allowed the Director's appeal, and ordered that the refund be returned to the Director: (1991), 82 Alta. L.R. (2d) 67, 8 C.B.R. (3d) 238, 123 A.R. 1, 35 R.F.L. (3d) 225. The Court of Appeal for Alberta dismissed the Trustee's appeal: (1992), 4 Alta. L.R. (3d) 97, 14 C.B.R. (3d) 127, 131 A.R. 154, 25 W.A.C. 154, 442 R.F.L. (3d) 76, 94 D.L.R. (4th) 394. This Court granted leave to appeal from that decision: [1993] 1 S.C.R. vii.

10 The Attorney General of Alberta, a named respondent who participated in the proceedings below, was not represented in the appeal before this Court.

II. Relevant Statutory Provisions

A. Bankruptcy Act, R.S.C. 1985, c. B-3

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

11

2. In this Act,

.....

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

.....

67. The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides,

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

68. (1) Notwithstanding section 67, where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt, in this section referred to as the "employer", the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine, having regard to the family responsibilities and personal situation of the bankrupt.

(2) An order under subsection (1) shall be directed to the bankrupt and his employer and shall be expressed to continue for such time as the court may fix or until payment of a sum specified in the order and, unless otherwise stated in the order, it ceases to have effect on the discharge of the bankrupt.

.....

(4) An order under subsection (1) shall be served on the bankrupt and is binding on him, and when the order is served on his employer, it is binding on the employer named therein and any subsequent employer of the bankrupt if a copy of the order is served on the subsequent employer, but nothing in this section shall be construed as requiring the trustee to serve such an order on any employer of a bankrupt if it appears to the trustee inexpedient to do so.

.....

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

70. (1) Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and except the rights of a secured creditor.

.....

71 ...

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

.....

158. A bankrupt shall

.....

(l) execute such powers of attorney, conveyances, deeds and instruments as may be required;

.....

(o) generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested ...

B. Family Orders and Agreements Enforcement Assistance Act, R.S.C. 1985, c. 4 (2nd Supp.)

12

23. In this Part,

.....

"garnishable moneys" means moneys authorized to be paid by Her Majesty by or under such Acts of Parliament or provisions thereof or programs thereunder as are designated by the regulations;

.....

24. Notwithstanding any other Act of Parliament preventing the garnishment of Her Majesty, Her Majesty may, for the enforcement of support orders and support provisions, be garnisheed in accordance with this Part in respect of all garnishable moneys.

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

.....

28. Subject to this Part and the regulations, service of the following documents on the Minister, namely,

(a) a garnishee summons,

(b) a copy of the support order or agreement containing the support provision to which the garnishee summons relates, and

(c) an application in the form prescribed by the regulations,

binds Her Majesty for one year in respect of all garnishable moneys payable to the judgment debtor named in the garnishee summons.

C. Family Support Orders and Agreements Garnishment Regulations, SOR/88-181

13

3. The following Acts, provisions thereof and programs thereunder are designated for the purposes of the definition "garnishable moneys" in section 23 of the Act:

(a) sections 164 and 216 of the *Income Tax Act* as they relate to the personal return of income of the taxpayer for a particular taxation year;

D. Financial Administration Act, R.S.C. 1985, c. F-11

14

66. In this Part,

"Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;

.....

67. Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

E. Tax Rebate Discounting Act, R.S.C. 1985, c. T-3

15

2 ...

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

(2) For the purposes of this Act, a person acquires a right to a refund of tax where that person, as between himself and another person, acquires a right to a refund of tax or to an amount equal to the amount of a refund of tax, notwithstanding that, by virtue of section 67 of the *Financial Administration Act* or any provision of any other Act of Parliament or of the legislature of a province, the refund of tax is not assignable.

III. Judgments

16

A. Alberta Court of Queen's Bench (1990), 2 C.B.R. (3d) 109 (Master Funduk in Chambers)

17 Master Funduk asked whether an income tax refund can be considered property of a bankrupt which vests in a trustee by virtue of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. He answered that a refund is prima facie "property", as that term is used in s. 67 of the *Bankruptcy Act*. However, he realized that some courts have treated refunds as deferred wages, and that such courts, by invoking s. 68 of the *Bankruptcy Act*, have held that refunds do not automatically vest in trustees under s. 67.

18 Master Funduk was prepared to accept that s. 68 of the *Bankruptcy Act* removes wages from the scope of s. 67(c). But after a comprehensive review of case law, he was not prepared to accept that income tax deductions from an employee's wages retain the character of wages. He stated, plainly: "I do not think that an income tax refund can logically be considered to be 'deferred wages'" (p. 119).

19 Further, Master Funduk noted that, if the refund retained its character as wages, then the plain language of s. 68 would seem to preclude trustees from obtaining orders in respect of the refund. Pursuant to s. 68, while a trustee can secure an order to obtain wages, the s. 68 order can be directed only toward "the bankrupt and his employer". Master Funduk stated that s. 68 does not permit the attachment of a debt owed by a third party to a bankrupt.

20 Accordingly, Master Funduk held that the income tax refund is not within the scope of s. 68 of the *Bankruptcy Act*. He held that it is property of the bankrupt within s. 67(c) which vested automatically in the Trustee. In light of these holdings, Master Funduk did not consider arguments relating to the Agreement Letter.

B. Alberta Court of Queen's Bench (1991), 8 C.B.R. (3d) 238 (Wachowich J.)

21 Wachowich J. (as he then was) agreed with Master Funduk that the tax refund is prima facie property within s. 67(c) of the *Bankruptcy Act*. He also agreed that the refund is neither wages nor deferred wages within s. 68. However, Wachowich J. indicated that "while the tax refund falls within s. 67(c), it seems clear from the language of the *Bankruptcy Act* that s. 67(d) must also apply *before* the property can be dealt with by the trustee" (pp. 246-247). Wachowich J. stated (at p. 247):

This means that the trustee's right to deal with this property is limited to those rights the bankrupt would have had had he not been bankrupt ... if Marzetti had not been bankrupt, he would have had no power to collect the portion of the tax refund garnisheed by the Director because of the *Family Orders and Agreements Enforcement Assistance Act*. Similarly then, the trustee has no right to that portion of the tax refund garnisheed and paid to the Director.

.....

Thus, the tax refund does not automatically vest in the trustee under s. 67(c) and (d).

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

22 Wachowich J. next considered the Agreement Letter. He found that, under ss. 66 and 67 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, "there is a statutory prohibition against the assignment of Crown debts except as specifically authorized by federal legislation" (p. 247). Wachowich J. accepted that, by virtue of *Re Northward Airlines Ltd.*, (1981), 37 C.B.R. (N.S.) 137 (Alta. Q.B.), an assignment might nonetheless be effective as between an assignor and an assignee. However, Wachowich J. referred to *Tailby v. Official Receiver* (1888), 13 App. Cas. 523 (H.L.), and stated (at p. 249):

while the assignment might bind the conscience of the assignor, it cannot bind the property until such time as the contract becomes capable of being performed ... the contract between the assignor and the assignee cannot be performed until the assignor has received his tax refund. Because of the nature of the garnishment proceedings available to the Director, the assignor (the bankrupt) never does receive the tax refund. Thus, the assignee's rights to the property never materialize.

Thus, Wachowich J. distinguished *Re Northward Airlines* on the ground that it did not involve a prior right to garnish a Crown debt.

23 On the question of assignment, then, Wachowich J. concluded that the Trustee is "attempting to get through the back door something it could not get through the front" (p. 249). He stated that the Trustee could take action against the Director only if Marzetti could similarly take action, which he could not. He found that, once the refund passed to the Director, it ceased to be Marzetti's property under s. 67(c), in that Marzetti had "no power over or in respect of that property" (p. 249). Additionally, Wachowich J. stated that even if the assignment were otherwise enforceable, it would remain unenforceable on the facts because of the Trustee's failure to comply with ss. 69 and 70 of the *Financial Administration Act*.

24 The assignment being ineffective, and s. 67(c) of the *Bankruptcy Act* being inoperative, Wachowich J. allowed the appeal. He declared that the income tax refund was properly attached by the Director. Accordingly, he ordered the Trustee to remit the refund plus interest to the Director.

C. Court of Appeal of Alberta (1992), 14 C.B.R. (3d) 127 (Major J.A. for the Court)

25 Major J.A. (as he then was) first discussed the role of s. 68 of the *Bankruptcy Act*. In his opinion, s. 68 legislatively overruled *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109. Thus, Major J.A. interpreted s. 68 to mean that "only upon application to the court having regard to the enumerated considerations can a trustee access the wages or salary earned by a bankrupt" (p. 131).

26 Major J.A. next accepted as correct both *Federal Commissioner of Taxation v. Official Receiver* (1956), 95 C.L.R. 300 (Aus. H.C.), and *Re Goulet* (1977), 24 C.B.R. (N.S.) 222 (Ont. S.C.). This acceptance supported his conclusion, namely, that "tax deductions taken at source by an employer and remitted to Revenue Canada do not lose their character as wages" (p. 135). Major J.A. explained that "the reality of the situation is that the income tax refund, insofar as it relates to employer withholdings, represents wages that otherwise would have been paid to the bankrupt" (p. 134). He buttressed his conclusion with dicta from *Dauphin Plains Credit Union Ltd. v. Xyloid Industries Ltd.*, [1980] 1 S.C.R. 1182. But he also qualified his conclusion by stating (at p. 135):

I do not conclude that all tax refunds are wages. It depends on the nature of the refund. In this case the refund was the result of taxes deducted directly from wages. Tax refunds may arise in other ways and can be determined when that case arises.

27 Then, as a final point on the wages issue, Major J.A. considered whether the language of s. 68 precludes a wages characterization for income tax refunds. He described the position of Master Funduk, namely, that since s. 68

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

does not contemplate an order against the Crown, a refund cannot constitute s. 68 "wages". For Major J.A., however, the alleged problem with s. 68 is irrelevant, inasmuch as it "cannot change the characterization of employer withholdings returned in the form of a tax refund as 'wages' " (p. 135). He stated that any s. 68 problem associated with the making of orders is a problem for Parliament.

28 In the alternative, Major J.A. agreed with Wachowich J.'s other conclusions relating to the operation of s. 67 of the *Bankruptcy Act*, the effectiveness of the Agreement Letter, and the requirements of the *Financial Administration Act*. Major J.A. dismissed the appeal, and held that the Director was properly entitled to the refund because of the Notice of Continuing Attachment.

IV. Issues

29 The central issue in this appeal, as I have already noted, is whether the Trustee or the Director has priority in respect of Marzetti's post-bankruptcy income tax refund. In discussing this issue, I find it convenient to adopt the following structure:

A. What is the position under the *Bankruptcy Act*?

1. In general terms, is the *Bankruptcy Act*'s reference to "property" broad enough to embrace the facts of this case?
2. In specific terms, must a court conclude that both s. 67(c) and (d) of the *Bankruptcy Act* have been satisfied in order to conclude that there exists "property of a bankrupt divisible among his creditors" for the purposes of s. 67?
3. Is s. 68 a complete code in respect of a bankrupt's wages?
4. Should a post-bankruptcy income tax refund be considered "wages" for the purposes of s. 68?

B. Did the Agreement Letter create an enforceable assignment?

30 In answering these questions, I will make frequent reference to the *Bankruptcy Act*. I do so with full knowledge that the relevant statute is now entitled the *Bankruptcy and Insolvency Act*; see S.C. 1992, c. 27, ss. 1 and 2. However, since the statute was known as the *Bankruptcy Act* at the pertinent times, and since none of the 1992 amendments materially affects my opinion, I will generally find it unnecessary to have regard to the amended version.

V. Analysis

31

A. What is the position under the *Bankruptcy Act*?

32 Perhaps more for logic than for law, I consider it helpful, as an initial matter, to consider s. 67 of the *Bankruptcy Act* in isolation. That section is of critical importance to the Act's operation, inasmuch as it establishes certain rules regarding what will, and what will not, comprise "property of a bankrupt divisible among his creditors". These rules, in turn, rest upon a definition of "property" found in s. 2 of the *Bankruptcy Act*.

33 Both s. 67 and the "property" definition can trace their legislative roots back to the original *Bankruptcy Act*, S.C. 1919, c. 36. The "property" definition in that early statute is nearly identical to the existing definition found in s. 2. Likewise, s. 25 of the early statute performed much the same function as the current s. 67. In contrast, s. 68 is historically rooted in a relatively recent amendment: S.C. 1966-67, c. 32, s. 10. Although I will later conclude that s. 68

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

is operative in this case, both the long history and the fundamental importance of s. 67 lead me first to consider that section of the *Bankruptcy Act* in isolation.

1. In general terms, is the Bankruptcy Act's reference to "property" broad enough to embrace the facts of this case?

34 Section 67(c) of the *Bankruptcy Act* provides that "The property of a bankrupt divisible among his creditors ... shall comprise ... 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". At the "date of his bankruptcy" in this case, Marzetti had no interest in the tax refund, since that refund relates to income he earned following his voluntary assignment into bankruptcy. Accordingly, the relevant issue is whether Marzetti "acquired" any property, or whether any property "devolve[d] on him", prior to his discharge.

35 In discussing this issue, it must first be observed that Marzetti's income tax return was not filed until after his discharge from bankruptcy. This means that, if Marzetti acquired property in respect of the refund, or had such property devolve upon him, the acquisition or devolution cannot depend upon the filing of the income tax return itself. Can it be said that, prior to his discharge, Marzetti had property in respect of his eventual income tax refund, even though a return was not filed until after his discharge?

36 According to the Director, it cannot, and for this proposition the Director cited *Munich Reinsurance Co. (Canada Branch) v. Minister of National Revenue* (1991), 91 D.T.C. 1137 (T.C.C.). In that case, Rip T.C.J. stated that "the right to a refund does not arise at the time an overpayment of any tax instalment is made but it arises on the day a return is filed" (p. 1143). In making this statement, however, Rip T.C.J. was speaking in terms of the taxpayer having "an enforceable right against the Minister" (p. 1143, emphasis added). In particular, he was considering whether the taxpayer who overpays an instalment acquires a right to receive interest income.

37 Viewed in context, therefore, the conclusion in *Munich* does not rest upon Rip T.C.J.'s independent assessment of the proprietary character of overpayments. Rather, it derives inferentially from the existence of a statutory refund procedure in s. 164(1) of the *Income Tax Act*, R.S.C. 1952, c. 148, as amended. In the words of Rip T.C.J., "as section 164 makes clear, a refund is not due and payable until a return is filed" (p. 1143). Accordingly, assuming that *Munich* is correctly decided, it is of little assistance to the Director. There is a marked distinction between the existence, and the statutory enforceability, of a proprietary right.

38 Is there, then, a proprietary character to tax overpayments? Not surprisingly, the *Bankruptcy Act* defines the word "property" in very broad terms. In particular, I note that the definition includes "every description of property, whether ... legal or equitable", and it specifically mentions "every description of ... interest ... present or future, vested or contingent, in, arising out of or incident to property": s. 2. Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, surely that taxpayer has at least a future and contingent interest in the ultimate tax refund.

39 During oral argument, counsel for the Director was asked whether it might be valid to compare a tax overpayment to a demand promissory note, the suggestion being that each is a form of property, but that neither is enforceable prior to the satisfaction of certain preconditions. In the case of the promissory note, the precondition is the demand. In the case of the tax overpayment, the recognized preconditions relate to the filing of the return: see, e.g., *Munich*, supra, and *Hughes v. R.* (1991), 91 D.T.C. 5290 (Fed. T.D.). In my view, the comparison is a good one. The argument of the Director artificially restricts the *Bankruptcy Act* definition of "property", and it fails to distinguish between accrued legal debts and other, inchoate, forms of property.

40 On this preliminary issue, therefore, I conclude that the *Bankruptcy Act*'s reference to "property" is broad enough to embrace the facts of this case. More specifically, using the language of s. 67(c), I conclude that Marzetti

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

acquired at least a future and contingent interest in his income tax refund at the time excess overpayments were withheld on his behalf.

2. In specific terms, must a court conclude that both s. 67(c) and (d) of the Bankruptcy Act have been satisfied in order to conclude that there exists "property of a bankrupt divisible among his creditors" for the purposes of s. 67?

41 According to Wachowich J., s. 67(c) and (d) of the *Bankruptcy Act* must both be satisfied before a court can conclude that there exists "property of a bankrupt divisible among his creditors". Those two paragraphs provide:

67. The property of a bankrupt divisible among his creditors ... 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.

42 In other words, like Master Funduk, Wachowich J. concluded that the income tax refund could be considered "property" for the purposes of s. 67(c), such that it was capable of vesting automatically in the Trustee. However, for Wachowich J., s. 67(d) precluded automatic vesting on the facts. He reasoned that, by virtue of s. 67(d), the Trustee could exercise only those powers in respect of the refund which might have been exercised by Marzetti but for the bankruptcy. And, he stated, if the bankruptcy had not occurred, Marzetti could have exercised *no* power over the refund because of the garnishee instituted by the Director. So while Marzetti had "property" in respect of the refund, there was no "property of the bankrupt divisible among his creditors". The Court of Appeal approved this reasoning, but without analysis.

43 With respect, Wachowich J. misinterpreted s. 67(c) and (d). In effect, Wachowich J. characterized s. 67(c) as an inclusionary provision, and s. 67(d) as an exclusionary provision. Section 67(c) giveth, and s. 67(d) taketh away. But this interpretation ignores the structure of s. 67 as a whole, since s. 67(a) and (b) are preceded by the phrase "the property of a bankrupt ... *shall not comprise*" (emphasis added), whereas s. 67(c) and (d) are preceded by the phrase "the property of a bankrupt ... *shall comprise*" (emphasis added). If s. 67(d) were intended to limit the scope of s. 67(c), why would it not have been placed with (a) and (b)?

44 This criticism of Wachowich J.'s interpretation is echoed by L.W. Houlden and C.H. Morawetz in *Bankruptcy and Insolvency Law in Canada* (3rd ed., 1993), vol. 1, at p. 3-6, where the authors comment upon Wachowich J.'s trial decision:

... Wachowich J. of the Alberta Court of Queen's Bench was of the opinion that if property falls within [s. 67(c)] it must also meet the requirements of [s. 67(d)] before the trustee can claim it. With respect, this seems wrong. Sections [67(c)] and (d) have always been treated as alternatives.

45 In other words, because of the statutory structure, it is inappropriate to read paras. (c) and (d) restrictively when those paragraphs are intended broadly and inclusively to define the "property of a bankrupt divisible among his creditors". Surely the better view is to give, at least at this stage of the analysis, a wider effect to these paragraphs so as not to reduce artificially the estate available to creditors. In grammatical terms, the word "and" which appears at the end of the English version of s. 67(c) must, by reason of its context, be read disjunctively. As stated by E.A. Driedger, "The inclusive *or* and the several *and* produce the same result, and it remains for the context to indicate in what sense these two little words are used": *Construction of Statutes* (2nd ed., 1983), at p. 18.

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46 Moreover, I am fortified in this conclusion by the French text of s. 67. Although the parties failed to highlight the point, the word "et" does not appear as a conjunction between s. 67(c) and (d). Although the absence of a conjunction in the French version does not make Wachowich J.'s interpretation impossible, it does make the interpretation even less defensible.

47 For these reasons, a bankrupt's interest in a post-bankruptcy income tax refund can be considered "property" for the purposes of s. 67(c) of the *Bankruptcy Act*. Moreover, it can be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67 as a whole, since s. 67(d) in no way qualifies the operation of s. 67(c). This, then, is my initial conclusion.

48 In the absence of other considerations, the logical consequence of my initial conclusion would be that Marzetti's interest in his refund vested automatically in his Trustee: see s. 71(2). In this way, the Trustee would have obtained priority over the Director's garnishment: see s. 70(1). However, as I will now proceed to explain, my initial conclusion cannot govern in this case. It is overruled by s. 68.

49 To assess the importance of s. 68 in this case, I must do two things. First, I must determine whether s. 68 always controls the disposition of a bankrupt's wages. Is s. 68 a substantive provision, that is, one which always removes wages from the scope of s. 67, or does it simply create a procedural device for trustees? Second, if I determine that s. 68 is a complete code in respect of a bankrupt's wages, I must then proceed to consider whether Marzetti's post-bankruptcy income tax refund retained its wages character.

3. Is s. 68 a complete code in respect of a bankrupt's wages?

50 Prior to the enactment of what is now s. 68, it was clear that the salary, wages, or other remuneration of a bankrupt could sometimes constitute after-acquired "property", and so be considered "property of a bankrupt divisible amongst his creditors" for the purposes of what is now s. 67. The pre-amendment position was clarified by *Industrial Acceptance Corp. v. Lalonde*, supra.

51 In *Industrial Acceptance Corp.*, this Court was asked to explain whether wages or salary could be excluded from the definition of divisible property by s. 23(ii) (later s. 67(b)) of the *Bankruptcy Act*. According to the respondent bankrupt in *Industrial Acceptance Corp.*, the terms of s. 23(ii) could not operate to exclude wages or salary, inasmuch as wages or salary can "only be reached by a garnishee or attachment procedure" (p. 118). This procedural reality was said to be important because s. 23(ii) excluded from the definition of divisible property only property exempted from "execution or seizure" under provincial law. Estey J. rejected the distinction between garnishment or attachment procedures on the one hand, and procedures by way of execution or seizure on the other hand, in the following terms (at p. 117):

It would appear that Parliament, in adopting the language of s. 23(ii) (particularly when compared with the language of s. 38(2) in the English act) intended that only such portion of the salary as was subject to seizure by legal process under the law of the respective provinces should vest in the trustee. Moreover, the omission of any such provision as that contained in s. 51(2) of the English act, under which, on the application of the trustee, an order might be made against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee, appears to support the foregoing view.

In modern terms, *Industrial Acceptance Corp.* established that the language of s. 67(b), which removes from "property of a bankrupt divisible among his creditors ... any property that as against the bankrupt is exempt from execution or seizure under the laws of the province", can operate to exclude wages or salary as contemplated by provincial exemptions.

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

52 In effect, therefore, the pre-amendment position was this: after taking into account provincial wage and salary exemptions, any remaining wages or salary of a bankrupt was "property of a bankrupt divisible among his creditors". These excess wages vested automatically in the trustee. And it is clear from *Industrial Acceptance Corp.* that this conclusion was partly driven by the absence of a provision like s. 68, namely, one which permits, "on the application of the trustee, an order ... against a bankrupt in receipt of a salary to pay the whole or part thereof to the trustee" (p. 117). But what is not clear in *Industrial Acceptance Corp.*, and what must be resolved in this appeal, is how the presence of s. 68 alters this pre-existing structure.

53 Two possibilities present themselves. First, it can be argued that s. 68 is a complete code in respect of a bankrupt's salary, wages, or other remuneration. Under this view, such forms of property cannot be "property of a bankrupt divisible among his creditors" for s. 67. They do not automatically vest in the trustee. The trustee can access them only following a court application as contemplated by s. 68(1). Proponents of this first view characterize the s. 68 amendment as a substantive amendment to the pre-existing structure, in so far as s. 68 leaves no room for the operation of s. 67 in respect of a bankrupt's salary, wages, or other remuneration. The substantive view has judicial support: *Re Giroux* (1983), 45 C.B.R. (N.S.) 245 (Ont. S.C.); *Re McCullough* (1984), 52 C.B.R. (N.S.) 313 (Ont. S.C.); *Re Ali* (1987), 62 C.B.R. (N.S.) 64 (Ont. S.C.).

54 The second view, not surprisingly, is that s. 68 is simply a procedural provision. Proponents of this view contend that the pre-amendment position persists, and that wages, salary, and other remuneration can still vest automatically in the trustee as non-exempt property under s. 67(b). To explain s. 68's existence, a procedural purpose is advanced to demonstrate that s. 68 applications can be beneficial from the trustee's perspective. Two variations of the procedural argument can be identified.

55 The first variation characterizes s. 68 as creating an additional remedy for trustees. It is said that s. 68 permits a trustee to access not only the non-exempt portion of a bankrupt's wages (which vests automatically), but also the otherwise exempt portion, subject to the court's discretion as defined by s. 68. This view is expressed in *Re Beaton* (1979), 30 C.B.R. (N.S.) 225 (Ont. C.A.), where Arnup J.A. stated (at pp. 227-228):

Section 48 [now s. 68], in my view, adopted and enlarged upon the procedure in the English Act. It gave the trustee an expeditious and convenient means of getting into his hands not only the [non-exempt portion] which by s. 47 [now s. 67] was already the divisible property of the bankrupt ... but possibly more, if the court saw fit to order a larger portion to be paid to the trustee ...

56 The second variation of the procedural argument, which is not inconsistent with the first, emphasizes the convenience of s. 68 over its potential to increase a trustee's access to wages. This view is expressed by Kroft J. in *Re Hoffer* (1980), 34 C.B.R. (N.S.) 222 (Man. Q.B.), at p. 234:

under s. 47 [now s. 67] alone the trustee could not attach the [non-exempt portion] until it fell due. How wages were attached as they became due was a source of considerable confusion, and the approaches across Canada were inconsistent.

Section 48 [now s. 68] appears to have been passed to give trustees a fair and convenient procedure by which they can ask a court to determine the portion of wages which will be available to creditors and to direct the manner of payment.

57 In addition to *Re Beaton* and *Re Hoffer*, the procedural view was advanced in *Re Kellaway* (1977), 24 C.B.R. (N.S.) 14 (B.C. S.C.), though without explanation.

58 To proceed, I restate the question: is s. 68 a substantive or procedural provision in respect of a bankrupt's salary, wages, or other remuneration? In my opinion, the case law debate summarized above should be resolved in

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

favour of the substantive view for three reasons. First, that view better accords with the language of s. 68. Second, it permits s. 68 to remedy more effectively the mischief which led to the original amendment. And, third, it has some support in authority from this Court. I will now elaborate upon each of these reasons in turn.

59 The language of s. 68 twice favours the substantive view. These points of support were described by Thorson J.A. dissenting in *Re Beaton*, supra. I can do no better than quote his cogent discussion of each. First, Thorson J.A. considered the implications of the phrase "an order directing the payment to the trustee", as that phrase is used in s. 68 (then s. 48(1)) of the *Bankruptcy Act*. He stated (at p. 237):

It is not without significance that the only order which s. 48(1) authorizes the court to make is "an order directing the payment to the trustee" of a part of the bankrupt's earnings. The inference which I draw from this phrasing of language is that it contemplates a payment being made to the trustee to which the trustee would not be entitled in the absence of the order. There is no hint or suggestion anywhere in the subsection that the payment which is to be made is to take the place of, or is to be in addition to, some part of those earnings to which the trustee is in any event already entitled; rather there is the reverse implication that, but for the order, the trustee would have *no* right to be paid whatever part of those earnings he is seeking to have paid to him.

[Emphasis in original.]

60 Second, Thorson J.A. examined the significance of the words "such part of the salary, wages or other remuneration" as they appear in s. 68(1). In the following passage, Thorson J.A. explains how those words favour the substantive view (at pp. 237-238):

Furthermore, I cannot conclude that no significance is to be attached to the language of the legislative condition of s. 48(1), beginning with the words "where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt", when that language is then followed by language authorizing the making of an order directing payment to the trustee of "such part of *the* salary, wages or other remuneration" (the italics are mine) as the court may determine. If the contention of counsel for the trustee were to be accepted, the only meaning that could be given to the words "such part of *the* salary, wages or other remuneration" would be "such part of *the portion of* the salary, wages or other remuneration *that has not already vested in the trustee*", i.e., the portion that remains after deducting the 30 per cent portion of the bankrupt's wages to which the trustee has already become entitled.

This is equally the result, in my opinion, of the argument of counsel for the Superintendent of Bankruptcy that s. 48 was not intended to, and does not, take away any rights that the trustee might otherwise have to the bankrupt's wages "at least until he has proceeded under s. 48". If he is correct, the only possible starting point of earnings from which a court could proceed to make an order under s. 48 would be from the remaining [otherwise exempt] portion of the bankrupt's earnings.

[Emphasis in original.]

61 I agree with both points made by Thorson J.A. in *Re Beaton*, supra. In my opinion, a plain language interpretation of s. 68(1) favours the view that it is a substantive provision. When s. 68(1) indicates that it applies "notwithstanding section 67", it means that it operates as a complete code in respect of the listed forms of property. Or, as stated by Houlden and Morawetz, at p. 3-126: "The opening words 'notwithstanding section [67]' are intended to make it clear that wages, etc. will not come within [s. 67(c)] but will be dealt with by s. 68".

62 My interpretation of s. 68 is reinforced by my understanding of the mischief which that provision was intended to remedy. As described above, prior to the enactment of s. 68's predecessor, while wages could vest in trustees automatically, provincial law could operate to exempt wages from the definition of "property of the bankrupt divisible

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

amongst his creditors": *Industrial Acceptance Corp.*, supra. The necessary, and problematic, consequence of this statutory structure was that the treatment of a bankrupt's wages for *Bankruptcy Act* purposes varied from province to province: Houlden and Morawetz, at p. 3-127.

63 Parliament no doubt considered it unreasonable for the treatment of bankrupt persons to depend upon the happenstance of provincial residence. Of course, even if one accepts that s. 68 is a complete code in respect of salary, wages, and other remuneration, the potential for uneven treatment across Canada remains in respect of other provincially exempted property. But it is hardly surprising that Parliament selected an important form of property — salary, wages, and other remuneration — and gave that property special treatment. In *Re Beaton*, supra, Thorson J.A. made the following statement with which I agree (at p. 235):

It is thus legitimate to speculate that one of Parliament's objectives in enacting s. 48 [now s. 68] was to avoid this potential for unevenness (and its consequent potential unfairness both to bankrupts and to creditors alike) by providing an entirely separate regime for dealing with salary, wages or other remuneration received or entitled to be received by a bankrupt from his employer, which would apply uniformly throughout Canada regardless of differences in provincial laws.

64 The view I take is, moreover, reflected in Hansard extracts. Then Minister of Justice, the Hon. Louis-Joseph-Lucien Cardin, proposed to amend the *Bankruptcy Act* in the following speech (*House of Commons Debates*, June 16, 1966, at p. 6488):

Other amendments clearly set out a procedure whereby bankrupts may be required to contribute some part of their post-bankruptcy income to the trustee for the benefit of the creditors. The present act would seem to indicate that a contribution may be required but this has been left to the discretion of trustees and the courts *with the result that debtors are treated in a most inconsistent manner across the country.*

[Emphasis added.]

65 Accepting as I do that s. 68 is intended to remedy province-to-province disparities in the application of the *Bankruptcy Act*, the conclusion necessarily follows that s. 68 is a substantive rather than a procedural modification to the pre-existing scheme. If s. 68 were only intended to give trustees access to funds *in excess* of the non-exempt portion defined by s. 67(b), then uniformity of provincial application could only be achieved if courts in all provinces made s. 68 orders calculated to reflect the lowest common denominator of provincial exemption. In my view, however, not only is this outcome anomalous, but it is also probably prevented by the language of s. 68(1) itself, which language compels courts to have "regard to the family responsibilities and personal situation of the bankrupt" prior to making s. 68 orders. It is thus reasonable to suppose that uniformity of provincial application was intended to be achieved through the operation of s. 68 as a complete code, whereby courts make orders in respect of a bankrupt's salary, wages, or other remuneration after considering only one standard: the one specified in s. 68 itself.

66 As a final point of support for the substantive view, I draw attention to the decision of this Court in *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417. In *Vachon*, Beetz J. discussed the rehabilitative purpose of the *Bankruptcy Act*. He did so in terms which suggest this Court's acceptance of the substantive view (at p. 430):

The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence. These measures are contained in s. 47 [now s. 67] of the *Bankruptcy Act* concerning, *inter alia*, the exemption from execution of certain property, and in s. 48 [now s. 68], regarding the wages of the bankrupt, which applies notwithstanding s. 47 and which empowers the Court to make

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an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.

The part of the wages paid to creditors does not necessarily correspond to the part which may attached. It may be more or less "having regard to the family responsibilities and personal situation of the bankrupt". Houlden and Morawetz, *op cit.*, vol. 1, write at pp. F-66 and F-69:

Since the enactment of s. 48, wages have been removed from the operation of s. 47 so that no part thereof vests in the trustee to be divided among creditors unless he makes an application under s. 48 and then only to the extent allowed by the court: Re Giroux (1983), 45 C.B.R. (N.S.) 245, 41 O.R. (2d) 351, 146 D.L.R. (3d) 103 (S.C.).

.....

Applications under s. 48 of the Bankruptcy Act come down not to a question of law, but of fact; that is, whether the bankrupt after being given credit for his reasonable living expenses has excess funds which might be used to pay creditors.

[Emphasis added.]

As I read the above quotation, Beetz J. approves of the highlighted passage from Houlden and Morawetz, which passage, in turn, rests upon *Re Giroux*, supra. Interestingly, while Houlden and Morawetz reach a more qualified conclusion in the current version of their work, they continue to favour the substantive view. The authors state (at p. 3-126): "The position in *Re Giroux* and *Re McCullough* seems more consonant with the amendment that was made to the Act by the addition of s. 68".

67 To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the decision of this Court in *Vachon*, supra, all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages, or other remuneration. These forms of property cannot fall within s. 67(c) of the *Bankruptcy Act* as a bankrupt's after-acquired "property", and they cannot be considered "property of a bankrupt divisible among his creditors" for the purposes of s. 67. They do not vest in the trustee through the simple operation of law.

68 Finally, for the sake of completeness, I note that this conclusion is not contradicted by Commonwealth authorities cited to this Court. The intervener Superintendent of Bankruptcy cited *Re Bertrand*, [1980] 2 N.Z.L.R. 72 (C.A.). In that case, McMullin J. considered a provision which the Superintendent argued is similar to s. 68(1) of the *Bankruptcy Act*, and characterized it as "primarily a machinery provision" (at p. 77). But it is apparent from reading *Re Bertrand* that there is, in fact, no similarity between the two provisions at all. In the New Zealand case, the relevant provision operated "without prejudice to any other rights conferred by" the Act in which it was found, and McMullin J. recognized that the provision was, therefore, not "intended to interfere with the pattern of vesting" (p. 77) otherwise apparent in the statute: cf. *Federal Commissioner of Taxation v. Official Receiver*, supra.

69 And it is also germane to observe that my reading of s. 68 in no way emasculates the importance of s. 67(b). There are many provincial exemptions from "execution or seizure" which have nothing to do with salary, wages, or other remuneration. See, for example, Houlden and Morawetz, at pp. 3-39 et seq., where the authors review provincial exemptions in respect of such things as pension plans (at p. 3-45), real estate and homesteads (at p. 3-45), and tools and chattels used in the bankrupt's business, profession or calling (at p. 3-47). See also *Canadian Encyclopedic Digest* (Western, 3rd ed.), at pp. 59-83 et seq., and *Canadian Encyclopedic Digest* (Ontario, 3rd ed.), at pp. 93 et seq.

70 So I proceed upon the footing that anything called "wages" will not vest automatically in a trustee. But this

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case, of course, involves not wages per se, but rather Marzetti's post-bankruptcy income tax refund. This means that s. 68's role as a complete code will only matter if Marzetti's refund retained, for present purposes, its character as wages.

4. Should a post-bankruptcy income tax refund be considered "wages" for the purposes of s. 68?

71 Major J.A. held that Marzetti's refund retained the character of wages to the extent that it represented a return of employer-withholding deductions. The available authority supports his position, with which I agree.

72 The principal Canadian case is *Re Goulet*, supra, which raised the precise issue being considered, viz., whether a bankrupt or a trustee was entitled to a tax refund arising from post-bankruptcy wages. Henry J. held (at p. 223):

When the minister returns the fund it then comes into the hands of the taxpayer, in this case the bankrupt, in the form of deferred wages. The fund in question is identified throughout as a deduction from wages earned and never loses its character as wages until it is finally applied by the minister to defray some portion of the tax liability.

Like Master Funduk, I fail to appreciate how *Re Szatmari* (1972), 18 C.B.R. (N.S.) 309 (Ont. S.C.), relied upon by Henry J. in *Re Goulet*, supports the passage quoted above. But *Re Goulet* was followed in *Re Walker* (1982), 43 C.B.R. (N.S.) 319 (Ont. S.C.), and I accept that both cases offer some direct support for the proposition that a tax refund can be characterized as deferred wages for *Bankruptcy Act* purposes.

73 There is also Commonwealth authority on point. In *Federal Commissioner of Taxation v. Official Receiver*, supra, legislation similar to the *Bankruptcy Act* in all material respects was considered by the Australian High Court. The court held that a tax refund should be considered "a refund of part of the earnings of the bankrupt and money which he is entitled to retain in the absence of an order of the court under s. 101 of the Act [the equivalent of s. 68]" (at p. 316 per Williams J.).

74 In an attempt to suggest that there is also contrary Commonwealth authority, the Trustee again cited *Re Bertrand*, supra, to this Court. The attempt must fail. In *Re Bertrand*, the New Zealand bankruptcy legislation considered by the Court of Appeal had no provision comparable to the Canadian s. 68 or the Australian s. 101. For this reason, the potential characterization of a tax refund as wages or earnings was irrelevant, since, under the common law, wages and earnings, like other forms of property, vest automatically in trustees. The court in *Re Bertrand* explicitly distinguished *Federal Commissioner of Taxation*, supra, on this basis (at pp. 77-78).

75 Finally, the Director cited *Dauphin Plains Credit Union Ltd. v. Xylold Industries Ltd.*, supra, and argued that obiter remarks by Pigeon J. in that case support a wages characterization. At issue in *Dauphin* was not a tax refund per se, but rather the nature of an employer's deduction, or withholding, in respect of an employee's taxes. Pigeon J. stated (at p. 1191):

It is important to consider the nature of the deduction for income tax. It is not a deduction for the benefit of the employer, it is a withholding for the benefit of the employee because it is to be remitted to the Receiver General of Canada on account of the employee's tax indebtedness. By virtue of other provisions of the *Income Tax Act* if, as happens in a large number of cases, the withholdings exceed the employee's tax liabilities, a refund will be made to the employee by the Department of National Revenue. *Therefore, the amount withheld remains a part of the wages*, and subs. 153(3) provides that it is "deemed to have been received" by him at the time the payment was made less the deduction.

[Emphasis added.]

76 I am willing to accept that the emphasized line in the above passage supports the Director's position. Certainly, the support is qualified, inasmuch as Pigeon J.'s opinion must be tied to s. 153(3) of the *Income Tax Act*, which states

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

that withholdings are "deemed to have been received" by employees at the time of withholding, but which establishes this result only "for all the purposes of *this Act*" (emphasis added). But there is an element of support in *Dauphin* nonetheless, since Pigeon J. concludes that "the amount withheld remains a part of the wages" *before* he discusses s. 153(3).

77 Adopting a stance in opposition to these authorities, Master Funduk thought it was not "logical" to view tax refunds as deferred wages. He stated that "the statutory deduction requirement is just an enforcement process to ensure that the employee makes payments on account of his tax liability" (p. 120). I agree with Master Funduk that withholding provisions are designed to ensure that employees pay taxes, but, with respect, I fail to see how this advances his position. If an excess of wages is withheld, that excess does not fulfil the enforcement purpose. Accordingly, its character is not informed by that purpose.

78 In my opinion, the transformation of Marzetti's wages over time does not alter their fundamental character. Marzetti earned a certain amount as wages after his voluntary assignment into bankruptcy. The fact that some portion of his wages was, by virtue of statute, automatically directed toward his tax liability does not affect the question. The intervention of statute speaks to how Marzetti spent his wages, not to how much he earned in the first place. In common parlance, taxpayers do not draw false distinctions between the wages they earn and the refunds they receive. As stated by Fullagar J. in *Federal Commissioner of Taxation*, *supra*, "his right to payment arises because, and only because, he worked for a remuneration which is found, on a contingency which was contemplated throughout, not to have been paid to him in full" (p. 322).

79 Therefore, Major J.A. was, I suggest, entirely justified in concluding that a tax refund is analytically similar to deferred wages in this case. He noted that "if there is any money that can be easily traced in a modern society, it is the amount of taxes paid and the amount of taxes owed" (p. 133). It is difficult to dispute this statement, and I reject the Superintendent of Bankruptcy's suggestion that a wages-characterization is precluded by the commingling of withheld sums in the Consolidated Revenue Fund. Equally, I agree with Major J.A. that there is no necessary inconsistency between holding that a tax refund is a debt owed by the Crown, and holding that a tax refund represents deferred wages originally owed by an employer. Again, as stated by Fullagar J. in *Federal Commissioner of Taxation*, *supra*, "to say that payment of the sum ... will be a repayment of income tax overpaid is not inconsistent with saying that that sum represents personal earnings of the bankrupt for the purposes of the *Bankruptcy Act*" (p. 321).

80 Furthermore, like Major J.A., I note that there is no doubt in this case that the post-bankruptcy income tax refund derived from Marzetti's wages. Of course, tax refunds can be generated by other sources of income. In the words of Major J.A., therefore, the wages-characterization "depends on the nature of the refund" (p. 135).

81 The only problems with the characterization of an income tax refund as deferred wages for the purposes of s. 68 of the *Bankruptcy Act* are structural ones which relate to the trustee's ability to make applications, and the court's ability to make orders. The former problem causes me little concern. It is said that s. 68(1) of the *Bankruptcy Act* permits a trustee to make an application only "if directed by the inspectors or the creditors", and that the trustee's inability to act independently is a reason to reject the wages characterization. But this aspect of s. 68(1) is an inherent flaw, and it equally affects the trustee's ability to access a bankrupt's salary, wages, and other remuneration *per se*. The flaw does not become more serious simply because the definition of "wages" is expanded. Moreover, the flaw has now been corrected such that s. 68(1) permits applications "on the trustee's own initiative": see S.C. 1992, c. 27, s. 34(1).

82 A bigger problem exists with respect to the making of s. 68(2) orders. Such orders can be directed only toward "the bankrupt and his employer", and not, for example, against third-party revenue authorities. Although s. 68(2) has also been amended by S.C. 1992, c. 27, s. 34(1), the amendment does not seem to resolve this problem.

83 Like Major J.A. at the Court of Appeal, I am content to state that any deficiency in s. 68(2) cannot affect the conclusion that an income tax refund retains its character as wages. Major J.A. stated (at p. 135):

1994 CarswellAlta 346, 26 C.B.R. (3d) 161, [1994] 7 W.W.R. 623, 20 Alta. L.R. (3d) 1, 5 R.F.L. (4th) 1, [1994] 2 S.C.R. 765, 116 D.L.R. (4th) 577, 169 N.R. 161, 155 A.R. 340, 73 W.A.C. 340, J.E. 94-1125, EYB 1994-66964

the master opined that even if the refund could be characterized as "wages," s. 68 does not contemplate an order against the Crown. Therefore, he concluded, the refund could not possibly be wages under the *Bankruptcy Act*. With respect, that is irrelevant. The trustee has not nor is not seeking an order under s. 68. The difficulties, if any, in the wording of s. 68 cannot change the characterization of employer withholdings returned in the form of a tax refund as "wages." That may be a problem for Parliament but not in this appeal.

84 Although it would be preferable, from a trustee's point of view, to obtain an order directly against the Crown in respect of an income tax refund, the deficiency in s. 68(2) does not entirely remove refunds from a trustee's grasp. Orders can still be obtained as against bankrupt persons and employers under s. 68(2). Of course, in the circumstances of an income tax refund, service of a s. 68(2) order upon the employer would be meaningless. In this respect, I note that s. 68(4) of the *Bankruptcy Act* permits trustees to withhold service of the s. 68(2) order where the trustee regards same as "inexpedient". Thus, the trustee can effectively obtain a s. 68(2) order as against the bankrupt person alone, and although such an order is not ideal, it does provide the trustee with the necessary legal entitlement to the refund.

85 My opinion is, furthermore, fortified by public policy considerations. Although the absence of language in s. 68(2) permitting an order to be made against the Crown weighs in favour of the Trustee in this case, when family needs are at issue, I prefer to err on the side of caution. In s. 68 of the *Bankruptcy Act*, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have "regard to the family responsibilities and personal situation of the bankrupt". This demonstrates, to my mind, an overriding concern for the support of families.

86 Furthermore, the discretion given to courts by s. 68 is amplified by the discretion which is necessarily left in the trustee, creditors, and inspectors. As stated by Houlden and Morawetz: "It is unlikely that the trustee would make, or that the inspectors or creditors would authorize [a s. 68], application, unless the earnings of the bankrupt were in excess of what was needed for the adequate maintenance of the bankrupt and of his family" (at p. 3-127). Since these kinds of discretion are better able to respond to the costs of raising families, I favour a purposive interpretation of the word "wages" in s. 68, notwithstanding difficulties associated with s. 68(2).

87 Moreover, there are related public policy goals to consider. As recently recognized by L'Heureux-Dubé J. in *Moge v. Moge*, [1992] 3 S.C.R. 813, "there is no doubt that divorce and its economic effects" (p. 854) are playing a role in the "feminization of poverty" (p. 853). A statutory interpretation which might help defeat this role is to be preferred over one which does not.

88 To summarize briefly, s. 68 governs in this case as a complete code. Marzetti's post-bankruptcy income tax refund retained its character as wages for the purposes of s. 68. The Trustee could access that refund only through a s. 68 application. None was made.

89 Accordingly, the contest in this case narrows, and priority will be accorded in respect of one of two happenings: first, the execution of the Agreement Letter; second, the Director's garnishment. Since the Agreement Letter came first in time, if it is effective, it will prevail over the garnishment because the latter could have taken effect only once statutory requirements were satisfied: *Family Orders and Agreements Enforcement Assistance Act*, s. 28. And so I turn to the final issue, and ask whether the Agreement Letter created an enforceable assignment.

B. Did the Agreement Letter create a valid assignment?

90 The parties debated the effectiveness of the Agreement Letter under several heads, most of which I will not examine. They disagreed as to whether the Director's garnishee, in substance, created an equitable assignment, such that the priority contest might truly involve two equitable assignees. And, leaving aside other statutory considerations, they fundamentally disagreed as to whether the Agreement Letter could have created an effective assignment. This latter disagreement involved component disputes. Does the Letter demonstrate an intention to assign, or does it merely

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direct a Crown payment? Is the characterization of the assigned interest as future property significant? And, is it necessary to find consideration to support the Agreement Letter?

91 In my opinion, these points of contention do not require resolution in this appeal, inasmuch as the Agreement Letter is rendered ineffective by s. 67 of the *Financial Administration Act*. Section 67 provides, in part, that "except as provided in this Act or any other Act of Parliament ... a Crown debt is not assignable". The expression "Crown debt" is defined in s. 66 to include not only existing debts, but also future debts "due or becoming due". Marzetti did not obtain an accrued legal debt in respect of his post-bankruptcy income tax refund until his income tax return was filed, as I have already mentioned. But his interest in that return can legitimately be described as an interest in a future Crown debt becoming due.

92 This Crown-debt characterization means that the *Financial Administration Act* operates to prohibit assignment of an income tax refund, due or becoming due from the Crown, unless assignment is permitted by that Act or another "Act of Parliament". There is no question that the *Financial Administration Act* fails to permit such assignment, and no express authorization appears in any other federal statute.

93 In this context, I pause to note s. 2(2) of the *Tax Rebate Discounting Act*, R.S.C. 1985, c. T-3. That section permits a person to "[acquire] a right to a refund of tax ... notwithstanding that, by virtue of section 67 of the *Financial Administration Act* ... the refund of tax is not assignable". This provision effectively illustrates a simple point: when Parliament means to make income tax refunds assignable, it can do so easily and with clarity.

94 The only effort made in this appeal to find statutory authorization for the Agreement Letter involved s. 158 of the *Bankruptcy Act*, but that effort must go unrewarded. Under s. 158(l), bankrupt persons are obliged to execute specified documents "as may be required", but this obligation says nothing about the independent validity of such documents in the face of a statutory proscription. Likewise, under s. 158(o), a bankrupt may be obliged to do "all such acts and things in relation to his property ... as may be reasonably required by the trustee", but it cannot be said that a trustee can "reasonably require" that which Parliament expressly prohibits.

95 In ss. 67 and 68 of the *Bankruptcy Act*, Parliament has established a regime which determines whether there exists "property of a bankrupt divisible among his creditors". In my opinion, it would be very odd if trustees could attain that which appears to be unattainable on the face of those provisions, namely, an entitlement to an income tax refund without the need for a court application. In other words, I do not believe that a trustee and a bankrupt can use contract law to circumvent statutory law in this area.

96 In the absence of clear statutory authority to permit the assignment envisioned by the Agreement Letter, s. 67(a) of the *Financial Administration Act* takes hold and renders that Crown debt not assignable. Moreover, the grip of s. 67(a) is not loosened by *Re Northward Airlines Ltd.*, supra, which was cited by the Trustee.

97 In *Re Northward*, an airline company purported to assign its book debts to a bank. The company later declared bankruptcy at a time when the federal Crown was the company's debtor. The bank claimed the value of the Crown debt as assignee, but the trustee relied upon the *Financial Administration Act*. MacDonald J. in *Re Northward* responded to these facts by holding that the rules of equity continued to apply as between the assignor and the assignee, notwithstanding the *Financial Administration Act*. MacDonald J. reasoned that the company as assignor would hold monies received from the Crown in trust for the bank, and that trust monies, under the equivalent of s. 67(a) of the *Bankruptcy Act*, would not constitute property of the bankrupt which could vest in the trustee.

98 With respect, I think that *Re Northward* is wrongly decided. MacDonald J. stated that the *Financial Administration Act* "does not abrogate the rights of parties except to the extent of exercising rights or remedies in respect of the Crown debt" (at p. 140). In other words, MacDonald J. held that an assignment will be invalid only to the extent that an assignee attempts to exercise "rights or remedies" directly against the Crown debtor. But this holding ignores

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the broad language chosen by Parliament in s. 67(b).

99 MacDonald J. in *Re Northward* interpreted s. 67(b) as if Parliament enacted a prohibition against attempts to assign to "any person any rights or remedies *against the Crown as debtor* in respect of [the Crown] debt". But, of course, section 67(b) renders ineffective attempts to assign to "any person *any* rights or remedies in respect of [the Crown] debt" (emphasis added). I do not think it is possible to go behind this broad language as *Re Northward* suggests. Moreover, since s. 67(a) prohibits the assignment of a Crown debt, that prohibition alone would presumably give the Crown the same protection as would s. 67(b) under the *Re Northward* interpretation. In my view, s. 67(b) amplifies the broad prohibition apparent in s. 67(a), so that a purported assignment of a Crown debt is rendered absolutely ineffective, as between debtor and creditor, and as between assignor and assignee.

100 For these reasons, I conclude that the Agreement Letter executed by Marzetti was statutorily incapable of creating an effective assignment. Priority in respect of the post-bankruptcy income tax refund remains unaffected by that instrument, and falls to be determined according to the principles I have already described.

VI. Conclusion and Disposition

101 Under s. 24 of the *Family Orders and Agreements Enforcement Assistance Act*, the Crown may be garnisheed in respect of "garnishable moneys". By virtue of s. 23 of that Act, read in conjunction with s. 3(a) of the *Family Support Orders and Agreements Garnishment Regulations*, SOR/88-181, an income tax refund constitutes "garnishable moneys". Accordingly, the Director was properly able to file the Notice of Continuing Attachment as against the Crown to recover Marzetti's income tax refund, and thus to instigate the process which led to the garnishee summons.

102 In conclusion, by taking steps to garnish the income tax refund, the Director necessarily obtained priority in this case. That is because the refund did not automatically vest in the Trustee. It could have been accessed by the Trustee only through an application under s. 68 of the *Bankruptcy Act*. However, since no application was made prior to the garnishment — indeed, since no application was ever made — the Director's claim to priority is effectively unchallenged.

103 I would dismiss the appeal. By agreement among the parties, there will be no order as to costs.

Appeal dismissed.

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TAB 9

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

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2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

Profitt v. A.D. Productions Ltd. (Trustee of)

Carol Profitt and APL Design & Promotions Inc. (Appellants) and Wasserman, Arsenault Limited, Trustee of the Estate of AD Productions Limited (Respondent)

Ontario Court of Appeal

Feldman, MacPherson, Cronk JJ.A.

Heard: December 3, 2001

Judgment: March 28, 2002

Docket: CA C35465

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Counsel: *Alan J. Lenczner, Q.C., Nicholas C. Tibollo*, for Appellants

Catherine Francis, for Respondent

Subject: Insolvency; Property; Corporate and Commercial

Bankruptcy --- Property of bankrupt — Tax credits or refunds

A Ltd. applied for refunds of federal sales tax which were ultimately paid — A Ltd. borrowed money from creditor which was secured by promissory note and general security agreement — Creditor made demand for repayment and appointed S receiver under agreement — On same date, A Ltd. made assignment in bankruptcy and S was appointed trustee in bankruptcy — S executed bill of sale transferring A Ltd.'s inventory, equipment and contingent assets including tax claim to A Inc. — W Ltd. was subsequently appointed guardian of estate and trustee in bankruptcy — W Ltd. received refund from government and held proceeds — Application judge found that tax refund was Crown debt which could not be assigned and any purported assignment was invalid to pass any interest in refund to creditor or A Inc. — Creditor and A Inc. appealed — Appeal dismissed — Overpayment by taxpayer resulted in money owed by government to taxpayer — As taxpayer had right to refund, if right was not discharged, taxpayer could enforce right by action against government — Right to reimbursement was chose in action within definition of Crown debt in s. 66 of Financial Administration Act — General power given to trustee in bankruptcy under s. 30(1)(a) of Bankruptcy and Insolvency Act to sell assets of bankrupt did not constitute specific power to assign Crown debt without specific reference to such power or to intention to override s. 67 of Financial Administration Act — Financial Administration Act, R.S.C. 1985, c. F-11, ss. 66, 67 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 30(1)(a).

Choses in action --- Assignability — Claim with respect to Crown

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

A Ltd. applied for refunds of federal sales tax which were ultimately paid — A Ltd. borrowed money from creditor which was secured by promissory note and general security agreement — Creditor made demand for repayment and appointed S receiver under agreement — On same date, A Ltd. made assignment in bankruptcy and S was appointed trustee in bankruptcy — S executed bill of sale transferring A Ltd.'s inventory, equipment and contingent assets including tax claim to A Inc. — W Ltd. was subsequently appointed guardian of estate and trustee in bankruptcy — W Ltd. received refund from government and held proceeds — Application judge found that tax refund was Crown debt which could not be assigned and any purported assignment was invalid to pass any interest in refund to creditor or A Inc. — Creditor and A Inc. appealed — Appeal dismissed — Overpayment by taxpayer resulted in money owed by government to taxpayer — As taxpayer had right to refund, if right was not discharged, taxpayer could enforce right by action against government — Right to reimbursement was chose in action within definition of Crown debt in s. 66 of Financial Administration Act — General power given to trustee in bankruptcy under s. 30(1)(a) of Bankruptcy and Insolvency Act to sell assets of bankrupt did not constitute specific power to assign Crown debt without specific reference to such power or to intention to override s. 67 of Financial Administration Act — Financial Administration Act, R.S.C. 1985, c. F-11, ss. 66, 67 — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 30(1)(a).

Cases considered by *Feldman J.A.*:

Canada Safeway Ltd. v. R., 1997 CarswellNat 1947, (sub nom. *R. v. Canada Safeway Ltd.*) 98 D.T.C. 6060, (sub nom. *Canada Safeway Ltd. v. Canada*) 154 D.L.R. (4th) 449, (sub nom. *Minister of National Revenue v. Canada Safeway Ltd.*) 222 N.R. 342, [1998] 1 C.T.C. 120, (sub nom. *R. v. Canada Safeway Ltd.*) 98 G.T.C. 6036 (Fed. C.A.) — referred to

Marzetti v. Marzetti, [1994] 7 W.W.R. 623, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 155 A.R. 340, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 73 W.A.C. 340, 116 D.L.R. (4th) 577, [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 20 Alta. L.R. (3d) 1, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 169 N.R. 161, 1994 CarswellAlta 346, 1994 CarswellAlta 747, [1998] B.P.I.R. 732 (S.C.C.) — considered

Northward Airlines Ltd., Re, [1981] 2 W.W.R. 764, 37 C.B.R. (N.S.) 137, 36 A.R. 142, 1981 CarswellAlta 182 (Alta. Q.B.) — not followed

Woolwich Equitable Building Society v. Inland Revenue Commissioners, [1992] 3 All E.R. 737, [1993] A.C. 70, [1992] 3 W.L.R. 366, 65 T.C. 265, 145 N.R. 163 (U.K. H.L.) — referred to

Statutes considered:

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

Generally — referred to

s. 30 — considered

s. 30(1)(a) — considered

s. 158(o) — considered

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

Generally — referred to

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

Financial Administration Act, R.S.C. 1985, c. F-11

Generally — referred to

s. 66 "Crown debt" — considered

s. 67 — considered

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

Generally — referred to

s. 220(6) [en. 1997, c. 25, s. 66] — referred to

s. 220(7) — referred to

Tax Rebate Discounting Act, R.S.C. 1985, c. T-3

Generally — referred to

s. 2(2) — referred to

APPEAL from judgment that tax refund was Crown debt which could not be assigned.

Feldman J.A.:

OVERVIEW

1 The respondent is the trustee in bankruptcy of Ad Productions Limited, and in that capacity received and holds a federal sales tax refund belonging to Ad Productions. The issue in this case is whether the appellants are entitled to obtain the proceeds of the sales tax refund as assignees or transferees, or whether s. 67 of the *Financial Administration Act*, R.S.C. 1985, c. F-11, which prohibits assignments of "Crown debts", applies and prevents the appellants from claiming or receiving the amount being held.

2 The application judge held that the case was governed by the Supreme Court of Canada decision in *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765 (S.C.C.), that the sales tax refund is a Crown debt that could not be assigned, and that any purported assignment was invalid to pass any interest in the refund to the appellants.

3 In this court, counsel for the appellants sought to distinguish *Marzetti* on the basis that the nature of the sales tax refund in this case was not in law that of a Crown debt as defined.

FACTS (Based on agreed statement of facts with documents attached and findings of the applications judge)

4 In 1990 and again in 1992, Ad Productions applied for refunds of federal sales tax under the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended, paid by it over several years in respect of "imaged articles". In July, 1992, a test case with respect to federal sales tax on "imaged articles" was decided in favour of the taxpayers at the first level of adjudication. That decision was ultimately upheld by the Federal Court of Appeal in 1997. The amount of Ad Production's claim was in excess of \$200,000. When the amount was ultimately paid with interest, the amount was \$365,937.30.

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

5 On January 15, 1992, Ad Productions borrowed \$45,000 from Carol Profitt, secured by a promissory note and a General Security Agreement ("GSA"). The GSA contained assignments by Ad Productions of all of its assets as security, including in paragraph 1(c) which provided:

1. For value received, the Debtor hereby:

assigns, transfers and sets over to the Creditor, and grants to the Creditor a security interest in, all its present and future intangibles, including, without limiting the generality of the foregoing, all its book debts and other accounts receivable, chattel paper, contract rights and other choses in action of every kind or nature now due or hereafter to become due, including insurance rights arising from or out of the assets referred to in sub-clauses (a) and (b) above; ...

6 On March 26, 1993 Profitt made demand on Ad Productions for the \$45,000 and appointed a receiver under the GSA, Marshall Sone. On the same date, Ad Productions made an assignment in bankruptcy and Marshall Sone was appointed trustee in bankruptcy of the estate.

7 In May, 1993, Sone executed a bill of sale transferring Ad Production's inventory and equipment "and contingent assets including FST claim" to the appellant, APL Design. The trial judge noted that, on its face, the bill of sale is in the name of Sone as receiver and not as trustee in bankruptcy. The consideration for the transfer was \$15,000.

8 In 1998, Wasserman, Arsenault Limited was appointed guardian of the estate of Ad Productions and in 2000, trustee in bankruptcy. Wasserman received the refund cheques from the Government of Canada and has held the proceeds pending the outcome of this proceeding.

ANALYSIS

9 There are two assignments involved: the first is contained in the GSA which was given by Ad Productions to the first appellant, Carol Profitt, as security for a promissory note. The second is the transfer of the sales tax refund in the bill of sale from Marshall Sone to the second appellant, APL Design.

10 Section 67 of the *Financial Administration Act* provides:

s. 67 Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

11 "Crown debt" is defined in s. 66 of the *Act* as follows:

s. 66 "Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;

12 This section was considered by the Supreme Court of Canada in *Marzetti*, a case involving the assignment of an income tax refund. In that case, Iacobucci J. found that an income tax refund is a Crown debt, and that its assignment is prohibited by s. 67 of the *Act* and not permitted by any other section or any other act, such as the *Tax Rebate Discounting Act*, R.S.C. 1985, c. T-3, where s. 2(2) permits a person to "acquire ... a right to a refund of

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

tax . . . notwithstanding that, by virtue of s. 67 of the *Financial Administration Act* . . . the refund of tax is not assignable." He noted that where Parliament wished to make a particular tax refund assignable, it did so specifically.

13 Iacobucci J. also overruled the interpretation of the section which had been articulated by the Nova Scotia Supreme Court in *Northward Airlines Ltd., Re* (1981), 37 C.B.R. (N.S.) 137 (Alta. Q.B.). That case had held that the effect of s. 67 was only to prevent remedies being taken by assignees against the Crown, and that once the assigned funds were in the hands of the assignor/Crown debtor, then the funds would be held in trust for the assignee. Iacobucci J. stated that this interpretation ignored the words of the section which provide an absolute prohibition against assignment of a Crown debt, making such an assignment "absolutely ineffective as between debtor and creditor and as between assignor and assignee." (p.805)

14 Although s. 220(6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) added by S.C. 1997, c. 25 s. 66(1), now allows a corporation to assign any amount payable to it under the *Income Tax Act*, notwithstanding the *Financial Administration Act*, for assignments made after March 5, 1996[FNI], there has been no such amendment in respect of assignments of amounts payable under the *Excise Tax Act*.

15 Within this legal landscape, counsel for the appellants made two principal arguments:

(i) The nature of the sales tax refund in this case takes it out of the definition of Crown debt in s. 66 of the *Financial Administration Act*. As a result, the prohibition in s. 67 is not applicable and the *Marzetti* case has no application.

(ii) The transfer of the refund by Marshall Sone was made in his capacity as trustee in bankruptcy, and s. 30 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, provides an exemption to s. 67 of the *Financial Administration Act* for transfers of assets by trustees in bankruptcy.

Submission (1)

16 Counsel's submission is that the nature of the tax overpayment by Ad Productions was money paid under a mistake of law, to which the government, as it turned out, had no right. As a result, conversion of the monies occurred and the government is unjustly enriched by the receipt and retention of the funds. The government holds them for the taxpayer and is obliged to return them to the taxpayer. Counsel likened the government's obligation to a trust. He submitted that the relationship between the taxpayer and the government in those circumstances is not that of debtor/creditor, nor is the government's obligation to return the monies a *chose in action*.

17 Counsel sought to distinguish the nature of the income tax refund in *Marzetti*, which was held to be a Crown debt, from the excise tax overpayment in this case, on the basis that in that case the taxpayer was obliged initially to pay the tax but, as a result of certain deductions available to him, he ended up overpaying, so that the amount of the overpayment was a refund owed to him by the government and therefore was in the nature of a debt owed to him by the Crown. The appellant relied on the case of *Canada Safeway Ltd. v. R.* (1997), 154 D.L.R. (4th) 449 (Fed. C.A.) where the Federal Court of Appeal held that a reimbursement of taxes paid in error is not a refund which must be included in income in the year of the refund.

18 Although there is a distinction for some purposes between monies paid by mistake and therefore subject to return to the rightful owner, and monies found to have been overpaid after a proper accounting has been taken and owed back for that reason, that distinction does not have the effect contended by the appellant, that is, that monies that must be returned because they were paid by mistake are not a *chose in action*.

19 *Choses in action* or *things in action* are defined in the Walker, *Oxford Companion to Law* (1980) as follows:

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

Personal rights of property claimable or enforceable by legal action, as distinct from choses in possession, things capable of physical possession. This class of rights includes a great variety of rights of an intangible character. They are divided into legal and equitable choses in action, according as they may be recovered or enforced by action at law or, formerly, only by suit in equity. The former includes such as debts, claims under insurance policies, and shares in companies, the latter includes equitable rights in property such as interests under trusts, arising from those kinds of rights as to which the Court of Chancery formerly had exclusive jurisdiction. Choses in action arise from contracts, will and trusts, by virtue of statutes and from other sources. They are in general assignable by the person entitled to another by legal or equitable assignment, intimated to the debtor or fundholder, or in accordance with statute or, in the case of negotiable instruments, by delivery of the document of title, and pass on death or bankruptcy. Certain kinds of choses in action, such as certain salaries and pensions, are not assignable. The rights may be discharged in various ways, notably by payment.

20 Any overpayment by a taxpayer results in money owed by the government to the taxpayer. As the taxpayer has a right to a refund of the money, if that right is not discharged by payment, the taxpayer may enforce the right by an action against the government. The right to reimbursement is therefore a chose in action within the definition of "Crown debt" in s. 66 of the *Act*.

21 The appellant also points to the decision of the House of Lords in *Woolwich Equitable Building Society v. Inland Revenue Commissioners*, [1992] 3 All E.R. 737 (U.K. H.L.) where the court held that any overpayment by a taxpayer based on an *ultra vires* demand is *prima facie* recoverable by the taxpayer as of right and therefore with interest unless some special circumstances or principle of policy required otherwise. Counsel submits that this obligation of the government to repay monies paid based on an *ultra vires* demand is not a debt, but an entitlement of the taxpayer.

22 However, regardless of the characterization for the purpose of determining if such monies constitute income for the purposes of inclusion in taxable income (*Canada Safeway*) or for the purpose of determining whether and from what date the government is obliged to pay interest on the monies to the taxpayer (*Woolwich Building Society*), the issue for the s. 66 definition is whether the right to the monies is a *chose in action*. As ultimately the only way to recover the money, if it is not paid voluntarily, is by court action, the tax overpayment by Ad Productions is a Crown debt within the meaning of the section.

Submission (2)

23 The assignment by Marshall Sone is stated on its face to be made in his capacity as receiver of Ad Productions. However, it is argued that Sone was also trustee in bankruptcy on that date and, therefore, was acting in that capacity in assigning the tax refund claim. The appellant submits that s. 30(1)(a) of the *Bankruptcy and Insolvency Act* permits a trustee to sell the assets of the bankrupt and is therefore federal statutory authority to assign the tax refund.

24 Section 30(1)(a) of the *Bankruptcy and Insolvency Act* provides:

30.(1) The trustee may, with the permission of the inspectors, do all or any of the following things:

(a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

25 The *Bankruptcy and Insolvency Act* therefore gives statutory authority to a trustee in bankruptcy to transfer the property of a bankrupt, but does not reference the *Financial Administration Act*. The question is whether the s. 30(1)(a) authority constitutes a provision in "any other Act of Parliament" for the assignment of a Crown debt in

2002 CarswellOnt 922, 32 C.B.R. (4th) 94, 157 O.A.C. 356, 2002 G.T.C. 1162

accordance with s. 67 of the *Financial Administration Act*.

26 In my view this question is answered in the negative by the reasons of Iacobucci J. in *Marzetti*. He refers to the need for "express authorization" (p.803) and "clear statutory authority" (p.804) in a federal act by words such as "notwithstanding that by virtue of s. 67 of the *Financial Administration Act* . . . the refund of tax is not assignable." [FN2] (p.803) In that case, for example, he rejected s. 158(o) of the *Bankruptcy and Insolvency Act* as being effective to permit an assignment of an income tax refund by a bankrupt, stating: " . . . under s. 158(o), a bankrupt may be obliged to do 'all such acts and things in relation to his property . . . as may be reasonably required by the trustee', but it cannot be said that a trustee can 'reasonably require' that which Parliament expressly prohibits." (p.803)

27 I am satisfied that the general power given to a trustee in bankruptcy in s. 30(1)(a) to sell the assets of a bankrupt does not constitute the specific power to assign a Crown debt without specific reference to such a power or to an intention to override s. 67 of the *Financial Administration Act*.

CONCLUSION

28 I conclude that the application judge was correct in holding that the purported assignments were invalid to transfer the federal tax refund and that the trustee is therefore entitled to the rebate funds on behalf of the estate. I would therefore dismiss the appeal. In argument counsel for the appellant advised that this court need not deal with the costs of the appeal. If there is any issue with respect to costs, counsel may advise the registrar within one week of release of these reasons.

Appeal dismissed.

FN1 By s. 220(7), such assignments are not binding on the Crown.

FN2 The phrase used in the new s. 220(6) of the *Income Tax Act* is: "*Notwithstanding section 67 of the Financial Administration Act and any other provision of a law of Canada or a province, a corporation may assign any amount payable to it under this Act.*" (Emphasis added)

END OF DOCUMENT

TAB 10

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138



2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

Cargill Ltd. v. Ronald (Trustee of)

In the Matter of the Bankruptcy of Robert Glenn Ronald

Cargill Limited and Canadian Imperial Bank of Commerce (Appellants) and Meyers Norris Penny Limited, Trustee of
the Estate in Bankruptcy of Robert Glenn Ronald (Respondent)

Manitoba Court of Queen's Bench

Menzies J.

Judgment: May 1, 2007

Docket: Brandon Centre BK 04-02-77904

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Proceedings: reversing *Cargill Ltd. v. Ronald (Trustee of)* (2006), (sub nom. *Ronald (Bankrupt), Re*) 210 Man. R. (2d) 93, 26 C.B.R. (5th) 296, 2006 MBQB 262, 2006 CarswellMan 404, [2007] 2 W.W.R. 486, 10 P.P.S.A.C. (3d) 279 (Man. Q.B.)

Counsel: Mr. David R.M. Jackson for Appellants

Mr. Richard W. Schwartz for Meyer Norris Penny Limited

Mr. Brian Mayes for Estate of Robert Glen Ronald

Subject: Insolvency; Property; Civil Practice and Procedure

Bankruptcy and insolvency --- Property of bankrupt — Miscellaneous issues

What constituting property — Deceased bankrupt was farmer, whose estate was recipient of funds from Canadian Agricultural Income Stabilization Program ("CAIS") — Bank and C Ltd. were creditors who were beneficiaries of security agreements with bankrupt, which covered after-acquired property — Trustee disallowed claims of bank and C Ltd. — Bank and C Ltd. appealed to Registrar — Registrar dismissed appeal, concluding that any funds payable to producer under CAIS were not property within meaning of Bankruptcy and Insolvency Act — Registrar found that, as CAIS funds are pure subsidy, funds were not exigible and therefore security agreements held by C Ltd. or bank could not attach funds in question — Registrar held that producer was entitled to funds in their entirety, free from any claim by trustee or creditors — Trustee, bank and C Ltd. appealed — Appeal allowed — Proceeds paid to farmer under CAIS program constitute property within definition of Act — Right to participate in CAIS program is incidental to bankrupt's business and undertaking as farmer — As such, there exists right to apply for payment under CAIS in any year

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

bankrupt qualifies — Right to participate in program represents future contingent interest in CAIS program funding — Trustee's right to participate in CAIS program is power in respect of property as might have been exercised by bankrupt, so that any payments under CAIS fell within definition of property in Act.

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles

Deceased bankrupt was farmer, whose estate was recipient of funds from Canadian Agricultural Income Stabilization Program ("CAIS") — Bank and C Ltd. were creditors who were beneficiaries of security agreements with bankrupt, which covered after-acquired property — Trustee disallowed claims of bank and C Ltd. — Bank and C Ltd. appealed to Registrar — Registrar dismissed appeal, concluding that any funds payable to producer under CAIS were not property within meaning of Bankruptcy and Insolvency Act — Trustee, bank and C Ltd. appealed — Appeal allowed — C Ltd. and bank were holders of equitable assignment of CAIS proceeds — CAIS payment clearly constitutes revenue, if not income, for farmer and therefore would fit within definition of "total income" under s. 68 of Bankruptcy and Insolvency Act ("BIA") — As result of operation of s. 67 of Financial Administration Act, C Ltd. and bank could not enforce their security agreements directly against federal government to obtain CAIS funds — However, C Ltd. and bank did retain equitable right to enforce their security as against trustee once funds had been paid over — CAIS proceeds in hands of trustee were available for distribution among creditors only to extent proceeds exceeded what is necessary for bankrupt to retain reasonable standard of living in accordance with s. 68 of BIA — Once balance of proceeds was in hand of trustee, C Ltd. and bank could seek to enforce their security in priority to other creditors pursuant to s. 136 of BIA.

Cases considered by *Menzies J.*:

Agricultural Credit Corp. of Saskatchewan v. Featherstone (Trustee of) (1996), 1996 CarswellSask 344, (sub nom. *Agricultural Credit Corp. of Saskatchewan v. Featherstone (Bankrupt)*) 145 Sask. R. 161, [1996] 8 W.W.R. 281, 11 P.P.S.A.C. (2d) 194, 45 C.B.R. (3d) 113 (Sask. Q.B.) — considered

Alberta v. Canada West Interiors Ltd. (1986), 1986 CarswellAlta 22, 43 Alta. L.R. (2d) 155, 74 A.R. 330 (Alta. Master) — considered

Beatch, Re (2005), 2005 SKQB 3, 2005 CarswellSask 19, 7 C.B.R. (5th) 41, 256 Sask. R. 262 (Sask. Q.B.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

Kallenberger v. Beck (Trustee of) (2005), (sub nom. *Beck (Bankrupt), Re*) 390 A.R. 91, 2005 ABQB 895, 2005 CarswellAlta 1939, 18 C.B.R. (5th) 113 (Alta. Q.B.) — considered

Landry, Re (2000), 2000 CarswellOnt 3066, 3 C.C.E.L. (3d) 1, 50 O.R. (3d) 1, (sub nom. *Landry (Bankrupt), Re*) 135 O.A.C. 381, 192 D.L.R. (4th) 728, 21 C.B.R. (4th) 58 (Ont. C.A.) — considered

Laughlin, Re (2004), 2004 ABQB 324, 2004 CarswellAlta 531, 50 C.B.R. (4th) 104, 358 A.R. 255 (Alta. Q.B.) — considered

Marzetti v. Marzetti (1994), [1994] 7 W.W.R. 623, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 155 A.R. 340, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 73 W.A.C. 340, 116 D.L.R. (4th) 577, [1994] 2 S.C.R.

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 20 Alta. L.R. (3d) 1, (sub nom. *Marzetti v. Marzetti (Bankrupt)*) 169 N.R. 161, [1998] B.P.L.R. 732, 1994 CarswellAlta 942, 1994 CarswellAlta 346 (S.C.C.) — followed

Mini G. Enterprises Ltd. v. Kendrick (2001), 2001 MBQB 332, 2001 CarswellMan 596, 159 Man. R. (2d) 310, [2002] 3 W.W.R. 95 (Man. Q.B.) — considered

Mullin (Trustee of) v. Mullin (2002), [2002] 6 W.W.R. 290, 33 C.B.R. (4th) 250, (sub nom. *North 40 Farms (Bankrupt), Re*) 164 Man. R. (2d) 44, 2002 MBQB 138, 2002 CarswellMan 201 (Man. Q.B.) — considered

Orr & Co. v. Saskatchewan Economic Development Corp. (1994), 24 C.B.R. (3d) 196, (sub nom. *Rendamax/G.P. Industries Ltd. (Bankrupt), Re*) 119 Sask. R. 121, 6 P.P.S.A.C. (2d) 350, 1994 CarswellSask 16 (Sask. Q.B.) — considered

Orr & Co. v. Saskatchewan Economic Development Corp. (1994), 8 P.P.S.A.C. (2d) 83, (sub nom. *Rendamax/G.P. Industries Ltd. (Bankrupt), Re*) 125 Sask. R. 80, 1994 CarswellSask 86, (sub nom. *Rendamax/G.P. Industries Ltd. (Bankrupt), Re*) 81 W.A.C. 80 (Sask. C.A.) — referred to

Pannell Kerr MacGillivray Inc. v. Beer (1988), 69 C.B.R. (N.S.) 203, (sub nom. *Beer (Bankrupt), Re*) 53 Man. R. (2d) 200, 1988 CarswellMan 30 (Man. Q.B.) — considered

Portage Credit Union Ltd. v. 62031 Manitoba Ltd. (1989), 9 P.P.S.A.C. 111, (sub nom. *Portage Credit Union Ltd. v. 62031 Man. Ltd. (No. 2)*) 59 Man. R. (2d) 315, 74 C.B.R. (N.S.) 25, 1989 CarswellMan 22 (Man. Q.B.) — considered

Saulnier (Receiver of) v. Saulnier (2006), 2006 NSCA 91, 2006 CarswellNS 323, 22 C.B.R. (5th) 38, (sub nom. *Royal Bank v. Saulnier*) 271 D.L.R. (4th) 34, (sub nom. *Saulnier (Bankrupt), Re*) 246 N.S.R. (2d) 239, (sub nom. *Saulnier (Bankrupt), Re*) 780 A.P.R. 239, 21 B.L.R. (4th) 1, 10 P.P.S.A.C. (3d) 221 (N.S. C.A.) — considered

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment*) 63 N.R. 81, 1985 CarswellNat 12, 1985 CarswellNat 668, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641 (S.C.C.) — considered

Yablonski v. Cawood (1997), 143 D.L.R. (4th) 65, [1997] 3 W.W.R. 351, (sub nom. *Cawood v. Yablonski*) 152 Sask. R. 54, (sub nom. *Cawood v. Yablonski*) 140 W.A.C. 54, 1997 CarswellSask 28 (Sask. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 2 "property" — referred to

s. 67(1) — considered

s. 68 — considered

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

s. 68(1) — referred to

s. 68(2) — referred to

s. 68(2)(a) "total income" — referred to

s. 68(3)(a) — referred to

s. 136 — referred to

s. 136(1) — referred to

Financial Administration Act, R.S.A. 1980, c. F-9

Generally — referred to

Financial Administration Act, R.S.C. 1985, c. F-11

s. 66 "Crown debt" — referred to

s. 67 — considered

Personal Property Security Act, S.M. 1993, c. 14

Generally — referred to

Western Grain Stabilization Act, S.C. 1974-75-76, c. 87

Generally — referred to

APPEAL by creditors from judgment, reported at *Cargill Ltd. v. Ronald (Trustee of) (2006)*, (sub nom. *Ronald (Bankrupt), Re*) 210 Man. R. (2d) 93, 26 C.B.R. (5th) 296, 2006 MBQB 262, 2006 CarswellMan 404, [2007] 2 W.W.R. 486, 10 P.P.S.A.C. (3d) 279 (Man. Q.B.), dismissing creditors' appeal from trustee's disallowance of creditors' claims.

Menzies J.:

1 Once again the uncertain status of agricultural assistance programs under the *Bankruptcy and Insolvency Act* ("BIA") comes before the courts. This area of the law is further complicated by the reality that new programs available to assist agricultural producers are introduced more quickly than the courts can come to grips with their individual workings. The program which gives rise to these proceedings is the Canadian Agricultural Income Stabilization Program ("CAIS").

2 This matter comes before the Court by way of appeal from a decision of the Registrar in Bankruptcy found at 2006 MBQB 262 (Man. Q.B.) dated November 8th 2006. The Registrar concluded that any funds payable to a producer under the CAIS program are not property within the meaning of the BIA. The Learned Registrar also found that as the CAIS funds are a pure subsidy, the funds are not exigible and therefore the security agreements held by Cargill Limited ("Cargill") or the Canadian Imperial Bank of Commerce ("CIBC") could not attach the funds. The result of the

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

Registrar's decision was the producer was entitled to the funds in their entirety free from any claim by the trustee in bankruptcy or the creditors be they secured or otherwise. The Trustee, Cargill and CIBC appeal that decision.

Standard of Review

3 The facts giving rise to this matter are not in dispute although the interpretation to be given to those facts may be. This court is in just as good a position to determine the facts as the Learned Registrar and the issues before the court are legal in nature. Therefore, this court is of the opinion that the standard of review of the decision of the Learned Registrar is one of correctness. {See; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.)}

Factual Background

4 To put a context on the legal issues in this contest, it is necessary to outline the basic factual underpinning giving rise to this dispute.

5 The Bankrupt, (now deceased), farmed in the vicinity of Portage La Prairie in south central Manitoba. On December 9th 2004, the bankrupt made an assignment into bankruptcy naming Meyers Norris Penny Limited as the Trustee in Bankruptcy. Sadly, the Bankrupt died on August 15th 2005. The Trustee completed and filed an application pursuant to the CAIS program on May 5th 2005 and on October 3rd 2005, a CAIS cheque issued in the amount of \$159,221.28. Prior to the CAIS cheque issuing, CIBC and Cargill notified the Trustee that they held security against the property of the Bankrupt and claiming entitlement to the CAIS proceeds.

6 CIBC claims priority to the CAIS funds as the holder of a duly registered security agreement wherein the Bankrupt granted security over all present and after acquired undertakings, personal property and assets including receivables, intangibles and money. The agreement was registered under the Personal Property Security Act on July 5th 2002.

7 Cargill claims priority to the CAIS funds as the holder of a duly registered security agreement wherein the Bankrupt granted security over all of his present and after acquired real and personal property and proceeds which also included accounts, payments, contractual rights and other choses in action. This agreement was registered under the *Personal Property Security Act* on April 27th 2004.

The CAIS Funds as Property

8 The preliminary matter to be determined is whether any funds payable under the CAIS program fall within the definition of property under the *BIA*.

9 Property is defined in s. 2 and 67 of the *BIA*:

S. 2 Property — money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in arising out of or incident to property.

S. 67 PROPERTY OF BANKRUPT — (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

(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 in respect of the property as might have been exercised by the bankrupt for his own benefit.

10 In his usual comprehensive manner, the Learned Registrar conducted an extensive review of the history of agricultural support programs in coming to the conclusion that the funds were not property within the meaning of the *BIA*. At para. 62 of his decision, the Registrar indicated his conclusion was based on the following factors:

1. The lack of a contractual foundation between the farmer and the CAIS administration;
2. The lack of a statutory right of action supporting a farmer's rights;
3. The lack of assignability on the farmer's part;
4. Lack of certainty as payout and its quantum;
5. Large degree of discretion vested within CAIS administration in many areas;
6. Uncertainty, or at best on generalities, as to the legal principles in operation handbook;
7. Program dependency upon changing provincial and federal partnering and funding agreements;
8. History of proliferation of new federal/provincial support programs perhaps created and designed to meet the latest need or crisis within the agricultural sector of our economy. In many cases, the older programs administered under "umbrella" legislation have disappeared, either discontinued or unfunded.

11 There are very few sources available which explain how the CAIS program operates. As a result, the Court must reference the CAIS Handbook provided to participating farmers for the necessary information.

12 The CAIS Handbook makes the following statements:

PARA. 1.2.4 PROGRAM PAYMENTS-WITHDRAWALS AND GOVERNMENT CONTRIBUTIONS

If your program year margin has declined below your reference margin, some or all of the funds in your account will be available for withdrawal. At the same time, you will receive government funds which will be paid to you directly.

PARA. 2.1 STEPS IN THE PARTICIPATION PROCESS

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

5. After processing your program forms, you will be sent a Calculation of Program Benefits. If the Administration determines that your farming operation experienced a program year margin decline relative to your reference margin, you will trigger a withdrawal from your account. At the same time, the CAIS Program Administration will issue you a payment in the amount of the corresponding government contributions.

PARA. 3.2.4 BANKRUPTCY

An individual or entity that is in the state of bankruptcy in the program year may participate through the trustee in bankruptcy.

PARA. 5.4 TREATMENT OF CAIS PROGRAM PAYMENTS

Based on CRA tax guidelines:

Withdrawals from you CAIS program account are not taxable;

Government contributions paid to you are taxable in the year the cheque is dated;

Payment of government contributions must be reported as farming income for tax purposes;

The government contributions received from the CAIS program cannot be assigned, deferred (for income tax purposes), or otherwise encumbered.

13 The Learned Registrar relied upon the lack of a contractual relationship or statutory right by which the producer could compel payment of the CAIS funds. I find this inability to compel payment is not fatal to a finding that the right to participate in the program constitutes property. In *Marzetti v. Marzetti*, [1994] S.C.J. No. 64 (S.C.C.), the Supreme Court of Canada found that there is a distinction between the existence, and the enforceability of a proprietary right.

(Para. 31) Even if a taxpayer who makes overpayments has no right to compel a refund prior to filing a return, surely that taxpayer has at least a future and contingent interest in the ultimate tax refund.

14 A similar principle was followed in the decision of *Portage Credit Union Ltd. v. 62031 Manitoba Ltd.* (1989), 59 Man. R. (2d) 315 (Man. Q.B.). The issue was the trustee in bankruptcy's entitlement to payments made to a farmer under the Special Grains Program, another agricultural stabilization program. At para. 9, Barkman J. said:

Whether they could sue the federal government for their entitlement under the program or not, to my mind is of no consequence in deciding whether the payments are a gift. Because they became entitled to payment under the said program they acquired an interest in the said fund. This interest in the said fund, after the defendants qualified or became eligible under the program became part of the debtor's undertaking and all its business, property and assets of whatever nature and kind, both present and future...

15 I too am persuaded that although there is no right to force the payment of the CAIS funds, there is a future contingent interest in the funds.

16 The Learned Registrar also found that the lack of certainty and large discretion in the administration of the CAIS program were factors which tended to remove the CAIS payments from the definition of property. With respect, although these factors increase the contingent nature of the potential payments, they do not otherwise operate to re-

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

move the payments from the definition of property. Although leave to appeal to the Supreme Court of Canada has been granted, I find the statement of the Nova Scotia Court of Appeal in the decision of *Saulnier (Receiver of) v. Saulnier*, [2006] N.S.J. No. 307 (N.S. C.A.) at para. 25 very persuasive:

In Marzetti, Justice Iacobucci for the Court (page 783) noted the "very broad" reach of the "property" definition in S. 2. The Court held that bankrupt's interest in an eventual tax refund from income that he earned after his assignment in bankruptcy was captured by s. 67 (1)(c). Justice Iacobucci said that the bankrupt had "at least a future and contingent interest in the ultimate tax refund" and that such "inchoate" property satisfied the BIA's definition. That a contingent — i.e. unvested — interest is "property" under s. 2 illustrates the breadth of the definition.

17 The CAIS Handbook contemplates that a producer may participate after having made an assignment into bankruptcy. The CAIS Handbook permits the making of an application for CAIS funding by the trustee in bankruptcy.

18 The Learned Registrar also relies on a public policy foundation for exempting the CAIS monies from the operation of the *BIA*. The public policy argument proposes that the protection of the farming sector during difficult economic times requires that CAIS payments be exempt from being realized by creditors. The Registrar made the following comments beginning at page 33 of his decision:

The CAIS program falls under the common law as established in *Sutton v. Dorf* {[1932] 2 K. B. 304}. The program was designed to benefit one class of individual and should not be converted, according to the common law, for the benefit of other creditors be they secured or unsecured.

19 This public policy argument was considered in the decision of *Laughlin, Re*, [2004] A.J. No. 486 (Alta. Q.B.). At para. 21, Registrar Waller made the following comments:

I have reviewed the entirety of the Farm Income Protection Act (Canada) and the Farm Income Assurance Act (Manitoba) and can find no language that suggests payments under those Acts are to be considered exempt. Registrar Harrison appeared to find that the general purpose of the legislation was to give assurance to creditors of the farmer but rather to provide funds for his livelihood when he encountered difficult financial circumstances. I suppose it might fairly be said the FIDP program is intended to achieve that same purpose, but I wonder if it is the job of the court to opine general legislative intent in the absence of specific language which is well known to the law makers.

20 There is a long history of federally/provincially partnered programs designed to assist farmers during different periods. The issue of whether the proceeds of these programs are available for distribution among creditors on bankruptcy has been litigated many times.

21 In the decision of *Pannell Kerr MacGillivray Inc. v. Beer* (1988), 69 C.B.R. (N.S.) 203 (Man. Q.B.), Simonsen J. considered both the Western Grain Stabilization Act (WGSA) payments and the Special Canadian Grains Program (SCGP). Simonsen J. found the WGSA payments to be exempt as a result of a clearly worded exemption found in the WGSA itself. The SCGP payments were found to be available to creditors due to the absence of any similar exemption clause.

22 In *Beatch, Re*, [2005] S.J. No. 1 (Sask. Q.B.), Registrar Herauf found payments under the Canadian Farm Income program payments to be available for creditors for the lack of "a clear and unequivocal statement from the Federal and Provincial governments that these funds are exempt".

23 In *Mullin (Trustee of) v. Mullin*, [2002] M.J. No. 185 (Man. Q.B.) Schwartz J. found payments under the Agricultural Income Disaster Assistance program to be available to creditors noting that no exemption had been provided by either level of government responsible for the program.

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

24 This Court has considered the status of funds arising out of an agricultural assistance program in *Mini G. Enterprises Ltd. v. Kendrick*, [2001] M.J. No. 534 (Man. Q.B.). In that matter the payments in question arose from the Net Income Stabilization Account program. In that decision, I made the following statement:

Parliament has not seen fit to exempt the NISA accounts from seizure. The Provincial Legislature has not seen fit to exempt the NISA accounts from seizure. It is not for this court to provide an exemption where none exists.

25 The Learned Registrar also made reference to the comments found in the CAIS handbook that CAIS proceeds are not assignable. The CAIS handbook does not carry the authority of a statutory enactment.

26 There is a policy argument that can be made out for exempting agricultural assistance payments from distribution among creditors. Despite more than one court having held that absent an explicit statutory exemption, the funds will be divisible among creditors, Parliament and the Legislatures have not enacted such an exemption. I am not prepared to find that this lack of action was an oversight by the governing bodies. There is no exemption in the relevant statutes and the courts should not create one where one does not exist.

27 I am unable to agree with the Learned Registrar that the program dependency on the constantly changing funding formulas between the Federal and Provincial Governments or the decision of those governments to constantly change the nature of these support programs supports a finding the funds generated by these programs are not property in the hands of the trustee or the Bankrupt. Each program must be considered on its own and the decision of policy makers to create new programs on a frequent basis does not affect the status of any individual program.

28 I have come to the conclusion that proceeds paid to a farmer pursuant to the CAIS program do constitute property within the definition of the *BIA*. The right to participate in the CAIS program is incidental to the bankrupt's business and undertaking as a farmer. As such there exists the right to make application for payment under the CAIS program in any year in which the bankrupt qualifies. The right to participate in the program represents a future contingent interest in CAIS program funding. The Trustee's right to participate in the CAIS program is a power in respect of property as might have been exercised by the bankrupt on his own behalf. As such any payments made under the program fall within the definition of property under the *BIA*.

29 Having determined the proceeds of the CAIS program are in fact property under the *BIA*, the issue which must be determined is who is entitled to the funds.

Assignment of Crown Debt

30 The Trustee challenges the validity of the security agreements as they purport to attach the CAIS funds under the provisions of the *Financial Administration Act*, R. S. C. 1985, c. F-11 ("the *FAA*") which read as follows:

66. In this Part...

"Crown debt" means any existing or future debt due or becoming due by the Crown, and any other chose in action in respect of which there is a right of recovery enforceable by action against the Crown;

67. Except as provided in this Act or any other Act of Parliament,

(a) a Crown debt is not assignable; and

(b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

any rights or remedies in respect of that debt.

31 In Marzetti, supra, the Supreme Court was asked to rule on the validity of a post-bankruptcy assignment of an income tax refund:

(Para. 84) In my opinion, these points of contention do not require resolution in this appeal, inasmuch as the Agreement Letter is rendered ineffective by s. 67 of the Financial Administration Act. Section 67 provides, in part, that "[e]xcept as provided in this Act or any other Act of Parliament... a Crown debt is not assignable". The expression "Crown debt" is defined in s. 66 to include not only existing debts, but also future debts "due or becoming due". Marzetti did not obtain an accrued legal debt in respect of his post-bankruptcy income tax refund until his income tax return was filed, as I have already mentioned. But his interest in that return can legitimately be described as an interest in a future Crown debt becoming due.

This Crown-debt characterization means that the Financial Administration Act operates to prohibit assignment of an income tax refund, due or becoming due from the Crown, unless assignment is permitted by that Act or another "Act of Parliament". There is no question that the Financial Administration Act fails to permit such assignment, and no express authorization appears in any other federal statute.

32 While this statement appears to invalidate Cargill's and CIBC's attempts to enforce their security against the CAIS payments, the Marzetti decision has not been consistently followed.

33 On this point, the Saskatchewan Court of Appeal had the occasion to consider a prohibition of the assignment of proceeds of an insurance policy in the decision of Yablonski v. Cawood, [1997] S.J. No. 17 (Sask. C.A.):

(para.25) We turn to the respondents' contention that at the very least the impugned assignment is an equitable assignment with the result that moneys payable to the assignor (appellant) are held in trust for the assignees (respondents). An equitable assignment is an assignment which a Court of Equity will recognize and protect, it being in the nature of a declaration of trust based on principles of natural justice and essential fairness without regard to form: see Eastern Trust Co. v. Royal Bank of Canada, [1950] 2 D.L.R. 399 (N.S.S.C.).

In the case before us the appellant does not challenge the general rule that a person holding an equitable interest can assign it, but in the circumstances of this case, he contends that the "non-assignability" clause prohibits an equitable assignment as well as a legal assignment; accordingly it renders the assignment in question void as between the parties to this litigation.

In addressing these questions, one must first consider the purpose of the "non-assignability" clause. The provision against assignment, in circumstances like the present, is inserted for the benefit of Vermeer and its insurer. Following the finalization of the "structured" settlement nothing further remains except for Safeco to make payments under the schedule set forth in the annuity contract. Accordingly, a "non-assignability" clause should not defeat an equitable assignment such as the one before us. Furthermore Safeco has paid the moneys into Court and stands indifferent with respect to any issue between the appellant and respondents over the validity of the assignment.

In this case the question is not whether the debtor Safeco should pay but whether the assignor (appellant) should pay under the terms of an assignment that he voluntarily signed. In the circumstances of this case we find that the principles articulated in R. in Right of Alberta v. Canada West Interiors Limited, Revenue Canada and Continental Bank of Canada (1986), 43 Alta. L.R. (2d) 155 (Q.B. in Chambers) are apposite. Canada West entered into a contract with the Province and accordingly was subject to s.91(2) of the Alberta Financial Administration Act, R.S.A. 1980, c. F-9, which reads:

91 (2) The Crown is not bound by an assignment of a Crown debt unless:

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

- (a) it is an assignment binding on the Crown by reason of the regulations under this section or
- (b) in the case of a particular assignment to which the regulations do not apply the Provincial Treasurer consents to the assignment and the assignment becomes binding on the Crown under this section.

Previously Canada West Interiors had executed a general assignment of book debts in favour of Continental Bank. Alberta acknowledged receipt of the assignment but stated that its consent had not been given to the assignment. When the Province received a demand from Revenue Canada it paid the moneys into Court. The Court held that the assignment was valid as between the assignor and the assignee. When the Province paid the money into Court the rights of the bank came into play under its assignment and the bank became entitled to receive payment out of the money in Court.

This is consistent with the following observation of Danckwerts L.J. in *Spellman v. Spellman*, [1961] 2 All E.R. 498 (C.A.) at p. 500-501:

... On that view of the matter it is impossible to sustain the claim of the wife based on the theory of a gift of the car, but it appeared to me at one time that possibly there might be something in the nature of an equitable assignment of the various rights which were owned by the husband under the hire-purchase agreement. That would be a chose in action and it could be the subject of an equitable assignment which would not require to be in writing, nor, if it was done in an effective manner, would it require consideration, and that position has been discussed in the arguments. It is plain also that the fact that there is a prohibition in the document creating the chose in action against assignment is not necessarily fatal to such a claim: see *Re Turcan* (1). It is possible that if such an equitable assignment had been made, there could have been (as between husband and wife) an assignment of the benefit of the hire-purchase agreement with perhaps the obligation to indemnify the husband against the various liabilities which have to be carried out in order to comply with the terms of the hire-purchase agreement.

More recently, the British House of Lords has had occasion to comment on these matters. In *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd. and Others*, [1994] 1 A.C. 85 (H.L.(E.)), Lord Browne-Wilkinson, speaking for the majority, made reference to an academic note entitled, "Inalienable Rights?", written by Professor R.M. Goode, (1979) 42 M.L.R. 553, which commented on the case of *Helstan Securities Ltd. v. Hertfordshire County Council*, [1978] 3 All E.R. 262. At p. 104, the Law Lord stated:

In his Note, Professor Goode rightly pointed out that where a contract between A and B prohibits assignment of contractual rights by A, the effect of such a prohibition is a question of the construction of the contract. There are at least four possible interpretations, viz., (1) that the term does not invalidate a purported assignment by A to C but gives rise only to a claim by B against A for damages for breach of the prohibition; (2) that the term precludes or invalidates any assignment by A to C (so as to entitle B to pay the debt to A) but not so as to preclude A from agreeing, as between himself and C, that he will account to C for what A receives from B: In *re Turcan* (1888) 40 Ch. D. 5; (3) that A is precluded not only from effectively assigning the contractual rights to C, but also from agreeing to account to C for the fruits of the contract when received by A from B; (4) that a purported assignment by A to C constitutes a repudiatory breach of condition entitling B not merely to refuse to pay C but also to refuse to pay A.

Professor Goode then expressed the view that construction (2) (being the *Helstan* case itself) was permissible and effective but that construction (3) to the extent that it purported to render void not only the assignment as between B and C but also as between A and C was contrary to law.

I am content to accept Professor Goode's classification and conclusions, though I am bound to say that I think

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

cases within categories (1) and (4) are very unlikely to occur.

Later, he stated:

... If this is the right view of the case, it is unexceptionable: a prohibition on assignment normally only invalidates the assignment as against the other party to the contract so as to prevent a transfer of the chose in action: in the absence of the clearest words it cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy. ...

Clearly, this House of Lords decision adds significant support to the proposition that an equitable assignment as between assignee and assignor remains valid and enforceable, notwithstanding a "non-assignability" clause in the original contract. We agree with that proposition. On the undisputed facts of this case, it is enough to say that the assignment was not absolutely void and as between the parties to this litigation it is binding on the appellant.

34 In the decision of *Alberta v. Canada West Interiors Ltd.*, [1986] A.J. No. 63 (Alta. Master), the Court considered the effect of the statutory provision found in the *Alberta Financial Administration Act*, R. S. A. 1980 c. F-9:

(P. 4) There is nothing in the Act saying that an assignment of a Crown debt will be deemed to be a nullity unless it is consented to by the Crown. The Act says only that the Crown will not be bound by an assignment unless it consents to the assignment. This apparently means that the Crown can ignore, with impunity, any assignment served upon it, unless it agrees to consent to the assignment. That is not the same thing as saying the assignment is a nullity. In my opinion, the Bank did obtain a property interest in the Crown debt to Canada West as soon as that debt arose, but it was a property interest that the Bank could not enforce against the Province in the absence of the consent of the Province to the assignment. When the Province parted with the money by paying it into court, the rights of the Bank under its assignment of book debts came into play, and the Bank became entitled to receive payment out of the money in Court...

35 It must be observed that the Alberta statutory provision is not as stringent as the provisions of s. 67 of the *FAA*. However, the effect of s. 67 of the *FAA* was considered in *Orr & Co. v. Saskatchewan Economic Development Corp.*, [1994] S.J. No. 135 (Sask. Q.B.) {affirmed at (Sask. C.A.)} at para. 19:

Section 67 merely prevents an assignee or a secured creditor from exercising its rights and remedies as to a Crown debt. It does not prevent parties from entering into a security agreement to attach the debt.

36 I agree that s. 67 of the *FAA* operates to render the Crown immune from the effects of an assignment of a debt owed. The section prohibits any assignment holder from taking steps to enforce the payment of a Crown debt against the Crown. Having said that, the assignments between Cargill, CIBC and the bankrupt constitute valid equitable assignments, which the court exercising its equitable jurisdiction, will recognize. Once the CAIS monies were paid out to the Trustee, the equities between the parties bring the effects of the security agreements into play.

Income

37 Before deciding the effect of the security agreements, the court must determine how the proceeds come under the Trustee's jurisdiction.

38 In that regard, one must have reference to s. 68 of the *BIA* which reads as follows:

S. 68 Directives re standard of living factors — (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts, the standards for determining what portion of the total income

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

of an individual bankrupt that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

(2) Interpretation — For the purposes of this section,

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source;...

39 The Canadian Agricultural Income Stabilization (CAIS) Program Handbook describes the program as follows:

The Canadian Agricultural Income Stabilization (CAIS) program is designed to help you protect your farming operation from both small and large drops in income. Generally, individuals or entities that derive income from the primary production of agricultural commodities, as defined by the program, are eligible to participate in the CAIS program...

1.2.2 Reference Margin — The Basis of CAIS Program Protection

The Administration calculates your production margin for each of your previous five years, and determines your Reference Margin using an Olympic Average. This is your average production margin over the previous five-year period, where the year with the highest margin and the year with the lowest margin are dropped. This represents your average historical income and forms the basis of your protection under the program...

If your program margin has declined below your reference margin, some or all of the funds in your account will be available for withdrawal. At the same time, you will receive government funds, which will be paid to you directly. The amount of your withdrawal, and the corresponding amount of government funds, is determined by the tier of your reference margin into which your program has declined.

40 In summary, the program determines a reference margin against which each year's production is measured. In any year in which revenue production fails to meet the reference margin, the farmer may become eligible to receive government funds.

41 The characterization of funds paid to farmers under the agricultural income protection programs have been considered by other courts. In *Mullin v. Mullin*, supra the court said at para 17:

Since those payments represent losses to the respondents in farm income due to poor crops resulting from heavy frost and rains in 1998, I am satisfied that a purposive interpretation of the Act supports the applicant's argument. The AIDA payments are substitutes for income and ought to be treated as income in accordance with the provisions of S. 68 of the Act. (BIA)

42 In dealing with payments under the Canadian Farm Income Program, Registrar Herauf made the following comments in *Beatch, Re*, supra:

(para. 21) It seems to me that these payments are income and as such fall within s. 68 of the BIA. For the most part, farm subsidy programs are intended to be a form of income replacement and would certainly be "revenues of a bankrupt" as specified in s. 68. I do not see how any other conclusion is possible. This conclusion is in accord with many decisions that have held s. 68 is to be interpreted broadly. For example see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S. C. R. 701; *Re Landry* (2000), 21 C. B. R. (4th) 58 (Ont. C. A.); *Re Byrne* (2003), 41 C. B. R. (4th) 6 (Alta. Q. B.). For specific examples where similar types of payments have been held to be income see *Re Laughlin* (2004), 50 C. B. R. (4th) 104 (Alta. Q. B.); *Mullin (Trustee of) v. Mullin* (2002), 33 C. B. R. (4th) 250

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

(Man. Q. B.).

43 The comments of LoVecchio J. are helpful in *Kallenberger v. Beck (Trustee of)*, [2005] A.J. No. 1807 (Alta. Q.B.):

(para. 29) Finally, a purposive view must be taken of the CAIS account balance. There is not clear authority which deems such accounts not to operate as income. AIDA funds disbursed directly from the government to farmers have been deemed income. Classifying the payment as an asset only because of its delivery mechanism does not accord with the intent of the program or the wide interpretation given to s. 68 by the Supreme Court. With respect, I disagree with the Registrar. The CAIS receipt should be categorized as part of Mr. Beck's total income. Furthermore, classifying the CAIS receipt as part of Mr. Beck's total income does not mean he has not also acquired additional property.

44 I am satisfied the CAIS payments are meant to be a replacement or substitute for income for the farmer in a given year. Past income is used to determine the reference margin and current income used to determine entitlement. The CAIS payments clearly constitute revenue, if not income, for the farmer and therefore would fit within the definition of "total income" under s. 68 of the *BIA*. Therefore, the court must adhere to the provisions of s. 68 of the *BIA* in determining the ultimate issue of who is entitled to the funds in question.

Entitlement to CAIS Funds

45 Having found that Cargill and the CIBC are holders of an equitable assignment of the CAIS proceeds and that the CAIS proceeds constitute "total income" under the *BIA*, the task remains to determine the entitlement to the CAIS proceeds once they are paid out to the trustee.

46 The relevant provisions of the *BIA* respecting the income of the bankrupt are as follows:

68.(1) Directives re standard of living factors — The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

68.(2) Interpretation — For the purposes of this section.

(a) "total income" referred to in subsection (1) includes, notwithstanding paragraphs 67 (1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1) (b) and (b.1).

68.(3) Trustee to fix amount paid — The trustee shall

(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

136.(1) Priority of claims — Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:...

47 Having found Cargill and CIBC cannot enforce their security agreements as against the federal government,

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

the securities can attach to the CAIS proceeds after being paid out to the trustee in bankruptcy by way of an equitable assignment. I make reference to the comments found in the decision of *Agricultural Credit Corp. of Saskatchewan v. Featherstone (Trustee of)*, [1996] S.J. No. 319 (Sask. Q.B.) at para. 30 and 31:

Payments to which a person becomes entitled to, constitute personal property which is subject to a present and after-acquired security interest. (*Agricultural Credit Corporation of Saskatchewan v. Yaddof* (1998), 8 P. P. S. A. C. 234 (Q. B.); *Saskatchewan Crop Insurance Corp. v. Royal Bank and Cenaiiko* (1992), 3 P. P. S. A. C. (2d) 294 (C. A.)).

Monies owing to a bankrupt, when collected by the trustee continue to be the property of the bankrupt and continue to be subject to existing security interests. This includes monies realized through the efforts of the trustee. (*Holy Rosary Parish (Thorold) Credit Union Limited v. The Premier Trust Company*, [1965] S. C. R. 503; *Re Stadnik (Bankrupt)* (1991), 90 Sask. R. 12 (Q. B.); *Re Moore (Bankrupt)* (1989), 79 Sask. R. 63 (c. A.)).

48 Having found the CAIS monies are income replacements, they fall within the definition of "total income" under s. 68 of the *BIA*. S. 68 creates certain statutory obligations on the Trustee respecting income which come into the hands of the trustee. The nature and effect of s. 68 was described in the *Marzetti* decision, supra. Although I have not followed this decision on the effect of s. 67 of the *FAA*, the *Marzetti* decision is the leading authority on the operative effect of s. 68 of the *BIA*.

(para. 51) To proceed, I restate the question: is s. 68 a substantive or procedural provision in respect of a bankrupt's salary, wages, or other remuneration? In my opinion, the case law debate summarized above should be resolved in favour of the substantive view for three reasons. First, that view better accords with the language of s. 68. Second, it permits s. 68 to remedy more effectively the mischief which led to the original amendment. And, third, it has some support I authority from this Court...

(Para. 54) In my opinion, a plain language interpretation of s. 68(1) indicates that it applies "[n]otwithstanding section 67", it means that it operates as a complete code in respect of the listed forms of property. Or, as stated by Houlden and Morawetz, supra, at p. 3-126: "The opening words 'notwithstanding section [67]' are intended to make it clear that wages, etc. will not come within [s. 67 (c)] but will be dealt with by s. 68".

49 In *Marzetti*, the Court adopted comments from the decision of *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 (S.C.C.):

The part of the wages paid to creditors does not necessarily correspond to the part which may be attached. It may be more or less "having regard to the family responsibilities and personal situation of the bankrupt". Houlden and Morawitz, op. cit., vol. 1, write at pp. F-66 and F-69:

Since the enactment of s. 48, (now s. 68), wages have been removed from the operation of s. 47 (now s. 67) so that no part thereof vests in the trustee to be divided among creditors unless he makes an application under s. 48 and then only to the extent allowed by the court: *Re Giroux* (1983), 45 C. B. R. (N. S.) 245, 41 O. R. (2d) 351, 146 D. L. R. (3d) 103 (S. C.).

Applications under s. 48 of the Bankruptcy Act come down not to a question of law, but of fact; that is; whether the bankrupt after being given credit for his reasonable living expenses has excess funds which might be used to pay creditors.

50 The Supreme Court continued in the *Marzetti* decision, supra, at para. 60:

To summarize briefly, it is my opinion that the language of s. 68, the inferred purpose of that provision, and the

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

decision of this Court in *Vachon*, supra, all support the conclusion that s. 68 is a substantive provision, one which is intended to operate as a complete code in respect of a bankrupt's salary, wages and other remuneration. These forms of property cannot fall within s. 67 (c) of the Bankruptcy Act as a bankrupt's after-acquired "property", and they cannot be considered "property of a bankrupt divisible among his creditors" for the purposes of S. 67. They do not vest in the trustee through the simple operation of law.

51 The Ontario Court of Appeal had the occasion to apply the principles as set out in the *Marzetti* decision to the amended provisions of the *BIA* in *Landry, Re* (2000), 3 C.C.E.L. (3d) 1, 50 O.R. (3d) 1, 135 O.A.C. 381, 192 D.L.R. (4th) 728, 21 C.B.R. (4th) 58, [2000] O.J. No. 3249 (Ont. C.A.):

(Para. 27) The current s. 68 in the *BIA* differs from the former version in a number of respects...First, the section does not refer to "salary, wages or other remuneration" but to "total income". [T]otal income is defined for the purpose of s. 68 as including, notwithstanding s. 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source.

(Para. 30) In my view, the reasoning in *Marzetti* and *Wallace* that led to the conclusion that s. 68 was a complete code with respect to wages applies equally to this new section. The current provision applies to the "total income" of the bankrupt and, as such, is even wider than the earlier reference to "salary, wages and other remuneration"; the provision expressly excludes the application of s. 67 (1) (b); its purpose is no different than that described in *Marzetti* (except that applications to the court now appear to be limited to those cases where the issue cannot be otherwise resolved); and the jurisprudential principles reviewed by the Supreme Court in *Marzetti* are equally relevant.

(Para. 31) I therefore conclude that s. 67 is superseded by the provisions of the current s. 68 in so far as the "total income" of the bankrupt is concerned. It follows that, as in *Wallace*, *Landry's* claim against her former employer and any consequent award relating to lost wages do not automatically vest in the trustee under ss. 67 and 71. Resort can only be had to s. 68 for payment of any portion thereof of the estate of the bankrupt.

52 The issue to be decided therefore becomes the conflict between the equitable rights of *Cargill* and *CIBC* under their security agreements and the obligations of the trustee under s. 68 of the *BIA*.

53 As a result of the operation of S. 67 of the *Financial Administration Act*, *Cargill* and *CIBC* cannot enforce their security agreements directly against the federal government to obtain the CAIS funds. They do however retain an equitable right to enforce their security as against the trustee once the funds have been paid over.

54 On the other hand, the receipt of the CAIS funds under s.68 of the *BIA* does not automatically make these funds available to pay creditors. To the extent the funds are determined to be necessary for the bankrupt to maintain a reasonable standard of living, s. 68 operates as an exemption to execution and seizure of these funds. S. 68 imposes an obligation on all funds which constitute "total income" which must be satisfied before the funds become available for distribution among the creditors. I am persuaded that it is only after the requirements of s. 68 of the *BIA* have been met that the equitable assignment of *Cargill* and *CIBC* can attach the CAIS proceeds.

55 I am also reinforced in my opinion by comments in the *Marzetti* decision, supra, at para. 78:

My opinion is, furthermore, fortified by public policy considerations. Although the absence of language in s. 68 (2) permitting an order to be made against the Crown weighs in favour of the Trustee in this case, when family needs are at issue, I prefer to err on the side of caution. In s. 68 of the Bankruptcy Act, Parliament has indicated that, before wages become divisible among creditors, it is appropriate to have "regard to the family responsibilities and personal situation of the bankrupt". This demonstrates, to my mind, an overriding concern for the support of families.

2007 CarswellMan 191, 2007 MBQB 102, 32 C.B.R. (5th) 169, [2007] 8 W.W.R. 366, 216 Man. R. (2d) 138

Conclusion

56 The appeal from the decision of the Learned Registrar is therefore allowed. The CAIS proceeds do form part and parcel of the bankrupt's property under the provisions of the *BIA*. The security agreements held by Cargill and CIBC are valid security although unenforceable against the federal government. The CAIS proceeds are part of the Bankrupt's "total income" under the *BIA* and therefore are subject to the operation of s. 68 of the Act. The CAIS proceeds in the hands of the trustee are available for distribution among creditors only to the extent the proceeds exceed what is necessary for the bankrupt to maintain a reasonable standard of living in accordance with s. 68. The balance of the proceeds fall into the hands of the trustee for distribution to the creditors at which time Cargill and CIBC may seek to enforce their security in priority to the other creditors in accordance with s. 136 of the *BIA*.

Costs

57 This was a complex matter with many legal questions to be addressed. In my opinion, all parties should be entitled to their costs out of the Bankrupt's estate as a first charge on the property of the bankrupt's estate available after the appropriate steps have been undertaken pursuant to s. 68. I would request that counsel make submissions as to the appropriate quantum of costs to be awarded in each case.

Appeal allowed.

END OF DOCUMENT

TAB 11

1927 CarswellNS 5, 8 C.B.R. 534



1927 CarswellNS 5, 8 C.B.R. 534

McKay & Maxwell, Ltd., Re

In re McKay & Maxwell, Limited

The Canadian Bank of Commerce v. Trustee

Nova Scotia Supreme Court, In Bankruptcy

Carroll, J.

Judgment: November 14, 1927

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Counsel: *Finlay McDonald, K.C.*, for trustee.

J. MacNeil, for the Canadian Bank of Commerce.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Priorities of claims — Secured claims — Forms of secured interests — Assignments of book debts.

Luxury Tax on Automobiles — Repeal Thereof — Right of Debtor to Refund of the Taxes Paid on Automobiles Owned by Him — Assignment by Debtor to Bank — Bankruptcy of Debtor — Refund Paid to Trustee — Bank's Claim.

About four years prior to the authorized assignment of the debtor company it made an assignment to The Canadian Bank of Commerce in the following words, "all debts, accounts, claims, moneys and choses in action which now are or which may at any time hereafter be due or owing to or owned by the undersigned." The trustee received the sum of \$846.43 as a refund of the luxury tax on automobiles owned by the debtor company when the said tax was repealed by Order in Council of December 18, 1920.

On the application of the bank for the payment to it of these moneys received by the trustee,

Held, that the claim in question was covered by the words "claims" and "moneys" in the debtor's assignment to the bank, and that the bank was entitled to the same, less the costs of the parties represented at the hearing.

Claim by bank for moneys paid to trustee as a refund of luxury tax on automobiles owned by the debtor company.

Carroll, J.:

1927 CarswellNS 5, 8 C.B.R. 534

1 The firm of McKay & Maxwell were, in December, 1920, automobile dealers in Sydney and had on hand automobiles on which they had paid a luxury tax. This luxury tax law was repealed by Order in Council of December 18, 1920. McKay & Maxwell in common with automobile dealers throughout Canada asked for a refund of amounts of tax thus paid. I think it is common ground that such firms had no cause of action against the Government for the recovery of these tax payments, but the Government did set aside an amount for distribution among automobile dealers after representations made.

2 On November 15, 1921, McKay & Maxwell made an assignment of accounts, bills and securities to the Canadian Bank of Commerce, in the following words —

all debts, accounts, claims, moneys and choses in action which now are or which may at any time hereafter be due or owing to or owned by the undersigned (McKay & Maxwell).

3 In October, 1925, McKay & Maxwell made an assignment under *The Bankruptcy Act* and A. M. Crofton is trustee.

4 In 1926 Mr. Crofton received as trustee a cheque for \$846.43 as a refund of the luxury tax on the automobiles owned by McKay & Maxwell.

5 The question for determination is:

Assuming the said assignment to be valid, does the claim in question come within any of the classes assigned to the bank,

and I have come to the conclusion that the item is covered by the words "*claims*" and "*moneys*" in the assignment.

6 I do not understand why the question of the validity of the assignment as against the trustee in bankruptcy was not raised, but the fact is that it was not and the result is that the proceeds of the cheque go to the Canadian Bank of Commerce less the costs of the parties who were represented by counsel at the hearing.

END OF DOCUMENT

TAB 12

1961 CarswellOnt 50, 2 C.B.R. (N.S.) 324

C

1961 CarswellOnt 50, 2 C.B.R. (N.S.) 324

Christensen, Re

In re Christensen

Ontario Supreme Court, In Bankruptcy

Smily J.

Judgment: September 26, 1961

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Counsel: *C. H. Morawetz*, for the trustee.

C. A. Thompson, Q.C., for the applicant, Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Priorities of claims — Secured claims — Forms of secured interests — Assignments of book debts.

Secured claims — Assignment of debts, etc., to bank — Sales tax refund received by trustee.

The debtor gave to the bank an assignment of debts etc., pursuant to which he granted, assigned, transferred and made over to the bank "all book accounts and book debts and generally all accounts, debts due and demands of every nature and kind howsoever arising or secured and now due, owing or accruing or growing due, or which may hereafter become due, owing or accruing or growing due to the undersigned."

After bankruptcy of the debtor the trustee applied for a refund of sales tax and received the refund in due course.

An application was made by the trustee for directions as to whether the bank or the trustee was entitled to the sales tax refund.

Held, the bank was entitled to the refund. Although the form used by the bank was not too clear, the sales tax refund was covered by the word "demands", and came certainly within the spirit of the assignment of debts, etc., to the bank. *In re McKay & Maxwell Limited* (1927), 8 C.B.R. 534, 3 Can. Abr. 1054, applied.

Smily J. (Orally):

1 I think, as counsel for the trustee said, it would simplify the matter if the word "moneys" were put in the bank's form for "General Assignment of Debts, etc." as well as the words, "all book accounts and book debts and generally all accounts, debts due and demands of every nature and kind howsoever arising". However, my opinion is that the refund

1961 CarswellOnt 50, 2 C.B.R. (N.S.) 324

in question is covered. I would say it certainly comes within the spirit of the assignment and I should think technically it comes within the assignment, under the word "demands".

2 As counsel for the trustee points out there may not be and apparently there is not a debt which can be enforced against the Crown. I have not read the case to which he referred or the statute, but it would appear the Crown may not be bound to make the refund. However, it seems to me that this does not prevent the debtor "demanding" same and if, as a result of that demand, money is refunded then I think it belongs to the bank under the assignment. In the case of *In re McKay & Maxwell Limited* (1927), 8 C.B.R. 534, 3 Can. Abr. 1054 Carroll J. held that a refund of payments of luxury tax, the luxury tax law having been repealed, came within the words "claims" and "moneys" in a similar assignment. It was common ground that there was no cause of action against the government for the recovery of these tax payments. I do not think this case is substantially dissimilar to the case at bar.

3 The trustee is to be commended for his taking steps to get this refund. It shows that he was endeavouring to do the best he could to realize on the assets of the debtor, whether or not those assets could be retained by the debtor and the trustee, who stands in the position of the debtor.

4 It was an arguable point, as counsel for the trustee fully showed in his presentation, and as I indicated in the beginning it might have simplified matters if the word "moneys" had been included in the recital or enumeration of what was being assigned. However, I do think the application or claim for refund and the fruits thereof is covered by or included in the term "demands", within the intention of the parties and the direction will therefore go accordingly.

5 There will be no order for costs.

END OF DOCUMENT

TAB 13

1980 CarswellOnt 198, 36 C.B.R. (N.S.) 317

C

1980 CarswellOnt 198, 36 C.B.R. (N.S.) 317

Front Iron & Metal Co., Re.

Re FRONT IRON & METAL COMPANY LIMITED

Ontario Supreme Court, In Bankruptcy

Steele J.

Judgment: September 18, 1980

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Counsel: *J.H. Gardner*, for trustee.

J. Harris, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Secured creditors — Kinds of security — Assignment of book debts — Scope of assignment — Refund of corporations tax covered by assignment.

A refund of Ontario corporations tax was held to fall within the scope of an assignment of accounts in view of the bank's form which creates a trust in favour of the bank from the time of the signing of the document. The refund is covered by the word "demand" if no other.

Annotation

Although the bank's form is usually entitled "Assignment of Accounts etc." and is commonly called "assignment of book debts", the wording of the form is much wider.

In a similar case, dealing with a refund of sales tax, the late Smily J. came to the same conclusion: *Re Christensen* (1961), 2 C.B.R. (N.S.) 324 (Ont.).

C.H. Morawetz, Q.C.

:

Cases considered:

Eastern Trust Co. v. Royal Bank, 25 M.P.R. 73, [1950] C.T.C. 216, [1950] 2 D.L.R. 399 (N.S. C.A.) — applied

1980 CarswellOnt 198, 36 C.B.R. (N.S.) 317

END OF DOCUMENT

TAB 14

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

H

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

Bank of Montreal v. i Trade Finance Inc.

i Trade Finance Inc. (Appellant) and Bank of Montreal (Respondent)

Supreme Court of Canada

Binnie, LeBel, Deschamps, Fish, Charron, Rothstein, Cromwell JJ.

Heard: November 4, 2010

Judgment: May 20, 2011

Docket: 33394

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Proceedings: affirming *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.)

Counsel: Benjamin Salsberg, Fay Zalberg for Appellant

Joshua J. Siegel, Michael Collis for Respondent

Subject: Restitution; Estates and Trusts; Corporate and Commercial; Insolvency; Contracts

Restitution and unjust enrichment --- Benefits conferred under mistake --- Mistake of fact --- Miscellaneous

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s argument that it had prima facie right to recover monies paid under mistake of fact could not succeed — Principles respecting recovery of mistaken payments applied as between payor and payee — Bank was not payee, so those principles were inapplicable here.

Estates and trusts --- Trustees --- Breach of trust --- Remedies --- Against third parties --- Tracing --- Property bought

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

with trust funds

I Inc. was induced to advance substantial sum of money to W Inc. — Advances were made in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and his spouse pledged certain shares credited to investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to bank for extension by bank of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and granting tracing order allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest by virtue of constructive trust or equitable lien — This interest was not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Pledge made bank "purchaser" within meaning of words "bona fide purchaser for value without notice" — There was no dispute that bank's purchase was bona fide and was made for value and without notice — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Attachment of security interest — Elements — Debtor's interest

I Inc. was induced to advance substantial sum of money to W Inc. in context of fraudulent scheme perpetrated by W Inc.'s president, A, and others — A and spouse, R, pledged shares credited to investment account, which were purchased by A with funds from monies advanced to W Inc. by I Inc., to bank for extension of credit limit on credit card account — After fraud was discovered, I Inc. obtained judgment imposing constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and allowing tracing of those funds into hands of parties other than bona fide purchasers for value without notice — I Inc. brought successful motion for declaration that it was entitled to proceeds of sale of shares credited to investment account to exclusion of bank — Bank's appeal was allowed — I Inc. appealed — Appeal dismissed — I Inc.'s claim to disputed funds arose from judgment giving it equitable proprietary interest, interest not governed by Personal Property Security Act (PPSA) — Bank's receipt of pledge gave it enforceable PPSA security interest — Requirements for attachment under PPSA were met, including that A and R had "rights" in shares when they pledged them — A's acquisition of shares with funds he knew were obtained fraudulently under agreements between I Inc. and W Inc. did not preclude A and R from acquiring "rights" in shares — Fraud made agreement voidable, not void — Before I Inc.'s consent under agreements for W Inc. to use money advanced by I Inc. had been revoked, W Inc. was able to pass its interest in funds to A, and I Inc. had to bear risk of loss — I Inc.'s right to recover disputed funds instead of bank was limited by tracing order, and did not overcome fact that bank was bona fide purchaser for value without notice.

Personal property security --- Scope of legislation — Miscellaneous.

Restitution et enrichissement injustifié --- Avantages conférés à cause d'une erreur — Erreur de fait — Divers

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Argument de I Inc. selon lequel elle avait, à première vue,

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

le droit de recouvrer les fonds avancés à la suite d'une erreur de fait ne pouvait pas être retenu — Principes applicables en matière de recouvrement des paiements effectués par erreur s'appliquaient au rapport qui existe entre la personne qui fait le paiement et celle qui le reçoit — Comme la banque n'avait pas reçu de paiement, ces principes ne trouvaient pas application en l'espèce.

Successions et fiducies --- Fiduciaires — Abus de confiance — Réparations — À l'encontre de tierces parties — Droit de suite — Biens achetés avec les fonds de la fiducie

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. — Fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity — Cet intérêt n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable » — Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

Sûretés mobilières --- Charge effective de la sûreté — Éléments — Intérêt du débiteur

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes — Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, des actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. — Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude — I Inc. a demandé à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, avec succès — Appel interjeté par la banque a été accueilli — I Inc. a formé un pourvoi — Pourvoi rejeté — Réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity, un intérêt qui n'était pas régi par la Loi sur les sûretés mobilières (LSM) — Réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM — Conditions pour la création d'un intérêt fondé sur la LSM étaient remplies, y compris le fait que A et R avaient des « droits » sur les actions au moment où ils les ont données en gage — Acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquérir des « droits » à l'égard des actions — Fraude rendait une entente annulable, mais pas forcément nulle — Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte — Droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

connaissance préalable.

Sûretés mobilières --- Portée de la législation --- Divers.

I Inc. was induced to advance a substantial sum of money to W Inc. The advances were made in the context of a fraudulent scheme perpetrated by W Inc.'s president, A, and others. A and his spouse, R, pledged certain shares credited to an investment account, which were purchased by A with funds coming from monies advanced to W Inc. by I Inc., to the bank for an extension by the bank of the credit limit on a credit card account. At the time it received the pledge, the bank provided value and had no knowledge of the fraudulent scheme or the fact that the funds used to purchase the shares had originated from that scheme.

After the fraud was discovered, I Inc. obtained a judgment which imposed a constructive trust over all assets held by W Inc. and A that were purchased with funds fraudulently obtained from I Inc., and which granted a tracing order allowing tracing of those funds into the hands of parties other than bona fide purchasers for value without notice. On a motion by I Inc. for a declaration that it was entitled to the proceeds of the sale of the shares credited to the investment account to the exclusion of the bank, the motion judge determined that I Inc. was entitled to the funds. The motion judge held that the bank had not acquired an enforceable security interest under the Personal Property Security Act (PPSA) in the shares. The motion judge held that the investment account was impressed with a constructive trust in I Inc.'s favour. The motion judge held that the bona fide purchaser for value without notice defence did not preclude recovery by I Inc. because the bank had purchased its interest from A and R, not from W Inc.

The bank appealed to the Court of Appeal, which allowed the appeal and attributed the disputed funds to the bank, disagreeing with each of the motion judge's conclusions. I Inc. appealed.

Held: The appeal was dismissed.

Per Deschamps J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell JJ. concurring): As the bank was not a payee, the principles respecting the recovery of monies paid under mistake of fact were inapplicable. I Inc.'s claim to the disputed funds arose from the judgment giving it an equitable proprietary interest by virtue of a constructive trust or equitable lien. This interest was not governed by the PPSA.

The bank's receipt of the pledge gave it an enforceable PPSA security interest. The requirements for attachment under the PPSA were met. First, A and R signed a security agreement that identified the collateral as the shares credited to the investment account. Second, the bank gave value to A and R by extending further credit on the credit card account of A and R. Third, A and R had "rights" in the shares when they pledged them. A's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between I Inc. and W Inc. did not preclude him and R from acquiring "rights" in the shares. Fraud made an agreement voidable, not void. Before I Inc. revoked its consent under the agreements for W Inc. to use the money advanced by I Inc., W Inc. was able to pass its interest in the funds to A, and I Inc. had to bear a risk of loss.

The pledge made the bank a "purchaser" within the meaning of the words "bona fide purchaser for value without notice". There was no dispute that the bank's purchase was bona fide and was made for value and without notice. I Inc.'s right to recover the disputed funds instead of the bank was limited by the tracing order, and did not overcome the fact that the bank was a bona fide purchaser for value without notice.

I Inc. a été amenée à avancer une importante somme d'argent à W Inc. Les fonds ont été avancés dans le contexte d'un stratagème frauduleux établi par le président de W Inc., A, et d'autres personnes. Afin de faire augmenter la limite de crédit d'un compte de carte de crédit, A et sa conjointe, R, ont donné en gage, auprès d'une banque, certaines actions inscrites à un compte de placement, lesquelles avaient été achetées par A à l'aide des fonds que I Inc. avait avancés à W Inc. Au moment où elle a obtenu le gage, la banque a fourni une contrepartie et ignorait tout du stratagème frauduleux

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

ou du fait que les fonds utilisés pour acheter les actions provenaient de ce stratagème.

Après la découverte de la fraude, un jugement a été rendu en faveur de I Inc. en vertu duquel le tribunal a ordonné la création d'une fiducie par interprétation portant sur tous les actifs détenus par W Inc. et A et ayant été achetés à l'aide des fonds frauduleusement obtenus de I Inc., et a accordé un droit de suite permettant de retracer des fonds détenus par un acquéreur autre qu'un acquéreur ayant acquis les fonds de bonne foi, à titre onéreux et sans connaissance préalable de la fraude. Saisi d'une demande de I Inc. visant à faire déclarer qu'elle avait droit au produit de la vente des actions inscrites au compte d'investissement, et non la banque, la juge des requêtes a conclu que I Inc. avait effectivement droit aux fonds. La juge des requêtes a estimé que la banque n'avait pas acquis de sûreté opposable, au sens de la Loi sur les sûretés mobilières (LSM), grevant les actions. La juge des requêtes a conclu que le compte d'investissement faisait l'objet d'une fiducie par interprétation en faveur de I Inc. La juge des requêtes a estimé que la défense de l'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable, n'empêchait pas I Inc. de procéder au recouvrement parce que la banque avait acquis son intérêt de A et R, et non de W Inc.

La banque a interjeté appel auprès de la Cour d'appel, laquelle a accueilli l'appel et a jugé que la somme en litige appartenait à la banque, rejetant chacune des conclusions de la juge des requêtes. I Inc. a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (Binnie, LeBel, Fish, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Puisque la banque n'a pas été payée, les principes applicables en matière de recouvrement des paiements effectués par erreur ne s'appliquaient pas. La réclamation de I Inc. à l'égard de la somme en litige était fondée sur le jugement lui conférant un intérêt propriétaire en equity par le biais d'une fiducie par interprétation ou d'un privilège en equity. Cet intérêt n'était pas régi par la LSM.

La réception du gage par la banque lui a conféré une sûreté opposable au sens de la LSM. Les conditions pour la création d'un intérêt fondé sur la LSM étaient remplies. D'abord, A et R ont signé un contrat de sûreté décrivant les actions inscrites au compte d'investissement comme biens grevés. Ensuite, la banque a fourni une contrepartie à A et R en augmentant le crédit disponible à partir du compte de leur carte de crédit. Enfin, A et R avaient des « droits » sur les actions au moment où ils les ont données en gage. L'acquisition par A des actions tout en sachant que les fonds utilisés à cette fin avaient été frauduleusement obtenus à la suite d'ententes entre I Inc. et W Inc. ne les empêchait pas, lui et R, d'acquiescer des « droits » à l'égard des actions. La fraude rendait une entente annulable, mais pas forcément nulle. Avant que I Inc. ne révoque son consentement aux termes des ententes permettant à W Inc. d'utiliser les fonds avancés par I Inc., W Inc. a été en mesure de transmettre à A son intérêt dans les fonds, et I Inc. devait assumer un risque de perte.

Le gage a conféré à la banque la qualité d'« acquéreur de bonne foi, à titre onéreux et sans connaissance préalable ». Il ne faisait aucun doute que la banque avait la qualité d'acquéreur de bonne foi et qu'elle avait acquis les biens en cause à titre onéreux et sans connaissance préalable. Le droit de I Inc. de recouvrer la somme en litige, à l'exclusion de la banque, était restreint par l'ordonnance lui accordant un droit de suite, et ne l'emportait pas sur le fait que la banque avait la qualité d'acquéreur de bonne foi, à titre onéreux et sans connaissance préalable.

Cases considered by *Deschamps J.*:

Adams v. Alcroft (1907), 1907 CarswellNB 113, 38 S.C.R. 365 (S.C.C.) — referred to

B.M.P. Global Distribution Inc. v. Bank of Nova Scotia (2009), 2009 SCC 15, 2009 CarswellBC 809, 2009 CarswellBC 810, 304 D.L.R. (4th) 292, 386 N.R. 296, [2009] 1 S.C.R. 504, 94 B.C.L.R. (4th) 1, [2009] 8 W.W.R. 428, 452 W.A.C. 1, 58 B.L.R. (4th) 1, 268 B.C.A.C. 1 (S.C.C.) — considered

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd. (1979), [1979] 3 All E.R. 522, [1980] 1 Q.B. 677 (Eng. Q.B.) — considered

Bawlf Grain Co. v. Ross (1917), 55 S.C.R. 232, 37 D.L.R. 620, [1917] 3 W.W.R. 373, 1917 CarswellAlta 184 (S.C.C.) — considered

Bertrand v. Racicot (1978), 25 N.R. 181, 1978 CarswellQue 139, 1978 CarswellQue 139F, [1979] 1 S.C.R. 441 (S.C.C.) — referred to

Citadel General Assurance Co. v. Lloyds Bank Canada (1997), 152 D.L.R. (4th) 411, 1997 CarswellAlta 823, 1997 CarswellAlta 824, [1997] 3 S.C.R. 805, 66 Alta. L.R. (3d) 241, [1999] 4 W.W.R. 135, 19 E.T.R. (2d) 93, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada*) 206 A.R. 321, (sub nom. *Citadel General Life Assurance Co. v. Lloyds Bank Canada*) 156 W.A.C. 321, 219 N.R. 323, 47 C.C.L.I. (2d) 153, 35 B.L.R. (2d) 153 (S.C.C.) — referred to

Innovation Credit Union v. Bank of Montreal (2010), 500 W.A.C. 1, (sub nom. *Bank of Montreal v. Innovation Credit Union*) [2010] 3 S.C.R. 3, 362 Sask. R. 1, 2010 SCC 47, 2010 CarswellSask 723, 2010 CarswellSask 724, 72 C.B.R. (5th) 23, 407 N.R. 294, 325 D.L.R. (4th) 605, [2011] 2 W.W.R. 581 (S.C.C.) — considered

R. v. Canadian Imperial Bank of Commerce (2000), 2000 CarswellOnt 3955, 138 O.A.C. 127, 151 C.C.C. (3d) 439, 51 O.R. (3d) 257 (Ont. C.A.) — considered

United Shoe Machinery Co. of Canada v. Brunet (1909), [1909] A.C. 330, 18 B.R. 511, 1909 CarswellQue 39, C.R. [1909] A.C. 148 at 164 (Quebec P.C.) — referred to

434438 B.C. Ltd. v. R.S. & D. Contracting Ltd. (2002), 2002 BCCA 423, 2002 CarswellBC 1563, 171 B.C.A.C. 111, 280 W.A.C. 111 (B.C. C.A.) — referred to

Statutes considered:

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 1(1) "personal property" — considered

s. 1(1) "purchase" — considered

s. 1(1) "purchaser" — considered

s. 1(1) "security interest" — considered

s. 2 — considered

s. 2(a)(i) — considered

s. 11 — considered

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

s. 11(1) — considered

s. 11(2)(a) — considered

s. 11(2)(b) — considered

s. 11(2)(c) — considered

s. 72 — considered

Personal Property Security Act, 1993, S.S. 1993, c. P-6.2

Generally — referred to

Securities Transfer Act, 2006, S.O. 2006, c. 8

Generally — referred to

APPEAL from judgment reported at *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.), determining that bank, rather than appellant, was entitled to certain money resulting from sale of assets traceable to fraudulently obtained funds.

POURVOI à l'encontre d'un jugement publié à *Bank of Montreal v. i Trade Finance Inc.* (2009), 2009 ONCA 615, 310 D.L.R. (4th) 315, 56 C.B.R. (5th) 161, 2009 CarswellOnt 4782, 15 P.P.S.A.C. (3d) 188, 96 O.R. (3d) 561, (sub nom. *i Trade Finance Inc. v. Webworx Inc.*) 252 O.A.C. 291 (Ont. C.A.), dont la conclusion était que la banque, et non l'appelante, avait droit à certaines sommes d'argent découlant de la vente d'actifs reliés à des fonds obtenus frauduleusement.

Deschamps J.:

1 This appeal requires the Court to determine which of two innocent creditors is entitled to a limited pool of money resulting from the sale of assets traceable to fraudulently obtained funds. On one side is a creditor that advanced funds to the fraudster's corporation and that subsequently obtained an order authorizing it to trace those funds into the hands of persons other than *bona fide* purchasers for value without notice. On the other side is a creditor having no knowledge of the fraud, to which the fraudster and his spouse pledged securities acquired with the same funds in exchange for valuable consideration. To resolve this question, the Court must determine the nature of the interests held by these two parties and clarify the role that Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("*PPSA*"), plays in this determination.

I. Facts

2 The material facts in this appeal are not in dispute. Between 2002 and 2003, the appellant, i Trade Finance Inc. ("i Trade"), was induced to advance a substantial sum of money to a corporation named Webworx Inc. ("Webworx"). The advances were made in the context of a fraudulent scheme perpetrated by Webworx's President, Rohit Ablak-singh, and others, all of whom have since been convicted of criminal conspiracy in relation to the fraud. As a result of the scheme, i Trade extended financing to Webworx on the basis of representations that Webworx had substantial contracts for computer services with a large U.S. corporation, when in fact it did not.

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

3 The evidence indicates that Mr. Ablacksingh received both paycheques and corporate loans from Webworx that were financed by the advances made by i Trade to Webworx. This enabled him to purchase shares that were credited to an investment account with BMO Nesbitt Burns ("Nesbitt Burns") that was held jointly in the names of Mr. Ablacksingh and his spouse, Cindy Ramsackal.

4 Mr. Ablacksingh and Ms. Ramsackal were also joint cardholders of a MasterCard account with the respondent, the Bank of Montreal ("BMO"). The initial credit limit extended on this account was \$10,000, but it was subsequently increased to \$75,000. The basis for BMO's further extension of credit was a request by the cardholders and an agreement executed by Mr. Ablacksingh and Ms. Ramsackal pledging the shares credited to the investment account to BMO. At the time of the hearing in the Court of Appeal, the outstanding balance on the MasterCard account was \$138,747.66.

5 BMO does not dispute i Trade's evidence that the shares credited to the investment account were purchased by Mr. Ablacksingh with funds coming from the monies advanced to Webworx by i Trade, and that Ms. Ramsackal herself gave no consideration for the purchase of these shares. The parties also agree that at the time it received the pledge, BMO provided value (the extension of additional credit to Mr. Ablacksingh and Ms. Ramsackal) and had no knowledge of the fraudulent scheme or of the fact that the funds used to purchase the shares had originated from that scheme. Thus, BMO could not have any knowledge of any equitable interest of i Trade attributable to these funds.

6 On February 23, 2004 — after the fraud was discovered — MacDonald J. ordered, on consent of all parties, that the shares credited to the investment account be sold and that, after certain commissions and expenses were paid, the remaining proceeds be held in trust pending further order of the court. It is these monies (\$130,117.11 plus interest accrued since March 19, 2004) that are claimed by each of the parties to this appeal.

7 Civil proceedings were commenced by i Trade. On September 5, 2006, Belobaba J. ordered Webworx and Mr. Ablacksingh to pay US\$5,193,457.30 in damages — plus aggravated, exemplary and punitive damages, interest and costs — for conspiracy, deceit and fraudulent misrepresentation, and for knowing assistance in a breach of trust (unreported judgment dated September 5, 2006, at paras. 2, 4 and 16). He also declared that Webworx and Mr. Ablacksingh held "any real or personal property or any other assets that they purchased with funds provided by [i Trade] to Webworx as constructive trustee for the benefit [of] i Trade" (para. 5). In addition, Belobaba J. granted i Trade a tracing order, which excluded assets in the hands of *bona fide* purchasers for value without notice (para. 7). Upon execution of the tracing order, i Trade could elect in whole or in part between (1) imposing a constructive trust and/or an equitable lien; and (2) seeking a personal remedy against any party liable (para. 12).

II. Decisions of the Courts Below

A. Ontario Superior Court of Justice (No. 03-CV-246248CM4, October 14, 2008, Unreported)

8 Kiteley J. heard a motion by i Trade for a declaration that it was entitled to the disputed funds to the exclusion of BMO. She determined that i Trade was entitled to the funds on the basis of her resolution of three issues.

9 First, she found that BMO had not acquired an enforceable *PPSA* security interest in the shares credited to the investment account, because neither Mr. Ablacksingh nor Ms. Ramsackal had any "rights in the collateral" to pledge to BMO (para. 24). Ms. Ramsackal had not given any consideration for the shares and Mr. Ablacksingh "could not acquire an interest in the collateral that he knew was obtained through his fraud" (para. 25). For this reason, no security interest had attached within the meaning of s. 11 of the *PPSA*, which meant that none was enforceable against third parties.

10 Second, Kiteley J. considered whether i Trade could follow the funds it had advanced to Webworx and trace them into the shares in the investment account, which she understood to require a determination of whether the in-

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

vestment account was impressed with a constructive trust in i Trade's favour. She thus considered whether Webworx had been unjustly enriched, since the imposition of a constructive trust and tracing were, in her view, remedies that flowed from that cause of action. Kiteley J. found that Webworx had been unjustly enriched. However, because BMO had not acquired an enforceable security interest under the *PPSA*, the purported pledge by Mr. Ablacksingh and Ms. Ramsackal was "not a juristic reason that would preclude recovery by i Trade" (para. 30). Consequently, she held that the investment account was impressed with a constructive trust in i Trade's favour.

11 Finally, Kiteley J. considered whether the exercise of i Trade's right to follow the funds it had advanced to Webworx and trace them into the shares credited to the investment account was precluded on the basis that BMO was a *bona fide* purchaser for value without notice. Though she found that BMO met the requirements for establishing this defence, Kiteley J. held that this did not preclude recovery by i Trade, because BMO had *purchased* its interest from Mr. Ablacksingh and Ms. Ramsackal, not from Webworx (paras. 33-34).

B. Ontario Court of Appeal (2009 ONCA 615, 96 O.R. (3d) 561 (Ont. C.A.))

12 The Court of Appeal unanimously allowed the appeal and attributed the disputed funds to BMO. Blair J.A. (Simmons and Epstein J.J.A. concurring) disagreed with each of Kiteley J.'s conclusions.

13 Blair J.A. held that BMO had obtained, by virtue of the pledge, a security interest in the shares credited to the investment account that had attached and had been perfected under the *PPSA*. In particular, he disagreed with Kiteley J. on whether Mr. Ablacksingh had sufficient rights in the collateral to ground BMO's acquisition of an enforceable security interest in the pledged shares from him and his spouse. In Blair J.A.'s view, when i Trade loaned money to Webworx with the intention of transferring the ownership interest in it, the transfer was sufficient, even though it had been induced by fraud unbeknownst to i Trade, to create a voidable interest that could form the basis for a security interest (para. 20). Moreover, the fact that i Trade had loaned the funds to Webworx — the corporate vehicle used by Mr. Ablacksingh to commit the fraud — and not to Mr. Ablacksingh (or his spouse) personally was "quite immaterial" to the question of whether Mr. Ablacksingh had acquired a sufficient property interest from Webworx in the funds that were used to purchase the shares that Mr. Ablacksingh and Ms. Ramsackal later pledged to BMO (paras. 24-25). The key, in Blair J.A.'s opinion, was that i Trade had originally advanced the funds with an intention to pass title.

14 In any event, Blair J.A. found that BMO's *PPSA* security interest in the pledged shares made little difference to the result, since this was not a priority contest between i Trade and BMO under the *PPSA*. Further, i Trade's interest in the disputed funds by way of a constructive trust or an equitable lien was arguably excluded from the purview of the *PPSA*. Most importantly, if BMO was a *bona fide* purchaser for value without notice, any ability i Trade may have had pursuant to the order issued by Belobaba J. to recover the money it had advanced would have been lost.

15 Thus, Blair J.A. proceeded to consider whether the pledge granted to BMO had made it a *bona fide* purchaser for value without notice. He found that it had and that i Trade consequently lost its ability to trace funds into the shares that were pledged to BMO. He rejected Kiteley J.'s conclusion to the contrary, the basis for which was that BMO was a "purchaser" from Mr. Ablacksingh and Ms. Ramsackal rather than from Webworx, as follows (at para. 29):

Respectfully, that distinction is equally immaterial for these purposes. The fact that [BMO] purchased directly from the fraudster [Mr. Ablacksingh] rather than from the corporate vehicle used by the fraudster to perpetrate the fraud [Webworx] is of no moment.

16 Finally, Blair J.A. considered "whether [i Trade was] entitled to recover the [disputed funds] based on principles of unjust enrichment standing alone" (para. 30). He concluded that it was not, and that Kiteley J. had erred in focussing her unjust enrichment inquiry on Webworx and in finding that the pledge agreement with BMO was not a "juristic reason" for any enrichment that may have occurred. In Blair J.A.'s view, the unjust enrichment analysis had to be undertaken as between i Trade and BMO. Although he questioned whether BMO had in fact been "enriched" in the

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

circumstances, he found it unnecessary to decide this question, because if BMO had been enriched there were a number of juristic reasons for that enrichment, namely (i) that the shares had been pledged in a valid contract between Mr. Ablacksingh, Ms. Ramsackal and BMO; (ii) that, in law, the debtors had sufficient rights in the collateral to create a pledge; and (iii) that BMO was a *bona fide* purchaser for value without notice (para. 36).

III. Issue in This Court

17 In his judgment, Belobaba J. imposed a constructive trust over all assets held by Webworx and Mr. Ablacksingh that were purchased with the funds fraudulently obtained from i Trade. Moreover, the tracing order authorized i Trade to follow the funds it had advanced to Webworx and identify assets that could be traced to these funds in the hands of parties other than *bona fide* purchasers for value without notice.

18 At the hearing of this appeal, counsel for i Trade was asked whether i Trade had asserted a direct remedy for unjust enrichment against BMO. Counsel confirmed that no such claim had been made and that, although the Court of Appeal's reasons suggested that a direct claim for unjust enrichment was available against BMO, that was not a position i Trade had advocated.

19 Simply put, i Trade's ability to recover the disputed funds is circumscribed by the tracing order issued by Belobaba J., which incorporates an exception recognized in equity: it excludes assets in the hands of "*bona fide* purchasers for value without notice". If BMO is such a purchaser, i Trade's claim to the disputed funds cannot succeed. Consequently, this appeal ultimately turns on a single issue: Is BMO a *bona fide* purchaser for value without notice?

20 Straightforward as this issue may sound, it requires consideration of a number of interrelated matters to determine what rules will apply to resolve the competing claims. The first is the nature of i Trade's interest in the disputed funds. The second is the nature of BMO's interest in them. It is on consideration of BMO's interest that the *PPSA* is engaged. The *PPSA*'s application to BMO's interest leads us to consider whether the debtors — here the pledgors Ablacksingh and Ramsackal — had a right in the shares sufficient to support granting the pledgee, BMO, a security interest. It is worth noting that the legislation in force at the relevant time has since been changed: see *Securities Transfer Act, 2006*, S.O. 2006, c. 8. However, had that legislation applied, the outcome of this appeal would not have been different.

IV. Positions of the Parties

21 The argument of i Trade is that it advanced the funds to Webworx under a mistake of fact and accordingly has a *prima facie* right to recover them on the basis of the principles set out in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15, [2009] 1 S.C.R. 504 (S.C.C.), and *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.*, [1979] 3 All E.R. 522 (Eng. Q.B.).

22 Moreover, i Trade submits that BMO's claim to the disputed funds based on the pledge is a security interest governed by the *PPSA* and that BMO could acquire an enforceable security interest only if the pledgors themselves had rights in the collateral to pledge to BMO. This argument is based on the maxim *nemo dat quod non habet* (no one can give what he or she does not have). According to i Trade, the pledgors had acquired no interest in the shares: Ms. Ramsackal had no interest because she had given no consideration upon the purchase of the shares, and Mr. Ablacksingh could not have acquired an interest in the funds used to purchase the shares because he knew that they were attributable to the advances made by i Trade to Webworx, which he and others had procured by fraud.

23 BMO responds that the principles from *B.M.P.* and *Simms* with respect to the recovery of mistaken payments are inapplicable here because they concern the rights and obligations of payors and payees of such monies. BMO is not a payee. Even if the cases in question were applicable, this would not defeat BMO's position as a *bona fide* purchaser for value without notice, since i Trade's rights as against BMO are derived from the order, which contains an exception

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

for such a purchaser.

24 Moreover, BMO agrees with Blair J.A. that the fact that i Trade was fraudulently induced to advance money to Webworx, and not directly to Mr. Ablacksingh or Ms. Ramsackal, is immaterial to the question of whether BMO is a *bona fide* purchaser for value without notice. BMO submits that its status in this regard is not affected by any latent defect in title. BMO also agrees with the Court of Appeal that the important point is that when i Trade lent the money to Webworx, i Trade intended to pass title in the money to Webworx, regardless of the fact that it was induced to do so by fraudulent misrepresentations.

25 Finally, BMO asserts that the resolution of the dispute between the parties is not governed by the *PPSA*, even though it had a valid *PPSA* security interest. It argues that the pledge agreement establishes that it is a *bona fide* purchaser for value without notice and that, as a result of the order issued by Belobaba J., this shields it from i Trade's claim to the disputed funds.

V. Analysis

26 In Ontario, when a party claims a security interest in personal property to satisfy payment or performance of an obligation, the court must ask whether the *PPSA* applies: subject to limited exceptions, the application of that Act is pervasive. In *Innovation Credit Union v. Bank of Montreal*, 2010 SCC 47, [2010] 3 S.C.R. 3 (S.C.C.), this Court noted that the provisions of Saskatchewan's *Personal Property Security Act*, 1993, S.S. 1993, c. P-6.2, extend "to almost anything which serves the function of a security interest" (para. 18). The same is true in Ontario. Section 2 of the *PPSA* reads in part as follows:

2. Subject to subsection 4(1), this Act applies to,

(a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,

(i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt ...

27 A "security interest" is defined broadly as "an interest in personal property that secures payment or performance of an obligation", and the definition of "personal property" that applied at the relevant time included "intangibles" and "securities" (*PPSA*, s. 1(1)). The *PPSA* employs "a functional approach to determining what security interests are covered by its provisions" (*Bank of Montreal*, at para. 18). When it applies, it renders irrelevant the distinctions between the wide variety of instruments which existed at common law and in equity for taking a security interest in another person's property.

28 With this in mind, I will now consider the nature of the interests of the parties to this appeal in the disputed funds.

A. Interest of i Trade in the Disputed Funds

29 In i Trade's opinion, it has a *prima facie* right, as set out in *B.M.P., Simms* and other cases, to recover monies paid under a mistake of fact. This argument cannot succeed. The principles respecting the recovery of mistaken payments apply as between payor and payee. BMO is not a payee, so those principles are inapplicable here. Rather, the source of i Trade's claim to the disputed funds lies in Belobaba J.'s judgment, and more specifically in the order in which he authorized i Trade to follow and trace the assets acquired with funds it had advanced to Webworx. What i Trade now seeks to do is to recover the proceeds of sale of the shares credited to the investment account on the basis that they were impressed with a constructive trust or were subject to an equitable lien.

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

30 Regardless of whether i Trade elects to take the constructive trust or the equitable lien route to assert its interest, the *PPSA* does not apply to those rights. This is because i Trade acquired them as a result of Belobaba J.'s judgment granting a constructive trust or an equitable lien. The rights thus resulted from a court order, not from a "transaction ... that in substance creates a security interest" (*PPSA*, s. 2). In addition, the creation of the rights was not consensual: R. H. McLaren, *Secured Transactions in Personal Property in Canada* (2nd ed. loose-leaf), at § 1.02; F. Bennett, *Bennett on the PPSA (Ontario)* (3rd ed. 2006), at p. 15; R. C. C. Cuming, C. Walsh and R. J. Wood, *Personal Property Security Law* (2005), at pp. 85 and 96-97; J. S. Ziegel and D. L. Denomme, *The Ontario Personal Property Security Act: Commentary and Analysis* (2nd ed. 2000), at pp. 71-72.

31 Since i Trade's interest in the disputed funds is not subject to the *PPSA*, it arises in equity. The important point to bear in mind is that regardless of whether i Trade's interest resulting from Belobaba J.'s judgment was acquired by virtue of a constructive trust or an equitable lien, it is an equitable proprietary interest because it flows from one of those two equitable proprietary remedies: P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf), at pp. 5-4 and 5-39; A. H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials* (7th ed. 2009), at pp. 735-36. For the purpose of this appeal, the distinction between the constructive trust and the equitable lien is irrelevant because, if i Trade's interest prevails over that of BMO, the asset will consist of the disputed funds held in trust in lieu of the shares themselves.

32 In sum, i Trade's claim to the disputed funds arises from the judgment of Belobaba J., giving it an equitable proprietary interest in the shares credited to the investment account. This interest is not governed by the *PPSA*. The next question is whether BMO's interest prevails over i Trade's interest. This inquiry requires an examination of the consensual transaction on which BMO's interest in the disputed funds is based: the pledge by Mr. Ablacksingh and Ms. Ramsackal to BMO.

B. Interest of BMO in the Disputed Funds

33 The source of BMO's claim to the disputed funds — and of its assertion that it is a "purchaser" — is the interest it acquired when Mr. Ablacksingh and Ms. Ramsackal pledged the shares credited to the investment account. To characterize the nature of this interest, it will be necessary to review the circumstances of the pledge.

34 The documentary evidence indicates that between August and October 2002, Mr. Ablacksingh and Ms. Ramsackal requested that the credit extended on their MasterCard account with BMO be increased, first on a temporary basis and eventually on a permanent basis, from \$10,000 to \$60,000, and then to \$75,000.

35 On August 14, 2002, Mr. Ablacksingh and Ms. Ramsackal executed a "Collateral Agency Agreement" as pledgors (or "the Pledgor"). The agreement read in part as follows:

WHEREAS the Pledgor is, and has agreed with each of the Agent [Nesbitt Burns] and the Lender [BMO] that the Pledgor will at all times be, the beneficial owner of:

(a) the securities ... delivered to or held by the Agent herewith and credited by the Agent to the account of the Pledgor held at the Agent (the "Account") ...

.....

2. AGENT APPOINTMENT

The Lender hereby appoints the Agent to hold the Collateral on the Lender's behalf under the Pledge Agreement,

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

and the Agent accepts such appointment subject to the terms and conditions hereof. All Collateral shall be held by the Agent under and pursuant to this Agreement as the agent of the Lender under the Pledge Agreement.

36 Two days later, on August 16, 2002, Mr. Ablacksingh and Ms. Ramsackal executed Schedule "A" to the Collateral Agency Agreement, which designated the investment account with Nesbitt Burns as the account to which the shares being pledged were credited.

37 On February 21, 2003, the pledgors signed a "Notice and Direction" in which they expressly acknowledged that they had granted a security interest in the shares credited to the investment account to BMO. This document read in part as follows:

Until revocation and termination of this Notice and Direction under paragraph 4, below [which required BMO's written consent], ... Nesbitt Burns shall retain possession of and control over property in the Account for the benefit of [BMO] and not as agent for [Mr. Ablacksingh and Ms. Ramsackal].

38 Nesbitt Burns confirmed receipt of this Notice and Direction to BMO on March 7, 2003, and subsequent monthly statements for the investment account that were sent to BMO referred to that account as the "pledge account".

39 Professor MacDougall defines a pledge as follows:

A pledge is the creation of a possessory interest in a situation where a debtor — called the pledgor — transfers possession of property — called (like the transaction itself) the pledge — to a creditor — called a pledgee. It is a consensual transaction ... and it is a type of bailment. The peculiarity of the pledge is the ability of the pledgee to sell the pledged goods without recourse to a court of law....

.....

The pledgee acquires a special property interest in the property held.

(B. MacDougall, *Personal Property Security Law in British Columbia* (2009), at p. 35 (footnotes omitted))

40 Given the *PPSA*'s functional approach to determining which security interests it covers, regard must be had to the substance of the transaction between Mr. Ablacksingh, Ms. Ramsackal and BMO, not to its form.

41 In this case, it is clear from the evidence that the transaction was in substance intended to create a security interest: the purpose of that interest was to secure payment or performance of the obligations of Mr. Ablacksingh and Ms. Ramsackal in relation to the increased credit limit for the MasterCard account. Moreover, the examples listed in s. 2(a)(i) of the *PPSA* of transactions to which the Act applies include "pledge", and none of the exceptions to the application of the Act are relevant here. In sum, the *PPSA* applies to BMO's interest in the shares credited to the investment account.

42 Since the *PPSA* applies, BMO's interest has to be shown to comply with its provisions. The interest could be enforced only as of the moment of "attachment" (*Bank of Montreal*, at para. 20). Attachment is a statutory condition that must be met for a security interest to be enforceable against third parties. The requirements for attachment are set out in s. 11 of the *PPSA*. When Mr. Ablacksingh and Ms. Ramsackal signed the Collateral Agency Agreement, Schedule "A" to that agreement and the Notice and Direction relating to the shares credited to the investment account, that section read as follows:

11. — (1) A security interest is not enforceable against a third party unless it has attached.

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

(2) A security interest, including a security interest in the nature of a floating charge, attaches when,

(a) the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent obtains possession of the collateral or when the debtor signs a security agreement that contains a description of the collateral sufficient to enable it to be identified;

(b) value is given; and

(c) the debtor has rights in the collateral ...

43 The first two requirements for attachment of a *PPSA* interest are easily met. First, as was set out above, the debtors Mr. Ablacksingh and Ms. Ramsackal signed a security agreement that identified the collateral as the shares credited to the investment account. Second, it is clear that BMO gave value to the debtors by extending further credit on the MasterCard account of Mr. Ablacksingh and Ms. Ramsackal.

44 The real question is whether Mr. Ablacksingh and Ms. Ramsackal had rights in the shares when they pledged them to BMO. What is considered as "rights" in the collateral encompasses a range of interests beyond legal and equitable title (see McLaren, at § 2.01[2]). If Mr. Ablacksingh and Ms. Ramsackal did not have any rights in the collateral, then by operation of the *nemo dat* rule, BMO could not have acquired a statutory security interest that would be enforceable against third parties. It is not disputed that Mr. Ablacksingh purchased the shares with funds attributable to the fraud. Thus, the focus of the inquiry must be on whether Mr. Ablacksingh's acquisition of the shares with funds he knew to have been obtained fraudulently under the agreements between i Trade and Webworx precluded him and his spouse from acquiring "rights" in the shares, which they later pledged to BMO as collateral.

45 Fraud makes an agreement voidable, not void: A. Swan, *Canadian Contract Law* (2nd ed. 2009), at p. 656; G. H. L. Fridman, *The Law of Contract in Canada* (5th ed. 2006), at p. 293; *434438 B.C. Ltd. v. R.S. & D. Contracting Ltd.*, 2002 BCCA 423, 171 B.C.A.C. 111 (B.C. C.A.), at para. 34. This long-standing proposition is exemplified by *Bawlf Grain Co. v. Ross* (1917), 55 S.C.R. 232 (S.C.C.), in which Fitzpatrick C.J. wrote, at p. 233:

What is only voidable and not void cannot be held as invalid until it has been rescinded. It is not enough to avoid the contract, that nothing is done to affirm it, it must be disaffirmed. In *Deposit Life Assurance Co. v. Ayscough* [6 E. & B. 761], the defence was that the contract was induced by fraud and Lord Campbell C.J. said: —

It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded.

See also *Adams v. Alcroft* (1907), 38 S.C.R. 365 (S.C.C.), at pp. 375-76, per Idington J.; *Bertrand v. Racicot* (1978), [1979] 1 S.C.R. 441 (S.C.C.), at p. 453, citing *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330 (Quebec P.C.), at p. 339.

46 When an agreement is induced by fraud, it is the innocent party's consent to the agreement that has been fraudulently obtained. As Professor Fridman says, "[a] contract resulting from a fraudulent misrepresentation may be avoided by the victim of the fraud. In such instances the apparent consent by the innocent party to the contract and its terms, is not a real consent [and it] may be revoked at his option" (p. 286 (footnotes omitted)). However, since the decision to revoke the consent and avoid the contract falls to the innocent party, that party may elect to waive the fraud and not to avoid the contract (Swan, at p. 657).

47 The initial relationship between i Trade and Webworx was that of creditor and debtor. When it advanced funds

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

to Webworx under the agreements, i Trade, as creditor, acquired a chose in action in the form of the debt obligation (*Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805 (S.C.C.), at para. 29). Concurrently, also pursuant to the agreements, it passed title to the funds to Webworx. There is no doubt that when it did so, i Trade consented to Webworx having use of the funds. For this reason, Webworx acquired an interest that entitled it to use the funds, subject only to i Trade revoking its consent to the agreements. The following comments from *Goode on Commercial Law* are helpful in describing the concepts of personal property law that are relevant here:

Interest is to be distinguished from title. A person's interest in an asset denotes the quantum of rights over it which he enjoys against other persons, though not necessarily against *all* other persons. His title measures the strength of the interest he enjoys in relation to others....

Title to an absolute interest may be defeasible either because it is the second-best title, ... or because, though constituting the best title so long as it continues, it is subject to divestment, as where ... the contract under which the title was acquired was a voidable title which has been avoided by the exercise of a right of rescission.

(E. McKendrick, ed. (4th ed. 2009), at pp. 34-35 (emphasis in original; footnotes omitted))

48 In *R. v. Canadian Imperial Bank of Commerce* (2000), 51 O.R. (3d) 257 (Ont. C.A.), the Ontario Court of Appeal was confronted with a telemarketing scheme in which the fraudster, Mr. Obront, had induced victims in the United States to purchase gemstones at inflated prices from his corporation, Royal International Collectibles ("R.I.C."). The trial judge had ordered the forfeiture to the Crown of the proceeds of the fraudulent sales held in a U.S. dollar account in R.I.C.'s name at the Canadian Imperial Bank of Commerce, but the bank claimed to have a valid *PPSA* security interest in the funds in the account. In discussing whether R.I.C. had acquired rights in those funds that could ground the bank's acquisition of a security interest, the Court of Appeal wrote (at p. 260):

In this case, the victims of the gem scam did not know they were victims and intended to forward their funds to R.I.C. in exchange for the gemstones which they received. The interest of R.I.C. in the funds was voidable but not void *ab initio*. The security interest of the bank was therefore able to attach to the funds deposited into the account.

49 *Canadian Imperial Bank of Commerce* illustrates that when an innocent party consensually advances funds to another under an agreement, it voluntarily parts with those funds, and this divestiture conveys the right to use them. This right is subject to the innocent party avoiding the agreement by revoking their consent to it. Until that time, the agreement is effective by its terms.

50 Consequently, when i Trade discovered the fraud, it was entitled to revoke its consent to its agreements with Webworx, avoid any further obligations it may have had to Webworx under the agreements, and seek remedies. However, it was not required to do so, since it could have sought other forms of recourse. At the time of the agreements, i Trade had voluntarily passed title to the monies, and it had to bear a risk of loss under the agreements. As Angela Swan notes, at p. 656:

[i]f the contract is held to be voidable only, the risk of loss remains with the [initial] owner, for the contract with the rogue will not be rescinded in this situation and, as a result, title will have passed through the rogue and any subsequent *bona fide* purchaser will not be liable in conversion to the [initial] owner. It is far preferable that the loss remain with the [initial] owner, for that person had the better (and far cheaper) opportunity to avoid the risk entirely by requiring cash or some other secure form of payment.

51 The evidence before the Court indicates that the fraud perpetrated by Mr. Ablacksingh and others became clear to i Trade on March 23, 2003. A Mareva injunction freezing the assets of Webworx, Mr. Ablacksingh and others was obtained by i Trade on March 28, 2003. That order was continued by a further order dated April 7, 2003. Meanwhile, i Trade had filed a statement of claim on April 4, 2003, and this ultimately led to Belobaba J.'s judgment of September

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

5, 2006. That judgment ordered rescission of the agreements between i Trade and Webworx.

52 However, the evidence also indicates that before the foregoing chain of events transpired, Mr. Ablacksingh had received both paycheques and corporate loans from Webworx that were funded by the advances i Trade had made to Webworx, and that those amounts had enabled him to purchase the shares that were credited to the investment account.

53 The consequence of this chronology is that before i Trade discovered the fraud and initiated civil proceedings, Webworx had i Trade's consent under the agreements to use the money advanced by i Trade. Since Webworx was the vehicle used by Mr. Ablacksingh to perpetrate the fraud, that company was itself a party to the fraud, but this does not mean that Webworx was not entitled to use the funds. At the time Webworx was issuing paycheques and corporate loans to Mr. Ablacksingh, i Trade's consent had not been revoked and the agreements remained effective. Webworx was therefore able to pass its interest in the funds to Mr. Ablacksingh, and i Trade had to bear a risk of loss.

54 I cannot agree with the distinction drawn by i Trade on the basis of the fact that Webworx, rather than Mr. Ablacksingh, was the party to which i Trade advanced the funds. Nor can I accede to the corollary argument that Mr. Ablacksingh was unable to use the funds to acquire an interest in the shares credited, in his name and that of his spouse, to the investment account. The key is that at the time Webworx acquired the funds, it had i Trade's *consent* to their use, which brings into play the principle that a contract tainted by fraud is not void, but voidable. Webworx was entitled to use the funds. In turn, Mr. Ablacksingh was able to acquire the same interest in the funds as Webworx, and the funds were used to purchase the shares.

55 According to i Trade, to countenance this outcome would amount either to inappropriately lifting Webworx's corporate veil so as to favour Mr. Ablacksingh, or to sanctioning criminal activity. I do not accept these characterizations. Mr. Ablacksingh received no greater interest in the funds from Webworx than Webworx had received from i Trade. Because Webworx was entitled to use the funds, Mr. Ablacksingh and Ms. Ramsackal were able to acquire "rights" in the shares using the proceeds of the paycheques and of the corporate loans. As a result, they had "rights" in the collateral that were sufficient for them to pledge the shares to BMO and thereby create a security interest: see, e.g., Cuming, Walsh and Wood, who give the example (at p. 422) of a trustee who grants a security interest in the property held in trust and who, even though this was done in breach of the trust, holds sufficient title in that property for the interest to attach to the property.

56 The documents related to the pledge of the shares credited to the investment account were executed in August 2002, and Mr. Ablacksingh and Ms. Ramsackal signed the Notice and Direction on February 21, 2003, that is, before the orders rescinding the agreements with i Trade and authorizing that company to trace the funds into the hands of persons other than "*bona fide* purchasers for value without notice". BMO's interest in the shares credited to the investment account could therefore attach, giving it an enforceable *PPSA* security interest.

57 I will now consider whether BMO's receipt of the pledge, which gave it an enforceable *PPSA* security interest, also made it a "purchaser" and thereby qualified it for the *bona fide* purchaser for value without notice exception set out in Belobaba J.'s order.

C. Resolution of the Competing Claims of i Trade and BMO to the Disputed Funds

58 The *PPSA*'s priority rules do not apply here. Although BMO's interest is covered by the *PPSA*, i Trade's interest is not. As pervasive as it may be, the *PPSA* provides that, insofar as the principles of law and equity are not inconsistent with its express provisions, they supplement it and continue to apply. Section 72 reads:

72. Except in so far as they are inconsistent with the express provisions of this Act, the principles of law and equity, including the law merchant, the law relating to capacity to contract, principal and agent, estoppel, fraud,

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

misrepresentation, duress, coercion, mistake and other validating or invalidating rules of law, shall supplement this Act and shall continue to apply.

59 Recourse to the principles of law and equity does not render the *PPSA* meaningless. That Act continues to apply to BMO's statutory security interest. I find the following comment of the Court in *Bank of Montreal* (at para. 30) regarding the Saskatchewan *PPSA* illustrative of this point:

It is true that the internal priority rules of the *PPSA* cannot be invoked to resolve the dispute. However, it does not follow that the provincial security interest created under the *PPSA* does not exist outside these priority rules.

60 Traditionally, the fact that a party is a *bona fide* purchaser for value without notice has been an equitable defence. Professor Smith describes this defence as follows:

The full name of the equitable defence is 'bona fide purchase of a legal interest for value without notice of a pre-existing equitable interest'. The effect of the defence is to allow the defendant to hold its legal proprietary rights unencumbered by the pre-existing equitable proprietary rights. In other terms, where the defence operates, the pre-existing equitable proprietary rights are stripped away and lost in the transaction by which the defendant acquires its legal proprietary rights.

(L. Smith, *The Law of Tracing* (1997), at p. 386 (footnotes omitted))

61 In the case at bar, the transaction by which BMO acquired its rights was the pledge. The enforceable interest acquired by BMO in this transaction is a security interest that was created by statute and is recognized at law (*Bank of Montreal*, at para. 42). As I explained above, the statutory security interest replaced the common law pledge. If BMO is found to be a *bona fide* purchaser for value without notice, therefore, its equitable proprietary right will be defeated by the transaction in which BMO acquired its statutory security interest.

62 There is no dispute that if BMO is a "purchaser", its purchase was *bona fide* and was made for value (the increased credit extended on the MasterCard account) and without notice. It remains to be determined whether BMO is in fact a purchaser.

63 The *PPSA* expressly defines "purchase" and "purchaser":

1. — (1) In this Act,

.....

"purchase" includes taking by sale, lease, negotiation, mortgage, pledge, lien, gift or any other consensual transaction creating an interest in personal property;

.....

"purchaser" means a person who takes by purchase;

64 In addition, a purchaser, as understood in equity, is "a person who acquires *any* interest in property, whatever its quantum and whether absolutely or by way of security" (Ziegel and Denomme, at p. 26 (emphasis in original)).

65 Thus, BMO fits both the definition of "purchaser" in the *PPSA* and the meaning of that term as understood in equity, because it acquired a pledge of — that is, an interest in — the shares credited to the investment account.

2011 CarswellOnt 3306, 2011 SCC 26, J.E. 2011-880, 77 C.B.R. (5th) 231, 17 P.P.S.A.C. (3d) 250, 332 D.L.R. (4th) 193, 416 N.R. 166, 276 O.A.C. 141, [2011] 2 S.C.R. 360

66 I therefore conclude that the transaction by which BMO acquired its enforceable *PPSA* security interest made it a "purchaser" within the meaning of the words "*bona fide* purchasers for value without notice". BMO falls within the exception to the tracing order issued by Belobaba J. Consequently, any interest asserted against BMO by i Trade on the basis of Belobaba J.'s judgment will fail by virtue of the very terms of the order.

67 Since i Trade's interest in the disputed funds has been defeated by the transaction in which BMO acquired an enforceable security interest under the *PPSA*, i Trade cannot succeed in this appeal. Its right to recover the disputed funds instead of BMO is limited by the tracing order and does not overcome the fact that BMO is a *bona fide* purchaser for value without notice.

VI. Disposition

68 For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed.

Pourvoi rejeté.

END OF DOCUMENT

TAB 15

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

C

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

Torstar Corp. v. ITI Information Technology Institute Inc.

Torstar Corporation (Plaintiff) and ITI Information Technology Institute Incorporated (Defendant)

Nova Scotia Supreme Court [In Chambers]

Kennedy C.J.S.C.

Heard: June 4, 12, 2002

Judgment: June 25, 2002

Written reasons: August 7, 2002

Docket: S.H. 173364

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Counsel: *Anthony M. Tam*, for Applicant

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Personal property security --- Priority of security interest — Security interests versus other interests — Under provincial law — Lien, charge or other interest given by statute or rule of law — Miscellaneous interests

Debtor company entered into furniture and equipment lease with third party lessor — Court subsequently appointed receiver manager of debtor company — Receiver manager borrowed money to fund continued operation of debtor company and amounts borrowed were subject of receiver's certificates issued in accordance with receivership order — Receiver's certificates created charge on all assets of debtor company but specified that charge was subordinate to right of receiver manager to be indemnified for costs and expenses incurred — Receiver manager brought application for determination of its priority with respect to furniture and equipment which were subject of lease — Charges created by receiver's certificates and receiver manager's claim for indemnity for its costs and expenses had priority over interests of lessor — Receiver's priority was established by court order and was not affected by Personal Property Security Act — Fact that lessor had failed to perfect security interest under Act was moot — Receiver manager was appointed pursuant to Civil Procedure Rules and not with respect to any specific security or secured party — Court appointment of receiver manager preserved assets of debtor company for benefit of all interested parties in order to allow receiver manager to find purchaser for assets — Funds borrowed under receiver's certificates allowed for continued operation of debtor company pending closing of sale to purchaser — Personal Property Security Act, S.N.S. 1995-96, c. 13, s. 5(a) — Civil Procedure Rules, N.S. Civ. Pro. Rules, R. 46.01(1).

Receivers --- Remuneration of receiver — Costs

Debtor company entered into furniture and equipment lease with third party lessor — Court subsequently appointed

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

receiver manager of debtor company — Receiver manager borrowed money to fund continued operation of debtor company and amounts borrowed were subject of receiver's certificates issued in accordance with receivership order — Receiver's certificates created charge on all assets of debtor company but specified that charge was subordinate to right of receiver manager to be indemnified for costs and expenses incurred — Receiver manager brought application for determination of its priority with respect to furniture and equipment which were subject of lease — Charges created by receiver's certificates and receiver manager's claim for indemnity for its costs and expenses had priority over interests of lessor — Receiver's priority was established by court order and was not affected by Personal Property Security Act — Fact that lessor had failed to perfect security interest under Act was moot — Receiver manager was appointed pursuant to Civil Procedure Rules and not with respect to any specific security or secured party — Court appointment of receiver manager preserved assets of debtor company for benefit of all interested parties in order to allow receiver manager to find purchaser for assets — Funds borrowed under receiver's certificates allowed for continued operation of debtor company pending closing of sale to purchaser — Personal Property Security Act, S.N.S. 1995-96, c. 13, s. 5(a) — Civil Procedure Rules, N.S. Civ. Pro. Rules, R. 46.01(1).

Cases considered by *Kennedy C.J.S.C.*:

Bulut v. Brampton (City), 2000 CarswellOnt 1063, 185 D.L.R. (4th) 278, 48 O.R. (3d) 108, 15 P.P.S.A.C. (2d) 213, (sub nom. *Bulut v. Sun Life Assurance Co. of Canada*) 131 O.A.C. 52, 16 C.B.R. (4th) 41 (Ont. C.A.) — considered

Statutes considered:

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

s. 1 [rep. & sub. 1992, c. 27, s. 2] — referred to

s. 47(1) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

Personal Property Security Act, S.N.S. 1995-96, c. 13

Generally — considered

s. 1 — referred to

s. 5(a) — considered

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules

R. 46.01 — considered

R. 46.01(1) — considered

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

APPLICATION by receiver manager for determination of its priority in respect of certain assets which were subject of lease between debtor company and third party lessor.

Kennedy C.J.S.C.:

- 1 This is the matter of Torstar Corporation (Torstar) and ITI Information Technology Incorporated (ITI).
- 2 This is an application brought by Ernst & Young Incorporated, the receiver and manager of ITI, asking this Court to determine the priority interest of the receiver and manager in respect of certain personal property which was the subject of a lease between ITI and a third party lessor.
- 3 If the Court finds the interest of the receiver and manager is in priority, the receiver and manager seeks the authority to authorize the sale of that personal property by the receiver and manager, free and clear of the interest of the lessor.
- 4 The third party lessor did not attend to contest this application and I am satisfied that it had notice but chose not to do so.
- 5 The applicant has set out in detail the background of this matter and I will repeat much of it, if you will bear with me, because I think that the background is of some significance.
- 6 On August 16, 2001, Associate Chief Justice Michael MacDonald, of this Court, granted an interim receivership order appointing Ernst & Young as interim receiver of the property and assets of ITI Education Corporation (EDCo). That order was pursuant to subs. 47(1) of the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3, s.1; 1992, c.27, s.2. On September 14, 2001, the interim receivership order, so granted, was extended by order of Justice Robertson of this Court. That extension was until November 15, 2001. The term of the order was further extended by Justice LeBlanc of this Court until June 30, 2002.
- 7 EDCo was the parent company of ITI. The major assets of EDCo were shares of the capital stock of its wholly owned subsidiary ITI and trademarks relating to ITI.
- 8 ITI was incorporated under the laws of Nova Scotia, with its head office here in Halifax. It carried on the business of computer training at schools located in Halifax, Moncton, Toronto, Ottawa, Mississauga, Calgary and Vancouver.
- 9 EDCo and ITI owned no real property. The personal property consists substantially of intellectual property, computers, office equipment and furniture. Only the Halifax, Toronto and Vancouver schools remain open as of the date of this application.
- 10 On August 16, 2001, Associate Chief Justice MacDonald granted another order, the receivership order. And to be specific, it was order SH 173364. That order appointed Ernst & Young as receiver and manager of ITI and it was pursuant to *Civil Procedure Rule 46(1)*. Ernst & Young immediately offered the assets and property of the ITI business for sale and were able to conclude an agreement with Education Management Corporation for the sale of those assets, the assets of EDCo.
- 11 By an order dated September 17, 2001, Justice Robertson authorized the receiver and manager to execute the purchase agreement and to file a proposal to the creditors of ITI pursuant to the *Bankruptcy Act*. The purchase agreement required, as a condition to the closing of that transaction, the amalgamation of ITI, Education Financial Services Incorporated and a company known as 3059728 Nova Scotia Limited, which company is also owned by EDCo, and that amalgamation was to create a company to be known as ITI Information Technology Institute Incorporated. That amalgamation was accomplished. As a result, the purchase agreement closed effective November 22,

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

2001. On September 28, 2001, ITI submitted to Ernst & Young a proposal to its creditors, and a copy of the proposal and a projected cashflow statement was filed with the official receiver on that same day.

12 On October 15, 2001, the creditors of ITI voted in favour of approving that proposal and there was an amendment to it.

13 On October 31, 2001, Justice Coughlan of this Court granted an order approving that proposal. In accordance with the terms of the purchase agreement, the appointment of the receiver and manager was to be discharged in respect of the assets acquired under the purchase agreement, but the remaining assets, the excluded assets, were to remain under the control of the receiver and manager.

14 On November 15, 2001, Justice David Gruchy granted an order partially discharging the receiver and manager in respect of the assets acquired under the purchase agreement. It was a term of that order that read, "it is further ordered that any monies hereafter received by the receiver and manager from any dispositions of the excluded assets, after deducting the costs of the receiver and manager relating to such dispositions, be paid to the purchaser to partially reimburse the purchaser for amounts to be paid under the purchase agreement."

15 On the closing of the purchase agreement, the purchaser advanced to the receiver and manager certain amounts to pay the interim financing costs owed by the receiver and manager to Torstar Corporation. That was the company which had funded the receivership up to that point.

16 The purchaser further loaned certain amounts to the receiver and manager in connection with the receivership.

17 The amounts borrowed by the receiver and manager from the purchaser and Torstar Corporation are the subject of receiver's certificates issued in accordance with that receivership order. The certificates create a charge on all assets of ITI, but such charge ranks subordinate to the right of the receiver and manager to be indemnified out of the assets in respect of its costs and expenses incurred as receiver and allowed by this Court.

18 Paragraphs 3 and 4 of the receiver's certificate state:

Paragraph 3

Pursuant to the terms of the Order, repayment of the principal sum advanced pursuant to this Certificate and interest thereon, and all expenses incurred by the holder or holders in connection with its repayment, is by the terms of the Order secured by a charge (the "Charge") on the property, assets and undertaking of the Company as determined in accordance with the Order (collectively, the "Charged Property").

Paragraph 4

The Charge shall rank in priority to mortgages, charges, liens and security interests in respect of the Charged Property as determined by the Order of this Honourable Court, but the Charge shall rank subordinate to the right of the Receiver to be indemnified out of the Charged Property in respect of its remuneration to be allowed by this Honourable Court, and its costs and expenses properly incurred as Receiver. The charge shall be a continuous charge for any balance and any and all monies payable under the provisions of the Order.

19 ITI had entered into a certain personal property lease dated November 4, 1999, for furniture and equipment. The lessor was DeLage Landen Financial Services Incorporated. The lease was for a term in excess of one year, but a search pursuant to the *Personal Property Security Act*, R.S.N.S. 1995-96, c.13, s.1 (PPSA) disclosed no registration of the document in favour of the lessor. No registration in respect of the lease.

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

20 The personal property subject to the lease was not sold to the purchaser. The furniture that was the subject of the lease, the equipment that was the subject of the lease was not sold to the purchaser, but remains under the control of the receiver manager. The value of that furniture, that equipment, is difficult to determine. The value on liquidation depends upon whether the furniture can be sold *en bloc* and whether the purchaser would have use for furniture in its present configuration.

21 So, the question put by the applicant Ernst & Young for determination of this Court is this, do the charges under the receiver's certificates and the receiver manager's claim for indemnity for its costs and expenses, have priority to the interests of the lessor to the personal property subject to the lease? And in respect to that question, the applicant has argued that the lessor, by failing to register a financial statement under the PPSA *Personal Property Security Act* is an unperfected secured creditor.

22 The applicant further submits that the charges, under the receiver's certificate and the receiver manager's claim for indemnity for costs and expenses, have priority to the unperfected interests of the lessor.

23 I find that both these charges, both the charge created by the receiver's certificates and the receiver manager's claim for indemnity towards costs and expenses incurred in carrying out its function under the court order, do have priority with respect to the lessor's interest in the furniture and equipment subject to that lease, both do have priority.

24 I find though, that both of these charges have priority that is established by an order of this Court, and both are outside the ambit of the *Personal Property Security Act*. This was an alternative argument put forward by the applicant.

25 The receiver and manager was appointed pursuant to the Civil Procedure Rules of this Court. Rules created by this court, specifically Rule 46.01. The receiver and manager was not appointed pursuant to specific security in favour of a secured party.

26 Rule 46.01. (1) reads:

The court may appoint a receiver in any proceeding in which it appears to be just or convenient, and the appointment may be made either unconditionally or upon such terms and conditions as the court thinks fit.

27 Quite significant power to appoint a receiver under that rule. Two of the paragraphs contained in the Associate Chief Justice MacDonald's receivership order, one of the two orders dated August 16, 2001, two of the clauses under that receivership order are significant I think. Paragraph 8 reads:

AND IT IS FURTHER ORDERED that the Receiver and Manager

(a) in addition to the powers conferred by Paragraph 5 hereof, be at liberty and is hereby empowered to borrow moneys without personal liability from time to time as it may consider necessary or desirable not exceeding the principal sum of \$1,000,000 in the aggregate at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange for the purpose of carrying on the business of the Company and protecting, preserving and managing the Assets, and that as security for such borrowings and every part thereof, the Receiver and Manager is authorized to pledge, assign or give security or securities on the Assets or any portion thereof which shall form a charge on the Assets, any other property or asset in priority to the interest of any affected secured creditor, but subject to the right of the Receiver and Manager to be indemnified out of the Assets with respect to its own liabilities, expenses and remuneration properly incurred;

2002 CarswellNS 335, 2002 NSSC 200, 36 C.B.R. (4th) 114, 207 N.S.R. (2d) 9, 649 A.P.R. 9

28 And, paragraph 14 of the order reads as follows, I am not quoting all of it but a pertinent part of it, I believe:

AND IT IS FURTHER ORDERED that the Receiver and Manager is hereby empowered to retain such agents, employees, solicitors, auditors, engineers and other professionals or experts for the purpose of carrying out its powers and duties hereunder as the Receiver and Manager may consider necessary or desirable, including without restriction, for the purpose of performing environmental reviews of any of the assets, . . . and the expenditures which shall be properly made or incurred by the Receiver and Manager, together with the fees of the Receiver and Manager in connection therewith, shall be allowed to it in passing of its accounts and shall form a charge on the assets, collateral and undertaking of the Company in priority to all other claims and charges.

29 It is beneficial to remember why this order was granted. Why did the court exercise that kind of power? The appointment of the receiver and manager preserved the assets of ITI for the benefit of all the interested parties, in order to allow the receiver and manager an opportunity to find a purchaser for those assets. The funds borrowed under the receiver's certificates were used to continue the operation of the ITI schools across Canada, pending the closing of the sale to the purchaser. There were some thirteen hundred students attending those schools at the time. It was a court order, made for good reason. The court order granting these charges against the property of those creditors creates a charge that is created by operation of law. Section 5(a) of the *Personal Property Security Act* states:

Except as otherwise provided in this Act, this Act does not apply to

(a) a lien, charge or other interest given by rule of law . . .

30 Richard H. McLaren in the text *Secured Transactions in Personal Property in Canada*, Second Edition, 2002-Rel. 5 comments at p. 1-83:

In general, the Act [speaking of the various provincial personal property security acts] applies only to consensual transactions. Therefore security interests arising by the operation of law, with one exception, are not regulated by it. [and the one exception is not relevant for our purposes]

31 The case of *Bulut v. Brampton (City)*, [2000] O.J. No. 1062 (Ont. C.A.), that is a case, an example of that court, that Ontario Court of Appeal, specifically, Mr. Justice MacPherson of Bridgewater, Nova Scotia, writing for the majority, finding that priority determined by court order, made in that case by a motions judge, considering both common law and equity was priority that operated beyond the ambit of statutory regime. And particularly the ambit of the *Personal Property Security Act*, R.S.O. 1990.

32 The priority of the receiver and manager herein is judge made law, it was created, it was an order created for the benefit of all interested parties, and I again mention those thirteen hundred students who were interested parties no doubt. The *Personal Property Security Act* does not apply in this specific, this was priority created beyond the ambit of that *Act*, and because it does not apply the fact that the lessor has failed to perfect his security under the *Act*, I find to be moot. Having so found I will grant the order requested by the applicant, I will acknowledge the applicant's claim to be in priority to that of the lessor and will sign an order that accomplishes what the lessor wishes to do.

Order accordingly.

END OF DOCUMENT

TAB 16

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1



2010 CarswellBC 3419, **2010 SCC 60**, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [**2010**] 3 S.C.R. 379, [**2010**] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Ted Leroy Trucking [Century Services] Ltd., Re

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Supreme Court of Canada

Desehamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010

Judgment: December 16, 2010

Docket: 33239

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Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

Counsel: Mary I.A. Buttery, Owen J. James, Matthew J.G. Curtis for Appellant

Gordon Bourgard, David Jacyk, Michael J. Lema for Respondent

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

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

Debtor owed Crown under Excise Tax Act (ETA) for unremitted GST — Debtor sought relief under Companies' Creditors Arrangement Act (CCAA) — Under order of BC Supreme Court, amount of GST debt was placed in trust account and remaining proceeds of sale of assets paid to major secured creditor — Debtor's application for partial lifting of stay of proceedings to assign itself into bankruptcy was granted, while Crown's application for payment of tax debt was dismissed — Crown's appeal to BC Court of Appeal was allowed — Creditor appealed to Supreme Court of Canada — Appeal allowed — Analysis of ETA and CCAA yielded conclusion that CCAA provides that statutory deemed trusts do not apply, and that Parliament did not intend to restore Crown's deemed trust priority in GST claims under CCAA when it amended ETA in 2000 — Parliament had moved away from asserting priority for Crown claims under both CCAA and Bankruptcy and Insolvency Act (BIA), and neither statute provided for preferred treatment of GST claims — Giving Crown priority over GST claims during CCAA proceedings but not in bankruptcy would

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

reduce use of more flexible and responsive CCAA regime — Parliament likely inadvertently succumbed to drafting anomaly — Section 222(3) of ETA could not be seen as having impliedly repealed s. 18.3 of CCAA by its subsequent passage, given recent amendments to CCAA — Court had discretion under CCAA to construct bridge to liquidation under BIA, and partially lift stay of proceedings to allow entry into liquidation — No "gap" should exist when moving from CCAA to BIA — Court order segregating funds did not have certainty that Crown rather than creditor would be beneficiary sufficient to support express trust — Amount held in respect of GST debt was not subject to deemed trust, priority or express trust in favour of Crown — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

titre de la TPS ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

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

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

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

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

The creditor appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

Per Deschamps J. (McLachlin C.J.C., Binnie, LeBel, Charron, Rothstein, Cromwell JJ. concurring): A purposive and contextual analysis of the ETA and CCAA yielded the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the CCAA when it amended the ETA in 2000. Parliament had moved away from asserting priority for Crown claims in insolvency law under both the CCAA and Bankruptcy and Insolvency Act (BIA). Unlike for source deductions, there was no express statutory basis in the CCAA or BIA for concluding that GST claims enjoyed any preferential treatment. The internal logic of the CCAA also militated against upholding a deemed trust for GST claims.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

Per Fish J. (concurring): Parliament had declined to amend the provisions at issue after detailed consideration of the insolvency regime, so the apparent conflict between s. 18.3 of the CCAA and s. 222 of the ETA should not be treated as a drafting anomaly. In the insolvency context, a deemed trust would exist only when two complementary elements co-existed: first, a statutory provision creating the trust; and second, a CCAA or BIA provision confirming its effective operation. Parliament had created the Crown's deemed trust in the Income Tax Act, Canada Pension Plan and Employment Insurance Act and then confirmed in clear and unmistakable terms its continued operation under both the CCAA and the BIA regimes. In contrast, the ETA created a deemed trust in favour of the Crown, purportedly notwithstanding any contrary legislation, but Parliament did not expressly provide for its continued operation in either the BIA or the CCAA. The absence of this confirmation reflected Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings. Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings, and so s. 222 of the ETA mentioned the BIA so as to exclude it from its ambit, rather than include it as the other statutes did. As none of these statutes mentioned the CCAA expressly, the specific reference to the BIA had no bearing on the interaction with the CCAA. It was the confirmatory provisions in the insolvency statutes that would determine whether a given deemed trust would subsist during insolvency proceedings.

Per Abella J. (dissenting): The appellate court properly found that s. 222(3) of the ETA gave priority during CCAA proceedings to the Crown's deemed trust in unremitted GST. The failure to exempt the CCAA from the operation of this provision was a reflection of clear legislative intent. Despite the requests of various constituencies and case law confirming that the ETA took precedence over the CCAA, there was no responsive legislative revision and the BIA remained the only exempted statute. There was no policy justification for interfering, through interpretation, with this clarity of legislative intention and, in any event, the application of other principles of interpretation reinforced this conclusion. Contrary to the majority's view, the "later in time" principle did not favour the precedence of the CCAA, as the CCAA was merely re-enacted without significant substantive changes. According to the Interpretation Act, in such circumstances, s. 222(3) of the ETA remained the later provision. The chambers judge was required to respect the priority regime set out in s. 222(3) of the ETA and so did not have the authority to deny the Crown's request for payment of the GST funds during the CCAA proceedings.

La compagnie débitrice devait à la Couronne des montants de TPS qu'elle n'avait pas remis, en vertu de la Loi sur la taxe d'accise (LTA). La débitrice a entamé des procédures judiciaires en vertu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). En vertu d'une ordonnance du tribunal, le montant de la créance fiscale a été déposé dans un compte en fiducie et la balance du produit de la vente des actifs de la débitrice a servi à payer le

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

créancier garanti principal. La demande de la débitrice visant à obtenir la levée partielle de la suspension de procédures afin qu'elle puisse faire cession de ses biens a été accordée, alors que la demande de la Couronne visant à obtenir le paiement immédiat des montants de TPS non remis a été rejetée.

L'appel interjeté par la Couronne a été accueilli. La Cour d'appel a conclu que le tribunal se devait, en vertu de la LTA, de donner priorité à la Couronne une fois la faillite inévitable. La Cour d'appel a estimé que l'art. 222 de la LTA établissait une fiducie présumée ou bien que l'ordonnance du tribunal à l'effet que les montants de TPS soient détenus dans un compte en fiducie créait une fiducie expresse en faveur de la Couronne.

Le créancier a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Deschamps, J. (McLachlin, J.C.C., Binnie, LeBel, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : Une analyse téléologique et contextuelle de la LTA et de la LACC conduisait à la conclusion que le législateur ne saurait avoir eu l'intention de redonner la priorité, dans le cadre de la LACC, à la fiducie réputée de la Couronne à l'égard de ses créances relatives à la TPS quand il a modifié la LTA, en 2000. Le législateur avait mis un terme à la priorité accordée aux créances de la Couronne dans le cadre du droit de l'insolvabilité, sous le régime de la LACC et celui de la Loi sur la faillite et l'insolvabilité (LFI). Contrairement aux retenues à la source, aucune disposition législative expresse ne permettait de conclure que les créances relatives à la TPS bénéficiaient d'un traitement préférentiel sous le régime de la LACC ou celui de la LFI. La logique interne de la LACC allait également à l'encontre du maintien de la fiducie réputée à l'égard des créances découlant de la TPS.

Le fait de faire primer la priorité de la Couronne sur les créances découlant de la TPS dans le cadre de procédures fondées sur la LACC mais pas en cas de faillite aurait pour effet, dans les faits, de priver les compagnies de la possibilité de se restructurer sous le régime plus souple et mieux adapté de la LACC. Il semblait probable que le législateur avait par inadvertance commis une anomalie rédactionnelle, laquelle pouvait être corrigée en donnant préséance à l'art. 18.3 de la LACC. On ne pouvait plus considérer l'art. 222(3) de la LTA comme ayant implicitement abrogé l'art. 18.3 de la LACC parce qu'il avait été adopté après la LACC, compte tenu des modifications récemment apportées à la LACC. Le contexte législatif étayait la conclusion suivant laquelle l'art. 222(3) de la LTA n'avait pas pour but de restreindre la portée de l'art. 18.3 de la LACC.

L'ampleur du pouvoir discrétionnaire conféré au tribunal par la LACC était suffisant pour établir une passerelle vers une liquidation opérée sous le régime de la LFI, de sorte qu'il avait, en vertu de la LACC, le pouvoir de lever la suspension partielle des procédures afin de permettre à la débitrice de procéder à la transition au régime de liquidation. Il n'y avait aucune certitude, en vertu de l'ordonnance du tribunal, que la Couronne était le bénéficiaire véritable de la fiducie ni de fondement pour donner naissance à une fiducie expresse, puisque les fonds étaient détenus à part jusqu'à ce que le litige entre le créancier et la Couronne soit résolu. Le montant perçu au titre de la TPS mais non encore versé au receveur général du Canada ne faisait l'objet d'aucune fiducie présumée, priorité ou fiducie expresse en faveur de la Couronne.

Fish, J. (souscrivant aux motifs des juges majoritaires) : Le législateur a refusé de modifier les dispositions en question suivant un examen approfondi du régime d'insolvabilité, de sorte qu'on ne devrait pas qualifier l'apparente contradiction entre l'art. 18.3 de la LACC et l'art. 222 de la LTA d'anomalie rédactionnelle. Dans un contexte d'insolvabilité, on ne pourrait conclure à l'existence d'une fiducie présumée que lorsque deux éléments complémentaires étaient réunis : en premier lieu, une disposition législative qui crée la fiducie et, en second lieu, une disposition de la LACC ou de la LFI qui confirme l'existence de la fiducie. Le législateur a établi une fiducie présumée en faveur de la Couronne dans la Loi de l'impôt sur le revenu, le Régime de pensions du Canada et la Loi sur l'assurance-emploi puis, il a confirmé en termes clairs et explicites sa volonté de voir cette fiducie présumée produire ses effets sous le régime de la LACC et de la LFI. Dans le cas de la LTA, il a établi une fiducie présumée en faveur de la Couronne, sciemment et sans égard pour

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

toute législation à l'effet contraire, mais n'a pas expressément prévu le maintien en vigueur de celle-ci sous le régime de la LFI ou celui de la LACC. L'absence d'une telle confirmation témoignait de l'intention du législateur de laisser la fiducie présumée devenir caduque au moment de l'introduction de la procédure d'insolvabilité. L'intention du législateur était manifestement de rendre inopérantes les fiducies présumées visant la TPS dès l'introduction d'une procédure d'insolvabilité et, par conséquent, l'art. 222 de la LTA mentionnait la LFI de manière à l'exclure de son champ d'application, et non de l'y inclure, comme le faisaient les autres lois. Puisqu'aucune de ces lois ne mentionnait spécifiquement la LACC, la mention explicite de la LFI n'avait aucune incidence sur l'interaction avec la LACC. C'était les dispositions confirmatoires que l'on trouvait dans les lois sur l'insolvabilité qui déterminaient si une fiducie présumée continuerait d'exister durant une procédure d'insolvabilité.

Abella, J. (dissidente) : La Cour d'appel a conclu à bon droit que l'art. 222(3) de la LTA donnait préséance à la fiducie présumée qui est établie en faveur de la Couronne à l'égard de la TPS non versée. Le fait que la LACC n'ait pas été soustraite à l'application de cette disposition témoignait d'une intention claire du législateur. Malgré les demandes répétées de divers groupes et la jurisprudence ayant confirmé que la LTA l'emportait sur la LACC, le législateur n'est pas intervenu et la LFI est demeurée la seule loi soustraite à l'application de cette disposition. Il n'y avait pas de considération de politique générale qui justifierait d'aller à l'encontre, par voie d'interprétation législative, de l'intention aussi clairement exprimée par le législateur et, de toutes manières, cette conclusion était renforcée par l'application d'autres principes d'interprétation. Contrairement à l'opinion des juges majoritaires, le principe de la préséance de la « loi postérieure » ne militait pas en faveur de la préséance de la LACC, celle-ci ayant été simplement adoptée à nouveau sans que l'on ne lui ait apporté de modifications importantes. En vertu de la Loi d'interprétation, dans ces circonstances, l'art. 222(3) de la LTA demeurait la disposition postérieure. Le juge siégeant en son cabinet était tenu de respecter le régime de priorités établi à l'art. 222(3) de la LTA, et il ne pouvait pas refuser la demande présentée par la Couronne en vue de se faire payer la TPS dans le cadre de la procédure introduite en vertu de la LACC.

Cases considered by *Deschamps J.*:

Air Canada, Re (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]) — referred to

Air Canada, Re (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) — referred to

Alternative granite & marbre inc., Re (2009), (sub nom. *Dep. Min. Rev. Quebec v. Caisse populaire Desjardins de Montmagny*) 2009 G.T.C. 2036 (Eng.), (sub nom. *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*) [2009] 3 S.C.R. 286, 312 D.L.R. (4th) 577, [2009] G.S.T.C. 154, (sub nom. *9083-4185 Québec Inc. (Bankrupt), Re*) 394 N.R. 368, 60 C.B.R. (5th) 1, 2009 SCC 49, 2009 CarswellQue 10706, 2009 CarswellQue 10707 (S.C.C.) — referred to

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re (2000), 2000 CarswellOnt 3269, 19 C.B.R. (4th) 158 (Ont. S.C.J.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. *Doré v. Verdun (City)*) [1997] 2 S.C.R. 862, (sub nom. *Doré v.*

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Verdun (Ville) 215 N.R. 81, (sub nom. *Doré v. Verdun (City)*) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — distinguished

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — considered

First Vancouver Finance v. Minister of National Revenue (2002), [2002] 3 C.T.C. 285, (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 6998 (Eng.), (sub nom. *Minister of National Revenue v. First Vancouver Finance*) 2002 D.T.C. 7007 (Fr.), 288 N.R. 347, 212 D.L.R. (4th) 615, [2002] G.S.T.C. 23, [2003] 1 W.W.R. 1, 45 C.B.R. (4th) 213, 2002 SCC 49, 2002 CarswellSask 317, 2002 CarswellSask 318, [2002] 2 S.C.R. 720 (S.C.C.) — considered

Gauntlet Energy Corp., Re (2003), 30 Alta. L.R. (4th) 192, 2003 ABQB 894, 2003 CarswellAlta 1735, [2003] G.S.T.C. 193, 49 C.B.R. (4th) 213, [2004] 10 W.W.R. 180, 352 A.R. 28 (Alta. Q.B.) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 1990 CarswellBC 394, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*) [1991] 2 W.W.R. 136 (B.C. C.A.) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Komunik Corp., Re (2010), 2010 CarswellQue 686, 2010 QCCA 183 (Que. C.A.) — referred to

Komunik Corp., Re (2009), 2009 QCCS 6332, 2009 CarswellQue 13962 (Que. S.C.) — referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282 (Ont. C.A.) — considered

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

Philip's Manufacturing Ltd., Re (1992), 9 C.B.R. (3d) 25, 67 B.C.L.R. (2d) 84, 4 B.L.R. (2d) 142, 1992 CarswellBC 542 (B.C. C.A.) — referred to

Quebec (Deputy Minister of Revenue) c. Rainville (1979), (sub nom. *Bourgeault, Re*) 33 C.B.R. (N.S.) 301, (sub nom. *Bourgeault's Estate v. Quebec (Deputy Minister of Revenue)*) 30 N.R. 24, (sub nom. *Bourgeault, Re*) 105 D.L.R. (3d) 270, 1979 CarswellQue 165, 1979 CarswellQue 266, (sub nom. *Quebec (Deputy Minister of Revenue) v. Bourgeault (Trustee of)*) [1980] 1 S.C.R. 35 (S.C.C.) — referred to

Reference re Companies' Creditors Arrangement Act (Canada) (1934), [1934] 4 D.L.R. 75, 1934 CarswellNat 1, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) — referred to

Royal Bank v. Sparrow Electric Corp. (1997), 193 A.R. 321, 135 W.A.C. 321, [1997] 2 W.W.R. 457, 208 N.R. 161, 12 P.P.S.A.C. (2d) 68, 1997 CarswellAlta 112, 1997 CarswellAlta 113, 46 Alta. L.R. (3d) 87, (sub nom. *R. v.*

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Royal Bank 97 D.T.C. 5089, 143 D.L.R. (4th) 385, 44 C.B.R. (3d) 1, [1997] 1 S.C.R. 411 (S.C.C.) — considered

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Skydome Corp., Re (1998), 16 C.B.R. (4th) 118, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]) — referred to

Solid Resources Ltd., Re (2002), [2003] G.S.T.C. 21, 2002 CarswellAlta 1699, 40 C.B.R. (4th) 219 (Alta. Q.B.) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re (2000), 2000 BCCA 146, 135 B.C.A.C. 96, 221 W.A.C. 96, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, 16 C.B.R. (4th) 141, [2000] 5 W.W.R. 178 (B.C. C.A.) — referred to

Cases considered by *Fish J.*:

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — not followed

Cases considered by *Abella J.* (dissenting):

Canada (Attorney General) v. Canada (Public Service Staff Relations Board) (1977), [1977] 2 F.C. 663, 14 N.R. 257, 74 D.L.R. (3d) 307, 1977 CarswellNat 62, 1977 CarswellNat 62F (Fed. C.A.) — referred to

Doré c. Verdun (Municipalité) (1997), (sub nom. Doré v. Verdun (City)) [1997] 2 S.C.R. 862, (sub nom. Doré v. Verdun (Ville)) 215 N.R. 81, (sub nom. Doré v. Verdun (City)) 150 D.L.R. (4th) 385, 1997 CarswellQue 159, 1997 CarswellQue 850 (S.C.C.) — referred to

Ottawa Senators Hockey Club Corp., Re (2005), 2005 G.T.C. 1327 (Eng.), 6 C.B.R. (5th) 293, 2005 D.T.C. 5233 (Eng.), 2005 CarswellOnt 8, [2005] G.S.T.C. 1, 193 O.A.C. 95, 73 O.R. (3d) 737 (Ont. C.A.) — considered

R. v. Tele-Mobile Co. (2008), 2008 CarswellOnt 1588, 2008 CarswellOnt 1589, 2008 SCC 12, (sub nom. Tele-Mobile Co. v. Ontario) 372 N.R. 157, 55 C.R. (6th) 1, (sub nom. Ontario v. Tele-Mobile Co.) 229 C.C.C. (3d) 417, (sub nom. Tele-Mobile Co. v. Ontario) 235 O.A.C. 369, (sub nom. Tele-Mobile Co. v. Ontario) [2008] 1 S.C.R. 305, (sub nom. R. v. Tele-Mobile Company (Telus Mobility)) 92 O.R. (3d) 478 (note), (sub nom. Ontario v. Tele-Mobile Co.) 291 D.L.R. (4th) 193 (S.C.C.) — considered

Statutes considered by *Deschamps J.*:

Bank Act, S.C. 1991, c. 46

Generally — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

Generally — referred to

s. 67(2) — referred to

s. 67(3) — referred to

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

s. 81.2 [en. 1992, c. 27, s. 38(1)] — considered

s. 86(1) — considered

s. 86(3) — referred to

Bankruptcy Act and to amend the Income Tax Act in consequence thereof, Act to amend the, S.C. 1992, c. 27

Generally — referred to

s. 39 — referred to

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act, Act to amend the, S.C. 1997, c. 12

s. 73 — referred to

s. 125 — referred to

s. 126 — referred to

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

Generally — referred to

s. 23(3) — referred to

s. 23(4) — referred to

Cités et villes, Loi sur les, L.R.Q., c. C-19

en général — referred to

Code civil du Québec, L.Q. 1991, c. 64

en général — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

art. 2930 — referred to

Companies' Creditors Arrangement Act, Act to Amend, S.C. 1952-53, c. 3

Generally — referred to

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — referred to

s. 11(4) — referred to

s. 11(6) — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

s. 11.09 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — referred to

s. 18.3 [en. 1997, c. 12, s. 125] — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 18.4 [en. 1997, c. 12, s. 125] — referred to

s. 18.4(1) [en. 1997, c. 12, s. 125] — considered

s. 18.4(3) [en. 1997, c. 12, s. 125] — considered

s. 20 — considered

s. 21 — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 37 — considered

s. 37(1) — referred to

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

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

Generally — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Fairness for the Self-Employed Act, S.C. 2009, c. 33

Generally — referred to

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

s. 227(4) — referred to

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — referred to

Interpretation Act, R.S.C. 1985, c. 1-21

s. 44(f) — considered

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

Sales Tax and Excise Tax Amendments Act, 1999, S.C. 2000, c. 30

Generally — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1

Generally — referred to

s. 69 — referred to

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 128 — referred to

s. 131 — referred to

Statutes considered *Fish J.*:

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

Generally — referred to

s. 67(2) — considered

s. 67(3) — considered

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

Generally — referred to

s. 23 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 18.3(2) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

Employment Insurance Act, S.C. 1996, c. 23

Generally — referred to

s. 86(2) — referred to

s. 86(2.1) [en. 1998, c. 19, s. 266(1)] — referred to

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

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3)(a) [en. 1990, c. 45, s. 12(1)] — considered

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

Generally — referred to

s. 227(4) — considered

s. 227(4.1) [en. 1998, c. 19, s. 226(1)] — considered

s. 227(4.1)(a) [en. 1998, c. 19, s. 226(1)] — considered

Statutes considered *Abella J.* (dissenting):

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

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 18.3(1) [en. 1997, c. 12, s. 125] — considered

s. 37(1) — considered

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

Generally — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — considered

s. 222(3) [en. 1990, c. 45, s. 12(1)] — considered

Interpretation Act, R.S.C. 1985, c. I-21

s. 2(1)"enactment" — considered

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

s. 44(f) — considered

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

Generally — referred to

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

Deschamps J.:

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). In that respect, two questions are raised. The first requires reconciliation of provisions of the CCAA and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("ETA"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the CCAA and not the ETA that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the CCAA and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

that an amount of \$305,202.30 be held by the Monitor in its trust account.

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

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

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

2. Issues

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

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

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

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

3. Analysis

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

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

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of \$5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

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

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

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

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

3.2 GST Deemed Trust Under the CCAA

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

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (Que. S.C.), leave to appeal granted, 2010 QCCA 183 (Que. C.A.)). 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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

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

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

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

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

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the *Alberta Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

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

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

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

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

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

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

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

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

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

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

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

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

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

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

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

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("C.C.Q."), was held to have repealed a more specific provision of the earlier *Quebec Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

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

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for

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source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

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

54 I do not agree with my colleague Abella J. that s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

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

(*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

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

62 Perhaps the most creative use of CCAA authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

(4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The CCAA has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalf & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the CCAA's supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

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

64 The first question concerns the boundary between a court's statutory authority under the CCAA and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during CCAA proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the CCAA itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, per Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, per Blair J.A.).

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

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

67 The initial grant of authority under the CCAA empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (CCAA, s. 11(1)). The plain language of the statute was very broad.

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

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

70 The general language of the CCAA should not be read as being restricted by the availability of more specific

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

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

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

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

3.4 Express Trust

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

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object.

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

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

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

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

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

4. Conclusion

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

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

Fish J. (concurring):

I

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

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

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

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

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

II

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

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

...

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

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

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

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

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

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

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

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

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

...

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

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

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

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). All of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

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

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

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the \$305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

Abella J. (dissenting):

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

115 Section 11[FN1] of the *CCAA* stated:

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

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

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

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

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

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

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

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

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

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that compensation not be paid for compliance with production orders. [para. 42]

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

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

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

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non 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 c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

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

[T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:

The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such

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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, [FN2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

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

...

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

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

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

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

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

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

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On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

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

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

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

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

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

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

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

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

...

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

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

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding

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against the company; and

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

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

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

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

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

...

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

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

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

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

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

(i) the expiration of the order,

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

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

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

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

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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and of any related interest, penalties or other amounts, where the sum

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

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

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

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

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

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

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

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

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

...

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

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

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

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

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

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

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

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with

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the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

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

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

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

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

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

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

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

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

(3) Burden of proof on application — The court shall not make the order unless

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

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

- (i) the expiry of the order,
- (ii) the refusal of a proposed compromise by the creditors or the court,
- (iii) six months following the court sanction of a compromise or an arrangement,
- (iv) the default by the company on any term of a compromise or an arrangement, or
- (v) the performance of a compromise or an arrangement in respect of the company; and

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

- (i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
- (ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

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

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b) cease to be in effect if

- (a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under
 - (i) subsection 224(1.2) of the *Income Tax Act*,
 - (ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or
 - (iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

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

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

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

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

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

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(a) or (b), does not affect the operation of

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

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

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

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

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

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

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

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of

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

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

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

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (as at December 13, 2007)

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (a) or (b),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

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

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

2010 CarswellBC 3419, 2010 SCC 60, J.E. 2011-5, [2011] B.C.W.L.D. 534, [2011] B.C.W.L.D. 533, 12 B.C.L.R. (5th) 1, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, 326 D.L.R. (4th) 577, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 296 B.C.A.C. 1, 503 W.A.C. 1

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

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

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

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

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

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

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

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

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

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

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.

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FN1 Section 11 was amended, effective September 18, 2009, and now states:

FN2 The amendments did not come into force until September 18, 2009.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
PCAS PATIENT CARE AUTOMATION SERVICES INC. AND 2163279 ONTARIO INC.
(the "Applicants")

Court File No. CV-12-9656-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceedings commenced at Toronto

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OF THE APPLICANTS**

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